DEFERENCE OR DECEPTION: TREATY RIGHTS AS POLITICAL QUESTIONS

DAVID J. BEDERMAN*

In his path-breaking article, *Is There a "Political Question" Doctrine?*,[1] Professor Louis Henkin considered a number of aspects of the separation of powers doctrine and judicial competence to decide certain types of interbranch disputes.[2] He elucidated a positively crucial distinction, one that reverberates with consequences for understanding the role of courts in deciding sensitive matters, particularly those with foreign affairs dimensions. Henkin observed that the

> [f]ailure to maintain the distinction between the ordinary respect of the courts for the substantive decisions of the political branches, and extra-ordinary deference to those branches' determination that what they have done is constitutional, has aggravated confusion and controversy as to whether, and why, and when such extra-ordinary judicial deference is called for.[3]

This essay will certainly consider the "extra-ordinary judicial deference" exhibited when courts actually abstain from ruling on the bounds of constitutional power exercised by the political branches—what Henkin also called a "pure theory" of political questions.[4] But my primary concern is for what might first appear to be the more mundane phenomenon of the "ordinary respect" that courts accord to the "substantive decisions of the political branches."[5] This (in a departure from Henkin's

---

* Professor of Law, Emory University. I am grateful for the research assistance of Anthony J. Rollins, Emory Law '99.

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

2. Henkin's piece was in tribute to the scholarship of Professor Alexander Bickel on this subject. *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 172 (1962); *see also* Alexander Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 46 (1961).

3. Henkin, *supra* note 1, at 599-600.

4. *See id.*

5. *Id.*

terminology) is what I call judicial *deference* to the actual decisions of Congress and the executive branch. It is distinct from a constitutionally mandated prudential doctrine that requires judges to *abstain* from deciding the merits of these decisions, even when the decisions implicate the boundaries of interbranch power. Deference is something for which, as Professor Henkin noted, "[o]ne needs no special doctrine to describe the ordinary respect of the courts for the political domain."[6]

I maintain here, as I have elsewhere,[7] that there is very real cause for concern in unbridled judicial deference to executive branch decision making in the foreign relations area. As an illustration of this, I will review one aspect of the "ordinary respect" that courts accord to a particular sort of substantive decision making by the executive branch: the application and interpretation of treaties. This was no haphazard selection. Treaty litigation has grown exponentially in the past few years, especially by private parties seeking to vindicate rights under international instruments. The presence or absence of treaty rights in various contexts has proven to be an intensely contentious issue, a paradigmatic political question. And, as Professor Henkin had predicted, confusion has arisen again as to whether courts should "merely" defer to the preferred outcome espoused by the executive branch in treaty litigation or, as has been forcefully argued by the government in a number of recent cases, whether courts are constitutionally *obliged* to abstain from ruling on treaty rights cases.

This last point is significant, for it shows the inherent vitality of what Professor Henkin described as a "pure theory" for a political question doctrine. Not content with simply being accorded substantial (and, in many cases, overweening) deference to their treaty positions, the executive branch under the Reagan, Bush, and Clinton administrations has sought to revive a "strong" form of the political question doctrine that would fully insulate positions on treaty rights whenever the federal government situationally seeks such protection. Although no court has yet embraced the position advanced by the executive branch, there is a continual clamor for its adoption,

---

6. Id. at 598.

7. *See* David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953 (1994); David J. Bederman, 7 EMORY INT'L L. REV. 693 (1993) (reviewing THOMAS FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? (1992)).

and a number of arguments have been marshaled for its acceptance. As Professor Henkin wrote over twenty years ago, "the 'political question' doctrine . . . is an unnecessary, deceptive packaging of several established doctrines that has misled lawyers and courts to find in it things that were never put there and make it far more than the sum of its parts."[8] I propose here to deconstruct the "new" political question doctrine that has been offered as a means to block the litigation of various forms of treaty rights in U.S. courts.

Of course any revived political question doctrine for foreign affairs and treaty rights would be old wine poured into new bottles. Indeed, there is a sense of inevitable circularity in the evolution of judicial deference and abstention towards executive branch action in the foreign affairs realm. When one considers the arguments used by those who would deny judicial review for various treaty rights, one might think he or she was in a weird doctrinal time warp. This essay considers the pedigree of these claims and suggests that they continue to be unpersuasive.

There is little need to rehearse the broad outlines of two necessary postulates for my analysis: (1) that the political question doctrine in its pure form is dead; and (2) that courts nevertheless give broad deference to executive branch positions on treaty matters.

I. THE DEATH OF A PURE POLITICAL QUESTION DOCTRINE

My first contention is that the "pure" form of the political question doctrine is largely out of favor today in the Supreme Court, even with respect to foreign affairs controversies. Just as *Marbury v. Madison*[9] is the *locus classicus* of judicial review, and thus of American constitutional order, it is also the touchstone of the political question doctrine and its use in foreign affairs matters. After all, it was Chief Justice Marshall who noted, in dicta (the case did not, of course, concern foreign policy), that

> [b]y the constitution of the United States, the President is invested with certain important political powers, in the ex-

8. Henkin, *supra* note 1, at 622.
9. 5 U.S. (1 Cranch) 137 (1803).

> ercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience . . . . The acts of such an officer, as an officer, can never be examinable by the courts.[10]

With these words, a "Faustian pact" was made between the judicial branch, on the one hand, and the President and Congress, on the other.[11] The deal was simple: the political branches of government were compelled to accept judicial review and judicial supremacy in the adjudication of interbranch disputes. At the same time, the Court made a promise to restrain itself and refrain from deciding cases dealing with the exercise of, to use Chief Justice Marshall's turn of phrase, "important political powers."[12]

From these significant beginnings, American courts have invoked the political question doctrine to duck a whole panoply of important issues.[13] This has occurred despite these issues being squarely presented in ascertainable "cases" or "controversies," as the Constitution requires for the exercise of judicial power.[14] In Supreme Court practice, at least, the crest of the abstention principle may well have come in the 1936 decision of *United States v. Curtiss-Wright Export Corp.*[15] Afterwards, the rules of judicial abstinence in political controversies were refined and narrowed, as in *Baker v. Carr*.[16] Today, the doctrine appears to have slipped into disuse by the High Court. Nonetheless, the doctrine lives on in the lower courts, which are obviously fearful that the Supreme Court will use the principle of self-imposed abstention as a way to vitiate decisions limiting presidential or congressional power.

The fundamental problem with the political question doctrine is that it gives the executive branch (and, to a lesser degree, Congress) the power to dictate its own exclusive

---

10. *Id.* at 165-66.

11. *See* THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? 10-11 (1992).

12. *Marbury*, 5 U.S. (1 Cranch) at 164-66.

13. *See, e.g.*, Smith v. Reagan, 844 F.2d 195 (4th Cir. 1988) (Iran-Contra scandal); Americans United for Separation of Church & State v. Reagan, 786 F.2d 194 (3d Cir. 1986) (establishment of diplomatic relations with the Vatican); Mitchell v. Laird, 488 F.2d 611, 616 (D.C. Cir. 1973) (legality of the Vietnam War).

14. *See* U.S. CONST. art. III, § 2.

15. 299 U.S. 304 (1936).

16. 369 U.S. 186 (1962).

competence in various realms of policy and governance. Foreign affairs is just one of these, of course; but, because so much of the foreign affairs power lies in a "twilight realm"[17] between Congress and the executive branch, it remains the primary candidate for deference. The Framers of the Constitution may have contemplated that Congress would decide interbranch disputes or, at a minimum, would "make all Laws which shall be necessary and proper for carrying into Execution [its] Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof."[18] John Marshall's enunciation of the doctrine of judicial review, however, shifted the balance of power predominantly to the courts as the ultimate arbiters of interstitial disputes in the constitutional scheme.

Nonetheless, the trend has been for the executive branch to accumulate power, a process that has accelerated in this century. The Supreme Court, in *Oetjen v. Central Leather Co.*,[19] observed that "[t]he conduct of foreign relations of our Government is committed by the Constitution to the Executive and Legislative—the 'political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."[20] Courts in the last century, and well into this one, were quick to grasp the contention that resolution of questions implicating foreign affairs was beyond the ken of judges and would upset and embarrass a carefully-wrought allocation of power to Congress and the President.[21]

Despite this, courts have been cautious to articulate a strong doctrinal antidote to the notion that "all questions

---

17. The phrase is borrowed from Justice Jackson's opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

18. U.S. CONST. art. 1, § 8, cl. 18. For more on the application of this clause to disputes within the interstices of the Constitution's allocation of power among the branches, see William Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 36 OHIO ST. L.J. 788 (1975).

19. 246 U.S. 302 (1918).

20. *Id.* at 302.

21. *See* Doe v. Braden, 57 U.S. (16 How.) 635, 657-58 (1853); Taylor v. Morton, 23 F. Cas. 784 (C.C.D. Mass. 1855) (No. 13,799), *aff'd*, 67 U.S. (2 Black) 481 (1862).

touching foreign affairs are political questions."[22] As Justice Brennan famously observed in *Baker v. Carr*:

> [I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in the field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political Branches, its susceptibility to judicial handling in light of its nature and posture in the specific case, and of the possible consequences of judicial action.[23]

Subsequent courts have been hostile to a form of a political question doctrine that is "susceptible to indiscriminate and overbroad application to claims properly before the federal courts."[24] And as for the litigation of treaties, the Supreme Court as recently as 1986 noted that "the courts have the power to construe treaties and executive agreements . . . and

---

22. Baker v. Carr, 369 U.S. 186, 211 (1962).

23. *Id.* at 212. In an important passage that followed, Justice Brennan illustrated that certain sorts of foreign affairs disputes had both justiciable and nonjusticiable aspects, often turning on the timing of threshold political action:

> While recognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called "a republic of whose existence we know nothing," and the judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory, once sovereignty over an area is politically determined and declared, courts may examine the resulting status and decide independently whether a statute applies to that area. Similarly, recognition of belligerency abroad is an executive responsibility, but if the executive proclamations fall short of an explicit answer, a court may construe them seeking, for example, to determine whether the situation is such that statutes designed to assure American neutrality have become operative. Still again, though it is the executive that determines a person's status as representative of a foreign government, the executive's statements will be construed where necessary to determine the court's jurisdiction, Similar judicial action in the absence of a recognizedly authoritative executive declaration occurs in cases involving the immunity from seizure of vessels owned by friendly foreign governments.

Id. at 212-13 (footnotes and citations omitted). For more on *Baker*'s significance in reformulating the political question doctrine into a standard of application by courts, see Jack Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395 (1999).

24. Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1514 (D.C. Cir. 1984) (en banc), *vacated on other grounds*, 471 U.S. 1113 (1985).

we cannot shirk this responsibility merely because our decision may have significant political overtones."[25]

Quite apart from the problems inherent in determining exactly what makes a question "political," the paradox of the doctrine is manifested whenever jurists try to contain it. The last cogent attempt, in *Baker v. Carr*, left unresolved a vexing question: which branch of government decides when, to use Justice Brennan's words in that decision, an "exercise of a discretion [has been] demonstrably committed to the executive or legislature" by the Constitution.[26] Moreover, "to whom must the commitment be demonstrable? To the Supreme Court? Or only to an executive or Congress self-judging the scope of its constitutional authority?"[27]

What the political question doctrine boils down to is, which branch of government ultimately decides the scope of its powers, and, possibly, those of the other two? We have taken it as an article of faith, at least since 1803, that it is the judiciary. Faustian bargain or not, there seems little dispute that, as Justice Douglas once put it, "the mere assertion of an inherent power [by the executive branch does not] create[] it."[28] Or, as Justice Powell noted in *First National City Bank v. Cuba*,[29] "I would be uncomfortable with a doctrine which would require the judiciary to receive the Executive's permission before invoking [the Court's] jurisdiction. Such a notion, in the name of the doctrine of separation of powers, seems to me to conflict with that very doctrine."[30]

The recent decisions have all but given the political question doctrine a quiet burial.[31] With the exception of *Nixon v. United States*,[32] in which the Court abstained in ruling on the manner of trying impeachments in the Senate, the political question doctrine has played almost no role in Supreme Court

---

25. Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 230 (1986).

26. *Id.* at 211.

27. FRANCK, *supra* note 11, at 35.

28. Harisiades v. Shaughnessy, 342 U.S. 580, 600 (1952) (Douglas, J., dissenting).

29. 406 U.S. 759 (1972).

30. *Id.* at 773 (Powell, J., concurring).

31. *See* FRANCK, *supra* note 11, at 61 ("Particularly in the Supreme Court, the political-question doctrine is now quite rarely used and may be falling into desuetude.").

32. 506 U.S. 224 (1993).

jurisprudence—and virtually none at all in the foreign affairs realm. This Court, as conservative as it is, has consistently refused to give credence to the executive branch's claims that certain kinds of disputes are nonjusticiable because they implicate political questions. But all that may well change.

II. JUDICIAL DEFERENCE IN TREATY APPLICATION AND INTERPRETATION

My second contention is that, as Professor Franck has observed in the cases, the courts engage in "double-entry bookkeeping."[33] With this "forked approach," judges disavow the political question doctrine, but then proceed to rule in favor of the executive branch's case on the merits.[34] This phenomenon is especially marked in treaty cases.[35] I think it is important, however, to distinguish two sorts of cases implicating treaty rights. The first involves treaty *application*, the threshold question of whether a treaty right can even be claimed by a party. In part—but only in part—this question of applicability turns on the well-known distinction between self-executing and non-self-executing treaties in American jurisprudence. But it can also implicate other questions, such as whether the treaty is even in force.

The second question is one of *interpretation*. Assuming that a party can plausibly claim a right under an international agreement, does the instrument (when properly construed) provide for that right? These distinct aspects of judicial review of treaty rights need to be assessed separately. What one finds, I think, is startlingly different levels of deference accorded to executive branch decisions on treaty matters.

---

33. *See* FRANCK, *supra* note 11, at 21.

34. *See id.*

35. It is also notable in the immigration area. *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 804-06 (1977) (Marshall, J., dissenting) (noting that, while the Court rejected the government's claim of "unreviewable discretion" in immigration matters, "[t]he review the majority purports to require turns out to be completely 'toothless'. . . . Such 'review' reflects more than due deference; it is abdication").

A. *Deference to Executive Branch Positions on Treaty Application*

As Professor Carlos Vázquez has argued,[36] American courts have been substantially confused in their handling of questions of treaty rights. In large measure, he attributes this bewilderment to the doctrinal problem of whether a treaty is self-executing. I concur with his view that the question of a treaty's self-execution is analytically distinct from whether private parties, or a particular party, has either a cause of action under the treaty or standing to bring a claim.[37] He has also observed that, on occasion, courts have improperly applied some version of the political question doctrine to bar the litigation of treaty rights.[38]

Indeed, I would go a step further and suggest that, when it comes to questions of treaty application, sharp distinctions need to be made between different kinds of issues. When courts fail to distinguish between these different inquiries and, at the same time, neglect to differentiate between the "mere" extension of deference to an executive branch position and outright abstention, the result is an appreciable tendency to increase the range of treaty rights that courts will refuse to enforce.

1. Unimplemented Treaties or Agreements Superseded by Later Statute

In the continuum of these issues, one might begin with the situation where a party is claiming a right derived from a treaty that was later superseded by an act of Congress. Under the well-established "last-in-time" doctrine, courts have held that the treaty provision is simply no longer in force.[39] Regrettably, when the Supreme Court articulated this doctrine, it did

---

36. *See* Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082 (1992).

37. *See id.* at 1117-28, 1133-60; *see also* Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 719-22 (1995).

38. *See* Vázquez, *supra* note 36, at 1128-33.

39. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1)(a) (1987); *see also* Chae Chan Ping v. United States, 130 U.S. 581 (1889) (the Chinese Exclusion Case); Whitney v. Robertson, 124 U.S. 190 (1888); Edye v. Robertson, 112 U.S. 580 (1884) (the Head Money Cases); The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1870).

so in an argot that was highly suggestive that this question was political and, therefore, that courts were *required* to abstain. This confusion arose when the parties that claimed a treaty right typically attacked the constitutionality of the subsequent statute that terminated that right.

For example, in the *Chinese Exclusion Case*,[40] the plaintiff "assailed" the "validity of the act" that had terminated the United States's treaty with China and his entitlement to remain in this country. The Supreme Court, relying upon the *Head Money Cases*[41] and *Whitney v. Robertson*,[42] noted that "[t]he validity of this legislative release from the stipulations of the treaties was, of course, not a matter for judicial cognizance. The question whether our government is justified in disregarding its engagements with another nation is not one for the determination of the courts."[43] Also relevant for the Court in the *Chinese Exclusion Case* was Justice Curtis's earlier discussion in *Taylor v. Morton*,[44] which the Court characterized in this fashion:

> [T]hat, whilst it would always be a matter of the utmost gravity and delicacy to refuse to execute a treaty, the power to do so was prerogative, of which no nation could be deprived without deeply affecting its independence; but whether a treaty with a foreign sovereign had been violated by him, whether the consideration of a particular stipulation of a treaty had been voluntarily withdrawn by one party so as to no longer be obligatory upon the other, and whether the views and acts of a foreign sovereign, manifested through his representative, had given just occasion to the political departments of our government to withhold tax execution of a promise contained in a treaty or to act in direct contravention of such promise, were not judicial questions; that the power to determine them has not been confided to the judiciary, which has no suitable means to execute it, but to the executive and legislative departments

40. 130 U.S. 581 (1889); *see also* Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 854-63 (1987).

41. 112 U.S. 580 (1884).

42. 124 U.S. 190 (1888).

43. *The Chinese Exclusion Case*, 130 U.S. at 602.

44. 23 F. Cas. 784 (C.C.D. Mass. 1855) (No. 13,799) (Curtis, J.).

> of the government; and that it belongs to diplomacy and legislation, and not to the administration of existing laws.[45]

The sentiment expressed here is that the courts are not competent to enforce a treaty that has been superseded by a subsequent act of Congress, or, as was the case in *Taylor*, had not been fully executed by enabling legislation.[46] Either the treaty right was inchoate or moribund, but, in any event, it was not to be considered as part of the "Law of the Land"[47] for purposes of application. The only recourse that an aggrieved treaty partner (or, derivatively, an individual claimant) had in these circumstances was negotiation and diplomatic adjustment.

But it would be a serious error to believe that a court must conclusively defer to an executive branch determination of whether a non-self-executing treaty has been implemented by legislation or, in the alternative, whether it has been superseded by a subsequent statute. Courts have consistently ruled on the merits of these issues. Likewise, courts have occasionally ruled on the impact that a Senate reservation had on a

---

45. *Taylor*, 130 U.S. at 602.

46. *See id.*; *see also* Botillier v. Dominguez, 130 U.S. 238, 247 (1889). In *Botillier* the Court noted:

> [S]o far as the act of Congress is in conflict with the treaty with Mexico, that is a matter in which the court is bound to follow the statutory enactments of its own government. If the treaty was violated by this general statute enacted for the purpose of ascertaining the validity of claims derived from the Mexican government, it was a matter of international concern, which the two States must determine by treaty, or by such other means as enables one State to enforce upon another the obligations of a treaty. This court, in a class of cases like the present, has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States, as a sovereign power, chooses to disregard.

Id.; *see also* Whitney v. Robertson, 124 U.S. 190, 195 (1888).

> [W]hen a law is clear in its provisions, its validity cannot be assailed before the courts for want of conformity to stipulations of a previous treaty not already executed. Considerations of that character belong to another department of the government. The duty of the courts is to construe and give effect to the latest expression of the sovereign will.

Id.

47. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pusuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .").

particular treaty obligation.[48] Where the political question doctrine enters the picture is in disclaiming the consequences that flow from a prior determination that a treaty has not been executed or has been superseded. Courts have properly concluded that, assuming (under these particular circumstances) a treaty obligation is not in force as part of the law of the land, the courts are powerless to enforce it. In that sense—and that sense alone—the existence of a treaty right is a political question, beyond the competence of the courts.

A related situation arises where the executive branch has failed to enforce a particular treaty provision, and a private party claiming a right under that provision is aggrieved.[49] Unlike the cases applying the last-in-time rule, there is no way for a court to avoid the related question of whether the treaty is self-executing as a matter of law. In such a circumstance, a court may be tempted to defer to the executive branch's wish that the particular international agreement be characterized as *non*-self-executing, in order to avoid the domestic enforcement of the treaty as part of the law of the land.

A good example of this problem arose in *George E. Warren Corp. v. United States.*[50] In that case, a U.S. company imported

---

48. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 314(1) & cmt. b (1986). See also *Power Authority of New York v. Federal Power Commission*, 247 F.2d 538 (D.C. Cir. 1957), *vacated as moot*, 355 U.S. 64 (1957), where the dissent noted that,

> [u]nless it can be said that petitioner has a right to have the Senate not make treaties executory in their internal operation, no one is legally injured. Whether treaties should be thus executory seems strictly a political question. Clearly, it is as political a matter as whether the President chose to negotiate a treaty or whether the Senate chose to consent to a treaty negotiated. It would seem that it would be time enough to describe the limits of the treaty power when a case arises where our constitutional scheme of government is subverted, or where there is some usurpation of power, or where what is done under the treaty power is adverse to a legal right of some person or entity.

Id. at 552-53 (Bastian, J., dissenting). For more on this case, see Louis Henkin, *The Treaty Makers and the Law Makers: The* Niagara *Reservation*, 56 COLUM. L. REV. 1151 (1956).

49. The presence of a treaty right distinguishes this scenario from that where the executive branch declines to enforce a rule of customary international law. *See, e.g.*, Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986). *See also Agora: May the President Violate Customary International Law?*, 80 AM. J. INT'L L. 913 (1986) (essays by Jonathan I. Charney, Michael J. Glennon, and Louis Henkin); 81 AM. J. INT'L L. 371 (1987) (essays by Frederic L. Kirgis, Jr., Anthony D'Amato, and Jordan J. Paust).

50. 94 F.2d 597 (2d Cir. 1938).

coal and coke from Britain and Germany and was charged an import duty in violation of treaties the United States had concluded with both countries. The Second Circuit could have decided this case on last-in-time grounds, a revenue statute authorizing the duty collections having been passed by Congress subsequent to the treaties. But this would have raised problems of the most favored nation status enjoyed by the United States vis-à-vis Britain and was not pursued.[51] Likewise, the court could have held that the claimant had no standing to claim a right to a penalty for violation of the treaty. Thus, while the company had received a refund, under international law only the British or German governments had standing to claim additional damages.[52] But the court chose, instead, to emphasize a political question idiom as a way to dismiss the treaty claim:

> The fundamental difficulty with the petitioner's suit is that it seeks to submit to judicial decision questions which are not justiciable but pertain to the executive Branch of the government. It is not for a court to say whether a treaty has been broken or what remedy shall be given; this is a matter of international concern, which the two sovereign states must determine by diplomatic exchanges, or by such other means as enables one state to force upon another the obligations of a treaty. It is true that this doctrine has been advanced in cases involving conflicts between treaties and statutes; but no reason is apparent why the same considerations should not be applicable when the question is whether an executive officer of one of the contracting states has denied rights secured by treaty to the other. These are matters concerning the relations between the two nations and their adjustment must be left to the field of diplomacy. Obviously, it would not do for the courts to declare that an act is a breach of a treaty and results in this or that remedy. The remedy accorded might not content the foreign power or might bring about a conflict between the executive and judicial Branches of our own government.[53]

By converting a matter of claimant standing into a political question, this decision would require courts to defer conclu-

---

51. *See id.* at 598-99.
52. *See id.* at 599.
53. *Id.*

sively to any executive branch position as to the enforceability of treaty obligations in particular cases. Fortunately, this approach has not been widely followed.[54] Instead, and as Professor Vázquez has suggested, the preferred approach is for courts to concentrate on the merits of the particular international agreement's obligations and the particular claimant's cause of action or standing under the treaty.[55]

2. Treaty Invalidity, Breach, and Termination

Now we must turn from questions resulting from unimplemented and superseded treaties and agreements to problems arising from treaty invalidity, breach, and termination. Beginning with treaty invalidity, it appears that the handful of courts that have considered the legal effect of a treaty partner's alleged incapacity to enter into an agreement have deferred to the executive branch's position. As was remarked in *Doe v. Braden*,[56] in response to a challenge to Spain's ratification of the treaty of February 6, 1819,

> it would be impossible for the executive department of the government to conduct our foreign relations with any advantage to the country, and fulfil the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution and laws, to make the engagements into which he entered.... These are political questions and not judicial. They belong exclusively to the political department of the government.[57]

I would concur in this point, and I think the only question is whether the courts must actually abstain from deciding such

---

54. But compare the peculiar case of *Z. and F. Assets Realization Corp. v. Hull*, 31 F. Supp. 371 (D.D.C. 1940), *aff'd*, 114 F.2d 464 (D.C. Cir. 1940), *aff'd*, 311 U.S. 470 (1941), in which a party challenged the distribution of awards made by the U.S.-German Claims Commission established under the Claims Agreement, Aug. 10, 1922, U.S.-Ger., 42 Stat. 2200. The Court of Appeals ruled that the plaintiffs had no standing, but also noted that the political question doctrine could apply. *See Hull*, 114 F.2d at 470-72.

55. *See, e.g.*, Canadian Transp. Co. v. United States, 430 F. Supp. 1168, 1171-72 (D.D.C. 1977).

56. 57 U.S. (16 How.) 635 (1853).

57. *Id.* at 657.

a matter of treaty invalidity under a "pure" political question doctrine. For a court to rule on a foreign government's capacity to enter into a treaty with the United States—whether because of the recognition accorded to that nation by the United States or because of the allocation of treaty-making authority under the domestic law of that state—raises particularly sensitive questions. Such a controversy stands at the intersection of three principles: (1) the President's treaty-making power; (2) the President's recognition power granted under the Constitution;[58] and (3) the courts' prudential reluctance to "sit in judgment on the acts of the government of another [nation] done within its own territory"[59]—what is known, of course, as the act of state doctrine.

Likewise, courts have been extraordinarily resistant when asked to take a position contrary to that espoused by the executive branch in situations where a private party is claiming that a treaty partner has breached its obligations to the United States and, thus, that the treaty has no force and effect. The paradigm of this scenario is *Charlton v. Kelly,*[60] where a U.S. national was sought for extradition to Italy and argued that, because Italy (under similar circumstances) would not deliver up its own nationals, in breach of the extradition treaty, the United States should not extradite its own nationals. This was flatly rejected by the Court on the ground that

> the political Branch of the government recognizes the treaty obligation as still existing[, as] evidenced by its action in this case. . . . The executive department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the appellant as one imposed by the treaty as the supreme law of the land, and as affording authority for the warrant of extradition.[61]

---

58. *See* U.S. CONST. art. II, § 3 ("[T]he President] shall receive Ambassadors and other public Ministers . . . .").

59. Underhill v. Hernandez, 168 U.S. 250, 252 (1897); *see also* Oetjen v. Central Leather Co., 246 U.S. 297, 302-03 (1918). As the Supreme Court in *Baker v. Carr* observed, however, *Oetjen*'s sweeping merger of the act of state and political question doctrines was improper. *See* Baker v. Carr, 369 U.S. 186, 212 (1961).

60. 229 U.S. 447 (1913).

61. *Id.* at 474, 476; *see also* Holmes v. Laird, 459 F.2d 1211, 1220 (D.C. Cir. 1972).

Not only has it consistently been held that the courts cannot command

From this language it has been inferred that the "President as Chief Executive [has the conclusive power] to determine whether a treaty has terminated because of a breach."[62]

In view of these positions, one would think that, when a treaty's continuing applicability is cast into doubt by a change in the identity of the treaty partner (as under the international law of state succession), courts are obliged to give conclusive weight to an executive branch position. But this is not the view adopted in the cases. A good example of this ambivalence was

---

the United States to take action assertedly necessary to performance of a treaty, but attempts to secure judicial adjudications that nonperformance by the other party to the treaty relieved the United States from its own obligations have met the same fate.

Id.

62. Goldwater v. Carter, 617 F.2d 697, 706 (D.C. Cir. 1979), *rev'd*, 444 U.S. 996 (1979); *see also* S. REP. NO. 96-119 (1979), a Senate Foreign Relations Committee Report which confirmed presidential powers to terminate treaties unilaterally on a number of grounds, including:

(1) in conformity with the provisions of the treaty;
(2) by consent of all the parties after consultation with the other contracting states;
(3) where it is established that the parties intended to admit the possibility of denunciation or withdrawal;
(4) where a right of denunciation or withdrawal may be implied by the nature of the treaty;
(5) where it appears from a later treaty concluded with the same party and relating to the same subject matter that the matter should be governed by that treaty;
(6) where the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time;
(7) where there has been a material breach by another party;
(8) where the treaty has become impossible to perform;
(9) where there has been a fundamental change of circumstances;
(10) where there has been a severance of diplomatic or consular relations and such relations are indispensable for the application of the treaty;
(11) where a new peremptory norm of international law emerges which is in conflict with the treaty;
(12) where an error was made regarding a fact or situation which was assumed by that state to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound;
(13) where a state has been induced to conclude a treaty by the fraudulent conduct of another state; and
(14) where a state's consent to be bound has been procured by the corruption or coercion of its representatives or by the threat or use of force.

Id.

exhibited in *Terlinden v. Ames*,[63] which concerned the continuation of the 1852 extradition treaty between Prussia and the United States after the declaration of the German Empire, which succeeded Prussia, in 1871. On the surface it would appear that the Court gave a double form of deference to the executive branch in this case. The first rationale was that it involved a question of extradition.[64] The second ground (and the more significant in light of courts' increased willingness today to review extradition matters) is that the case implicated a delicate question of foreign policy. The Court wrote, "We concur in the view that the question whether power remains in a foreign state to carry out its treaty obligations is in its nature political and not judicial, and that the courts ought not to interfere with the conclusions of the political department in that regard."[65]

It has been suggested, however, that *Terlinden* is actually a "double-entry" decision in which the Court professed to defer to an executive branch decision, but only after reviewing the law and comfortably arriving at the same conclusion proffered by the President.[66] After all, the Court in *Terlinden* carefully reviewed the German constitutional texts in order to ascertain whether the German Empire was the legal successor to the former kingdoms of Bavaria and Prussia.[67] In subsequent decisions, courts of appeals have mimicked this approach. In *Ivancevic v. Artukovic*,[68] which also concerned the continuation in force of an extradition treaty (this one with Yugoslavia as the successor to Serbia), the Ninth Circuit observed:

> There is no exact formula by which it can be determined that a change of a nation's fortunes amounts to a continuance of the old or the beginning of a new nation, and there

---

63. 184 U.S. 270 (1902).

64. *See id.* at 290.

> The decisions of the Executive Department in matters of extradition, within its own sphere, and in accordance with the Constitution, are not open to judicial revision, and it results that where proceedings for extradition, regularly and constitutionally taken under the acts of Congress, are pending, they cannot be put an end to by writs of *habeas corpus*.

Id.

65. *Id.* at 288.

66. *See* FRANCK, *supra* note 11, at 23-24.

67. *See Terlinden*, 184 U.S. at 285.

68. 211 F.2d 565 (9th Cir. 1954).

> can be no better equipped vehicle for decision than the Chiefs of State of the countries concerned. If their agreed decisions, *when based upon supporting facts*, are not conclusive, they should at least weigh very heavily.[69]

As in *Terlinden*, the *Ivancevic* court proceeded to review the domestic law of the treaty partner, additionally ascertaining that "[i]n our case, open recognition of treaties between the two countries has continued for many years without United States congressional interference, a fact negative in nature, yet highly consistent with the conclusion that the treaties exist in full effectiveness."[70] What thus appears to be at work here is not an application of conclusive deference to the executive branch on these matters, but rather a rebuttable presumption that the executive branch's position is well founded.[71] This form of deference is also applied in situations where the question is whether a later treaty concluded with a partner implicitly terminated an earlier agreement.[72]

This strikes me as peculiar. One would think that, if courts were prepared to offer complete deference to an executive branch position as to whether a treaty partner was capable of entering into an international agreement and whether it had actually breached it, they should likewise defer to the Executive's views on the continued force of the treaty in a situation where the identity of the state may have changed under the international law of state succession. Continuation of state identity is implicated as much in the recognition power as is the initial negotiation with a treaty partner and any subsequent *demarche* concerning breach.

The only logical saving for this paradox is that courts have also consistently deemed themselves competent to rule as to whether a particular treaty was terminated by reason of an

---

69. *Id.* at 573-74 (emphasis added).

70. *Id.* at 574.

71. But see *Arnbjornsdottir-Mendler v. United States*, 721 F.2d 679 (9th Cir. 1983), which notes that that "[j]udicial examination of the existence of extradition treaties has been limited by [*Terlinden*,] which stressed the importance of deferring in such cases to the intentions of the State Departments of the two nations." *Id.* at 681.

72. *See, e.g.*, Sayne v. Shipley, 418 F.2d 679, 684 (5th Cir. 1969) ("Because we recognize that the conduct of foreign affairs is a political, not a judicial function, such advice, while not conclusive on this Court, is entitled to great weight and importance." (citing *Terlinden*, 184 U.S. at 270)).

outbreak of hostilities between the United States and a treaty partner.[73] Indeed, in the celebrated case of *Techt v. Hughes*,[74] the New York Court of Appeals, in deciding that the inheritance provisions of the 1848 Treaty with Austria-Hungary survived the outbreak of the First World War, actually ruled at variance with the position taken by the U.S. government.[75]

One of the latest manifestations of this judicial willingness to conduct an independent review of an executive branch position was in *Clark v. Allen*,[76] which in many respects is simply a variant on a theme played in *Terlinden*. The question in *Clark* as much concerned whether the Second World War terminated the 1923 treaty with Germany as whether occupied Germany could be said to have succeeded to the original treaty obligation. The Court virtually collapsed these two aspects of the problem:

> The question whether a state is in a position to perform its treaty obligations is essentially a political question. We find no evidence that the political departments have considered the collapse and surrender of Germany as putting an end to such provisions of the treaty as survived the outbreak of the war or the obligation of either party in respect to them.[77]

As with *Terlinden*, the Court in *Clark* may have wished to appear deferential to the wishes of the executive branch in this matter, but the Court's own analysis evidenced, instead, an independent view of the question.[78] By searching for "evidence" of the executive branch's consideration of this issue, it gave license to substantial judicial review.

---

73. *See, e.g.*, Karnuth v. United States, 279 U.S. 231 (1929); Soc'y for the Propogation of the Gospel in Foreign Parts v. Town of New Haven, 21 U.S. (8 Wheat.) 464 (1823).

74. 128 N.E. 185, 191 (N.Y. 1920).

75. *See* Letter from Secretary of State Lansing to the Alien Property Custodian (Sept. 10, 1918), *reprinted in* 5 GREEN HAYWORD HACKWORTH, DIGEST OF INTERNATIONAL LAW 379 (1943).

76. 331 U.S. 503 (1947).

77. *Id.* at 514 (citing *Terlinden*, 184 U.S. at 270).

78. *See* FRANCK, *supra* note 11, at 25-26.

3. Unilateral Presidential Termination

That leaves the Supreme Court's most enigmatic and fractured articulation of the political question doctrine in questions of treaty application, *Goldwater v. Carter*.[79] *Goldwater* also happens to be the Court's most recent statement in the last foreign affairs case to be dismissed (apparently) on political question grounds. In that case, the Court refused to decide on the President's powers to terminate a treaty unilaterally. Now, it is true the case could as easily be explained as having been decided on a standing rationale, since it was not yet clear that Congress and the President had reached a constitutional impasse.[80] The argument for application of a political question bar was articulated by (then) Justice Rehnquist, and he relied chiefly upon the fact that the case implicated the general foreign relations power of the United States, "specifically a treaty commitment to use military force in the defense of a foreign government if attacked."[81] Questions of treaty application in the face of termination appeared to be an ancillary matter to Justice Rehnquist.

Justice Powell sensed this in his critique of Rehnquist's position. He observed that

> [t]he present case involves neither review of the President's activities as Commander in Chief nor impermissible interference in the field of foreign affairs. Such a case would arise if we were asked to decide, for example, whether a treaty required the President to order troops into a foreign country. But "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[82]

---

79. 444 U.S. 996 (1979).

80. A large part of the ambiguity of this opinion is attributable to the fact that it was a summary disposition of a petition for certiorari. Justices Marshall and Powell apparently took the position that the matter was not ripe for adjudication. Chief Justice Burger and Justices Stewart and Stevens joined Justices Rehnquist's opinion emphasizing the application of the political question doctrine. Justices White and Blackmun would have granted the petition, but otherwise reserved their views. Justice Brennan would have granted the petition and would have found the case to be justiciable. *See id.* at 996-97.

81. *Id.* at 1003-04 (Rehnquist, J., concurring).

82. *Id.* at 999 (Powell, J., concurring) (quoting Baker v. Carr, 369 U.S. 186, 211 (1962)).

Justice Powell also took issue with Justice Rehnquist's characterization that the President's unilateral power to terminate a treaty was a textually demonstrable constitutional commitment of the issue to a coordinate political department, and that there was a lack of judicially discoverable and manageable standards for resolving the case. He then offered this "simple hypothetical":

> Assume that the President signed a mutual defense treaty with a foreign country and announced that it would go into effect despite its rejection by the Senate. Under MR. JUSTICE REHNQUIST'S analysis that situation would present a political question even though Art. II, § 2, clearly would resolve the dispute. Although the answer to the hypothetical case seems self-evident because it demands textual rather than interstitial analysis, the nature of the legal issue presented is no different from the issue presented in the case before us. In both cases, the Court would interpret the Constitution to decide whether congressional approval is necessary to give a Presidential decision on the validity of a treaty the force of law. Such an inquiry demands no special competence or information beyond the reach of the Judiciary. . . . Resolution of this case would interfere with neither the President's ability to negotiate treaties nor his duty to execute their provisions. We are merely being asked to decide whether a treaty, which cannot be ratified without Senate approval, continues in effect until the Senate or perhaps the Congress takes further action.[83]

Putting aside whether the scenario described by Justice Powell was, in fact, very "simple," his conclusion that a question of the applicability of a treaty as part of the "Law of the Land" under Article VI of the Constitution seems quite tenable.

Justice Brennan put an even finer point on the problem presented in *Goldwater*. He rejected application of a political question doctrine in the case, but would have still held that a unilateral termination of the mutual defense treaty was within the President's recognition powers under the Constitution:

> The constitutional question raised here is prudently answered in narrow terms. Abrogation of the defense treaty with Taiwan was a necessary incident to Executive recogni-

83. *Id.* at 999-1000 & n.1 (Powell, J., concurring) (citations omitted).

> tion of the Peking Government, because the defense treaty was predicated upon the now-abandoned view that the Taiwan Government was the only legitimate political authority in China. Our cases firmly establish that the Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes. That mandate being clear, our judicial inquiry into the treaty rupture can go no further.[84]

This would appear to suggest that the executive branch should be accorded deference when it is acting within the intersection of its powers under the Treaty and Recognition Clauses of the Constitution. Justice Brennan's concern was that Justice Rehnquist's far-ranging opinion appeared to be a wholesale extension of the political question doctrine to the entire foreign relations field. Given the range of opinions expressed in *Goldwater*, it is impossible to conclude whether a court should dismiss a claim raising an objection to the President's unilateral termination of a treaty on political question grounds.[85]

4. A Spectrum of Deference on Treaty Application

On questions of treaty applicability, I would conclude that there is a continuum of deference that courts have accorded on particular issues. At one end of the spectrum, courts may freely consider the following questions unfettered by deference to an executive branch position and without the necessity of abstention under a pure articulation of the political question doctrine:

1. whether the domestic legal effect a particular treaty obligation was modified by reservation made by the Senate;
2. whether a treaty is self-executing or non-self-executing, and, if non-self-executing, whether a subse-

---

84. *Id.* at 1007 (Brennan, J., dissenting) (citations omitted).

85. For one case that took just such a position, see *Beacon Products Corporation v. Reagan*, 633 F. Supp. 1191, 1198-99 (D. Mass. 1986), *aff'd on other grounds*, 814 F.2d 1 (1st Cir. 1987). *See also* Guy M. Miller, *Treaty Termination Under the United States Constitution: Reassessing the Legacy of* Goldwater v. Carter, 27 N.Y.U. J. INT'L L. & POL. 859 (1995); Detlev F. Vagts, *International Agreements, the Senate, and the Constitution*, 36 COLUM. J. TRANSNAT'L L. 143 (1997).

quent piece of legislation effectively implemented the agreement; and

3. whether, as a matter of law, a treaty provision has been superseded by a subsequent statute (the "last in time" doctrine).

At the opposite end of the spectrum, courts have appeared to defer conclusively to the executive branch's position on these issues:

1. whether a treaty is invalid because our partner was incapable, by reason of the operation of the domestic law of that nation, to enter into the agreement; and
2. whether a treaty is terminated, suspended, or modified because of the breach of a treaty partner.

For these clusters of issues, complete deference approaches the abstention rule of a pure political question doctrine. Somewhere in the middle of this spectrum, courts have given conditional deference to executive branch positions on the following issues:

1. whether a treaty is terminated because of a change in a treaty partner's identity as a nation under the international law of state succession; and
2. whether a provision of a treaty is terminated because of an outbreak of hostilities between the United States and the treaty partner.

With these issues, courts conduct a full and independent review of the underlying legal claim while carefully weighing the position of the executive branch. In most (but certainly not all) instances, courts have accepted the positions advanced by the executive branch.

I acknowledge that the manner in which courts grant deference to executive branch determinations on treaty application issues has a formalistic flavor. As Professor Goldsmith has observed,[86] this formalism is reflective of a rules-based, "categorical" approach that courts take to deciding how to protect certain political branch prerogatives in the foreign rela-

86. *See* Goldsmith, *supra* note 23, at 1406.

tions realm. Unlike Professor Goldsmith, however, I cannot detect whether this formalistic approach, at least on treaty applications questions, really underwent the radical shift toward an instrumental "foreign relations effects test" that he documents in other areas of foreign relations law. Perhaps this is because treaty application issues had already been the subject of substantial jurisprudence, or that courts did not feel the extant pressures of Cold War politics that might have reformed their attitudes on resolving problems of treaty application.

B. Deference to Executive Branch Views on Treaty Interpretation

Very significant questions remain today as to the proper respect U.S. courts should extend to the President's treaty interpretations. One would think that these cases would raise *lesser* levels of deference to executive branch positions because a court necessarily must reach the threshold conclusion that a treaty is otherwise applicable to the claim. But treaty interpretation claims have been every bit as contentious as treaty application matters.

These concerns have, moreover, proven to be far more intractable than the recent competition between the Senate and President in forming a "common understanding" of treaties at the time of ratification. The truth is that the Senate is rarely prepared to confront the President on a question of treaty interpretation. On the other hand, the executive branch of the federal government is continuously called upon to provide authoritative interpretations of treaties. This is so not only in diplomatic practice, but also in litigation in U.S. courts. The trouble arises when the executive branch's interpretation of a treaty changes with administrations, or when the Executive adopts a clearly self-serving interpretation in order to advance its own interests. Judicial deference to the executive branch's treaty interpretations is so ingrained that when Justice Black said that "courts interpret treaties for themselves,"[87] he also noted in the same breath that "the meaning given [to treaties]

87. Kolovrat v. Oregon, 366 U.S. 187, 194 (1961).

by the departments of the government charged with their negotiation and enforcement is given great weight."[88]

Some authorities have argued that substantial deference to the Executive is warranted if the desire is to capture, via interpretation, the intent of the treaty's framers. It is, after all, the President who negotiates, signs, and concludes international agreements.[89] While this contention has equal force in the debate between the Senate and executive branch over "common understanding," it has been the courts that have given it the greatest credence.

The origins of this judicial deference can be traced to the early case of *Foster v. Nielson*,[90] but it only found its full expression by the Supreme Court in the first few decades of this century. While in some of these cases the Court was careful to say that the executive branch's determination was not "conclusive" as to a proper interpretation of a treaty,[91] the vast majority of these decisions did ultimately adopt the President's

---

88. *Id.; see also* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936) (discussing the basis of President's power in the area of foreign relations area).

89. *See* Abraham D. Sofaer, *The ABM Treaty, Part II: Ratification Process, reprinted in* 133 CONG. REC. 12,881, 12,891 (1987) (elaborating the "role reversal" between the President and Senate). In the treaty-making process, Sofaer suggests, the President is the "legislator," while the Senate has an unqualified veto. *See id.*; *see also* United States v. Chadha, 462 U.S. 919, 955 (1983) (recognizing constitutionality of absolute Senate veto over treaties); LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 167 (1972) (arguing the judiciary may be incapable of understanding the delicate diplomatic concerns leading to the framing of a treaty). But see James Madison, writing as Helvedius, who noted that the treaty power should not be considered legislative in character. *See* JAMES MADISON, HELVEDIUS NUMBER 4, *reprinted in* 6 THE WRITINGS OF JAMES MADISON 145 (Gaillard Hunt ed., 1906).

90. 27 U.S. (2 Pet.) 253, 307 (1829). *But see* Ware v. Hylton, 3 U.S. (3 Dall.) 199, 283 (1797) (suggesting that courts are not bound by the opinions of the treaty negotiators).

91. *See* Factor v. Laubenheimer, 290 U.S. 276, 294-95 (1933) (Stone, J.) (relying on diplomatic correspondence by the Secretary of State, written shortly after the extradition treaty in question was signed); *see also* Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184-85 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." (citing *Factor*, 290 U.S. 276 (1933))); *cf.* Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 276 n.5 (1984) (holding an agency's interpretation of a treaty was "not entitled to any special deference"). *But see Factor*, 290 U.S. at 319-21 (Butler, J., dissenting) (where the use of such diplomatic letters was criticized as not being probative of a legal meaning to the treaty, but, rather, as being only suggestive of a diplomatic resolution of a dispute with Great Britain).

proposed reading.[92] A few of these cases appear to accept an executive determination as to the meaning of a treaty, as manifested through diplomatic correspondence, even though treaty partners contested the proposed construction.[93] Similarly, where the other contracting party to a treaty with the United States concurred in an interpretation propounded by the Executive, courts have credited that construction, despite proof that it contradicted an earlier espoused position by an executive department or agency.[94]

There have, however, been instances where a federal court specifically refused to follow the Executive's lead in interpreting an international agreement. Courts have departed from a presidential construction of a treaty where the interpretation manifestly contradicted previous executive branch practice,[95] would have led to an unconstitutional result,[96] or was just poorly reasoned.[97]

But I would maintain that judicial deference to the Executive's position on treaty interpretation is the single best predic-

---

92. *See, e.g.*, United States v. Pink, 315 U.S. 203, 220-21 (1942); Nielsen v. Johnson, 279 U.S. 47, 52-53 (1929); Terrance v. Thompson, 263 U.S. 197, 223 (1923); Charlton v. Kelly, 229 U.S. 447, 468 (1913); Ortman v. Stanray Corp., 371 F.2d 154, 157 (7th Cir. 1967).

93. *See Factor*, 290 U.S. at 295, 298.

> Until a treaty has been denounced, it is the duty of both the government and the courts to sanction the performance of the obligations reciprocal to the rights which the treaty declares and the government assents, even though the other party to it holds a different view of its meaning.

Id. (citing Charlton v. Kelly, 229 U.S. 447, 472-73 (1913)).

94. *See Sumitomo Shoji Am., Inc.*, 457 U.S. at 184 n.10.

95. *See* Clark v. Allen, 331 U.S. 503, 513 (1947); Perkins v. Elg, 307 U.S. 325, 347-48 (1939) (1869 Naturalization Treaty with Sweden); Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1350, 1364 (2d Cir. 1992), *rev'd sub nom*, Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993) (article 33 of the 1951 U.N. Convention on the Status of Refugees).

96. *See* Reid v. Covert, 354 U.S. 1, 15-19 (1957) (interpreting a treaty waiver of right to jury trial as inapplicable to civilian spouse charged with murdering her husband while stationed in Great Britain); Liberato v. Royer, 270 U.S. 535, 538-39 (1926) (narrowly interpreting a court access provision in a treaty with Italy); *see also* Maiorano v. Baltimore & Ohio R.R. Co., 213 U.S. 268, 274 (1909).

97. *See* United States v. California, 381 U.S. 139, 161-67 (1965) (construing the 1958 U.N. Convention on the Territorial Sea and Contiguous Zone); Johnson v. Browne, 205 U.S. 309, 320-22 (1907) (interpreting an extradition treaty with Britain); De Lima v. Bidwell, 182 U.S. 1, 194-96 (1901) (reading the Treaty of Peace with Spain in 1898 as annexing the Philippines and Puerto Rico); United States v. Enger, 472 F. Supp. 490, 544-45 (D.N.J. 1978) (interpreting the 1961 Vienna Convention on Diplomats as raising a justiciable question of diplomatic immunity).

tor of interpretive outcomes in American treaty cases. Of the twelve treaty interpretation cases considered so far by the Rehnquist Court, *in all but one* the holding followed the express wishes of the executive branch of the government.[98] The deference afforded to the government, whether as cast in the

---

98. *See* El Al Israel Airlines, Ltd. v. Tseng, 119 S. Ct. 662, 671 (1999); Zicherman v. Korean Air Lines Co., 516 U.S. 217, 221-28 (1996); Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993); Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60 (1993); United States v. Alvarez-Machain, 504 U.S. 655 (1992); Eastern Airlines, Inc. v. Floyd, 499 U.S. 530 (1991); Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989); United States v. Stuart, 489 U.S. 353 (1989); Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988); Société Nationale Industrielle Aérospatiale v. United States Dist. Court for the S. Dist. of Iowa, 482 U.S. 522 (1987) [hereinafter *SNIAS*]; INS v. Cardoza-Fonseca, 480 U.S. 421 (1987); O'Connor v. United States, 479 U.S. 27 (1986). The exception was *Chan*, 490 U.S. at 133, where the Court appeared to take a position contrary to that advanced by the federal government. The Rehnquist Court statistics seem to be consistent with both Warren and Burger Court case figures.

For the Warren Court, of seven cases implicating treaty interpretation, in five the construction advanced by the United States was wholly and unambiguously embraced by the Court. *See* United States v. Louisiana (Louisiana Boundary Case), 394 U.S. 11, 36-38, 48-60, 67-73 (1969); Zschernig v. Miller, 389 U.S. 429 (1968) (United States appearing as amicus) (1923 Friendship, Commerce and Consular Rights with Germany); United States v. California, 381 U.S. 139, 161-76 (1965) (1958 Geneva Convention on Territorial Sea and Contiguous Zone); Maximov v. United States, 373 U.S. 49, 52-54 (1963) (1945 U.S.-U.K. Income Tax Treaty); Kolovrat v. Oregon, 366 U.S. 187, 194-95 (1961) (United States appearing as amicus) (1881 Friendship, Navigation and Commerce Treaty with Serbia); Wilson v. Girard, 354 U.S. 524, 529-30 (1957) (per curiam) (agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, specifically Japan). The only exceptions are short passages in *United States v. Louisiana*, 363 U.S. 1, 62-64 (1960), in which the Court rejected the Solicitor General's interpretation of the 1848 Treaty of Guadalupe Hidalgo with Mexico, and in *Louisiana Boundary Case*, 394 U.S. at 40-47, 60-63, where the Court disagreed with certain technical interpretations of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone.

For the Burger Court, of the six cases involving treaty construction, in five the interpretation made by the Solicitor General was accepted by the Supreme Court. *See* Air France v. Saks, 470 U.S. 392, 400 (1985) (United States appearing as amicus) (Warsaw Convention); INS v. Stevic, 467 U.S. 407, 416-18 (1984) (1968 U.N. Refugees Protocol); *Sumitomo Shoji Am., Inc.*, 457 U.S. at 184-85 (United States appearing as amicus) (Friendship, Commerce and Navigation Treaty with Japan); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690-91 (1979) (United States as a party in a case involving various Indian treaties); United States v. Alaska, 422 U.S. 184, 188-89 (1975) (1958 Geneva Convention on Territorial Sea). Some commentators have suggested that the executive branch's desires may have been satisfied in this case. *See* FRANCK, *supra* note 11, at 75-76. *But see* Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 253, 257-60 (1989) (where the Court appeared to act against the wishes of the executive branch in construing the Warsaw Convention).

position of litigant before the Court or as *amicus curiae* appearing in support of one party, is simply extraordinary.

The Rehnquist Court has gone further than previous Courts, elevating deference to new heights. In the past, there were substantive limits to deference. No more, it seems. This Court has not been content with merely reciting the mantra from earlier decisions that the government's proffered interpretation is "entitled to great weight."[99] One of the essential checks on deference to the President, as detailed in earlier treaty cases,[100] has been to see whether the executive branch's current interpretation squares with previous declarations. If there is a manifest contradiction, then courts have been less likely to honor a new presidential interpretation, especially where it seems that the construction was offered only to advance the situational litigation interests of the United States.

But this yardstick for measuring presidential assertions of authentic treaty interpretations has been snapped in two by the Court. It was broken in both *United States v. Alvarez-Machain*[101] and *Itel Containers International Corp. v. Huddleston.*[102] In *Alvarez*, the defendant, who had been kidnapped from Mexico to face federal criminal charges in the United States, relied on an 1881 statement by Secretary of State James G. Blaine[103] that the then-in-force extradition treaty

---

99. *Volkswagenwerk*, 486 U.S. at 713 (Brennan, J., concurring) (contemporaneous views of American negotiating delegation "entitled to great weight" (quoting *SNIAS*, 482 U.S. 522, 536 n.19 (1987))); *see also SNIAS*, 482 U.S. at 536 n.19 ("[T]he meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." (citing Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184-85 (1982))). No Rehnquist Court decision has, however, referred to Justice Stevens's dissent in *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984), that executive agency interpretations of treaties are "not entitled to any special deference." *Id.* at 276 n.5; *see also* FRANCK, *supra* note 11, at 75-76.

100. *See, e.g.*, Clark v. Allen, 331 U.S. 503, 513 (1947); Perkins v. Elg, 307 U.S. 325, 347-48 (1939) (1869 Naturalization Treaty with Sweden). *But see supra* note 94 and accompanying text (discussing *Sumitomo Shoji Am., Inc.* and holding that, where a current executive branch interpretation squares with the views of other nations, it will be accepted even if it contradicts earlier presidential statements).

101. 504 U.S. 665 (1992).

102. 507 U.S. 60 (1993).

103. *See* United States v. Verdugo-Urquidez, 939 F.2d 1341, 1354 (9th Cir. 1991) (opinion of the lower court, citing Letter from James Blaine, Secretary of State, to O.R. Roberts, Governor of Texas, *Domestic Letters of the State Department 1784-1906* (May 3, 1881) (on file at National Archives Microfilm Publication M40, Roll 93)); *see also* Brief for Respondent at 14, United States v. Alvarez-

with Mexico (which was substantively identical to the current 1978 agreement) "did not authorize unconsented to abductions from Mexico."[104] Chief Justice Rehnquist glibly replied that "[t]his misses the mark, however, for the Government's argument is not that the Treaty authorizes the abduction of respondent, but that the Treaty does not prohibit the abduction."[105] The Court could have reasonably questioned the significance of this purported inconsistency of government practice in interpreting the treaty. The Solicitor General briefed this point, and made a plausible argument suggesting that there was no real contradiction.[106] Chief Justice Rehnquist's reaction indicates that the Court was not actually willing to entertain *any* evidence of prior, inconsistent statements by the government.[107]

Itel merely made express this latent hostility to inconsistency challenges of presidential interpretations. When the taxpayer in that case pointed out that the U.S. government had previously interpreted the 1956 Container Convention to prohibit the kind of tax Tennessee imposed,[108] Justice Kennedy simply said that "[e]ven if this were true, the Government's current position is quite different; its *amicus* brief in this case expresses agreement with our interpretation of both the 1972 and the 1956 Container Conventions."[109] The clear message of

---

Machain, 504 U.S. 655 (1992) (No. 91-712); Brief for United Mexican States as Amicus Curiae in Support of Affirmance at 12, United States v. Alvarez-Machain, 504 U.S. 655 (1992) (No. 91-712).

104. *Alvarez*, 504 U.S. at 665 n.11.

105. *Id.*

106. *See* Brief for the United States at 29 n.24, United States v. Alvarez-Machain, 504 U.S. 655 (1992) (No. 91-712).

107. As further evidence of this, the Court chose to ignore some other prior, inconsistent statements made by the executive branch. These were relied upon by the lower court. *See Verdugo-Urquidez*, 939 F.2d at 1354 (citing Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 78 AM. J. INT'L L. 207, 207-09 (1984) (statement by Secretary of State George Shultz)); *see also Hearings on S. 1429 Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 99th Cong. 66 (1986) (statement by State Department Legal Advisor Abraham Sofaer).

Likewise, in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), the Court did not credit the respondent's assertion that its interpretation of the Refugees Convention squared with earlier U.S. practice. *See* Brief for Respondents at 22-24, Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993) (No. 92-344). Justice Blackmun's dissent did discuss this evidence. *See Haitian Centers*, 509 U.S. at 190.

108. *See* Brief of Petitioner at 17-18, Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60 (1993) (No. 91-321).

109. Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 68 (1993).

Alvarez and *Itel* is that it is pointless to challenge a treaty interpretation offered by the executive branch on the theory that it contradicts earlier American practice.

It is, however, still possible to dispute a presidential interpretation of a treaty on ostensible grounds of logic. This was respondent's arguable success in *Chan v. Korean Airlines Ltd.*,[110] the only case in which the Rehnquist Court did not, in fact, esteem an executive branch construction of a treaty. As is usually so often the case, though, the exception proved the rule. In *Chan*, the Solicitor General joined the case as *amicus* in favor of petitioner's position that the limit of an airline's liability in the Warsaw Convention was inapplicable when the airline did not give proper notice of the limitation in the passenger ticket. What is extraordinary in *Chan* is that the majority really appears to have been blissfully unaware that it was deciding the case contrary to the wishes of the government. The nature of the executive branch's intervention in the case is only mentioned once, as an aside.[111]

This extraordinary expansion in the measure of discretion given in favor of presidential interpretations of treaties has not gone unnoticed in the cases. Justice Stevens, in dissent in *Alvarez*, clearly realized that the Court's decision was influenced by unbridled deference. Not only did he suggest that such deference should have been constrained by the fact that the executive branch had evidenced conflicting positions about forcible abductions abroad,[112] but he also questioned the entire practice of giving so much credit to the litigation-inspired positions taken by the government.[113] "That the Executive may wish to reinterpret the Treaty to allow for an action that the Treaty in no way authorizes," Justice Stevens wrote, "should not influence this Court's interpretation."[114] The warning note sounded by Justice Stevens in *Alvarez* has not really been heeded. When it comes to treaty construction, courts are likely to con-

110. 490 U.S. 122 (1989).

111. *See id.* at 126 n.2.

112. *See* United States v. Alvarez-Machain, 504 U.S. 655, 686 n.34 (1992).

113. *See id.* at 686. The lower court said the following regarding the government's fabricated position: "Those views [of the government] appear to have been adopted only with an eye towards the current litigation." United States v. Verdugo-Urquidez, 939 F.2d 1341, 1353 (9th Cir. 1991). This statement was reminiscent of Justice Stevens's observation in *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 276 n.5 (1984).

114. *Alvarez*, 504 U.S. at 686-87 (Stevens, J., dissenting).

tinue masking an almost abdicationist stance in judicial review as merely gracious deference to executive branch interpretation.

The only bright news in this otherwise dismal picture of deference is, at least the Supreme Court has rebuffed the virulent forms of the political question doctrine suggested by the executive branch in some treaty interpretation cases. The government in *O'Connor v. United States*[115] attempted to argue that the agreed interpretation of the Panama Canal Agreements, jointly made by the United States and Panama on the eve of the appeal, was binding on the Court.[116] Indeed, the Solicitor General was so bold as to suggest that "when both government parties to a bilateral agreement have concurred in its interpretation, it is inappropriate for courts to chart a different course."[117] The government noted elsewhere in its briefs that "[i]t is, after all, the Executive Branch that is charged with conducting foreign affairs."[118] Even more extraordinarily, the Solicitor General wrote, "deference [to the executive branch] is the rule even when the treaty partner takes a view different from that taken by the United States."[119] The Supreme Court was able to duck this version of the political question doctrine, as applied to foreign affairs,[120] by simply ruling on the textual and contextual merits in favor of the government in *O'Connor*.[121]

I believe that the treaty interpretation cases have become the model of what Professor Franck calls "double-entry bookkeeping," in which courts profess independence and maintain

---

115. 479 U.S. 27 (1986).

116. *See id.* at 33 n.2.

117. Brief for the United States on Petition for a Writ of Certiorari at 10, O'Connor v. United States, 479 U.S. 27 (1986) (Nos. 85-558, 85-559, 85-560).

118. *Id.* at 13 (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-21 (1936)).

119. *Id.* For a virtually identical statement, see Brief for the United States as Amicus Curiae Supporting Petitioners at 24, Chan v. Korean Airlines Ltd., 490 U.S. 122 (1989) (No. 87-1055) ("Nor do we think that the contrary views of other signatories to the Warsaw Convention should be controlling . . . [since] they conflict with the view expressed by the United States."). *See also* Brief for the United States on Petitions for a Writ of Certioriari at 7, O'Connor v. United States, 479 U.S. 27 (1986) (No. 85-558, 85-559, 85-560).

120. For more on this problem, see generally Jonathan A. Bush, *How Did We Get Here? Foreign Abduction After* Alvarez-Machain, 45 STAN. L. REV. 939, 956-57 (1993). *See also* Malvina Halberstam, *In Defense of the Supreme Court Decision in* Alvarez-Machain, 86 AM. J. INT'L L. 736, 741 (1992).

121. *See O'Connor,* 479 U.S. at 30-35.

judicial review of treaty claims, but actually extend unnecessary and untoward deference to executive branch positions that tend to frustrate the litigation of those claims. In fact, the government's apparent distrust of, and hostility towards, the independent litigation of treaty rights claims in U.S. courts has apparently grown exponentially in the past few years. This antipathy has resulted in renewed assertions of a pure political question doctrine as a bar to litigation of treaty rights.

III. EMERGENCE OF A "NEW" POLITICAL QUESTION DOCTRINE FOR TREATY RIGHTS?

I believe three case studies might serve to illustrate this growing phenomenon of resurrecting an absolutist political question bar in the adjudication of treaty rights. All three arise from recent cases and are highly representative of new forms of treaty litigation. In each instance, the party defending against the application or interpretation of a treaty right sought to raise either a pure political bar of judicial abstention in litigating the claim, or a form of required deference exceeding what precedents had established.

A. Human Rights Litigation Under the Alien Torts Claims Act

As has been noted elsewhere,[122] the volume of litigation under the Alien Tort Claims Act ("ATCA")[123] has increased markedly over the past decade. One as-yet overlooked aspect of the ATCA is that it not only allows for the application of customary international law norms in U.S. courts, but also provides (in full) that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations *or a treaty of the United States*."[124]

So far, few cases have legitimately sought to litigate a treaty right, other than where the treaty obligation was offered

---

122. *See, e.g.*, David J. Bederman, *Dead Man's Hand: Reshuffling Foreign Sovereign Immunities in U.S. Human Rights Litigation*, 25 GA. J. INT'L & COMP. L. 255 (1995); Kathryn Lee Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation*, 39 VA. J. INT'L L. 41 (1998).

123. *See* 28 U.S.C. § 1350 (1994).

124. *Id.* (emphasis added).

as support for a violation of a customary international law norm.[125] To the extent that a treaty right is raised as the source of an obligation against commission of a tort under the ATCA, one can imagine that the political question doctrine might be raised as a defense. And, in fact, it has been argued in these circumstances.[126] Ironically, when the political question bar has been raised in these cases, it has been by private (non-governmental) defendants and in the face of tacit or express objection by the U.S. government.

No suit brought under the ATCA has been dismissed because of political question concerns. This is so despite the many occasions on which defendants have raised the political question doctrine as a bar to justiciability in ATCA cases. The consistent position of the executive branch, as manifested in *amicus* briefs filed in earlier ATCA cases, is that such cases do not typically implicate political questions.

Defendants have argued that, because certain ATCA cases make actionable the conduct of foreign officials, the cases touch on matters of U.S. foreign policy that must be left to the political branches (particularly the Executive), not the courts.[127] This argument has been uniformly rejected under no less an authority than *Baker v. Carr*, the *locus classicus* of the political question doctrine: "[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[128] A number of courts have cited this language in *Baker* to defeat political question bars to justiciability in ATCA cases.[129]

---

125. *See, e.g.*, Xuncax v. Gramajo, 886 F. Supp. 162, 181 (D. Mass. 1995) (holding that only those treaty provisions that would actually give rise to a "tort" action by reason of their violation are implicated by the ATCA, and thus plaintiffs may bring actions under the Act for torts committed in violation of a United States treaty, not for all violations of a United States treaty); Valanga v. Metropolitan Life Ins. Co., 259 F. Supp. 324, 327 (E.D. Pa. 1966) (holding that jurisdiction under the section of the ATCA giving federal district courts original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States, cannot be established by mere reference to a treaty totally irrelevant to the plaintiff's case).

126. *See* Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996) (rejecting application of the political question doctrine in a case involving torture in violation of the law of nations).

127. *See id.*

128. *Id.* at 211.

129. *See, e.g.*, *Abebe-Jira*, 72 F.3d at 848; Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1995).

According to the Supreme Court in *Baker*, a nonjusticiable political question would involve one or more of the following factors:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[130]

Courts that have faced political question challenges in ATCA cases have, with the guidance of the executive branch, applied these factors unanimously to determine that ATCA cases are fully justiciable.

As the Second Circuit held in *Kadic v. Karadzic*,[131] at the urging of the United States as *amicus curiae*,[132] in reference to the first three *Baker* factors, "'the department to whom [sic] this issue has been "constitutionally committed" is none other than our own—the Judiciary.'"[133] After all, Congress legislated the ATCA in pursuance of its power to "define and punish . . . Offenses against the Law of Nations,"[134] and delegated to the judiciary the power to hear ATCA cases.

The *Kadic* court also noted that "[t]he fourth through sixth *Baker* factors appear to be relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental inter-

---

130. *Baker*, 369 U.S. at 217.

131. 70 F.3d 232 (2d. Cir. 1995).

132. *See* Brief for the United States as Amicus Curiae, Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (No. 94-9035, 94-9069).

133. *Kadic*, 70 F.3d at 249 (quoting Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 49 (2d Cir. 1991)).

134. U.S. CONST. art. I, § 8, cl. 10.

ests."[135] Absent such manifest "prior decisions" there is no political question barring justiciability. In complaints brought under the ATCA properly pleading violation of a treaty of the United States, there is no likelihood of conflict with the executive branch. As the United States itself noted in its *amicus curiae* submission in *Filártgia v. Peña-Irala*,[136] once a court has concluded that a violation of a customary international law norm has been properly alleged, "there is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights."[137]

The only decision in which a judge suggests on record that an ATCA case should be dismissed on political question grounds is Judge Robb's concurrence in *Tel-Oren v. Libyan Arab Republic*.[138] Judge Robb raised the doctrine, as he was concerned that (1) terrorism was not definable as an international law violation, and (2) the Palestine Liberation Organization was not recognized by the United States.[139] Although Judge Robb did harbor systemic objections to the litigation of treaty or customary international law rights under the ATCA,[140] he appeared to be especially worried by a case that presented such incendiary facts.

---

135. *Kadic*, 70 F.3d at 249.

136. 630 F.2d 876 (2d Cir. 1980).

137. Brief for the United States as Amicus Curiae, Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), *reprinted in* 19 I.L.M. 585, 604 (1981), 12 HASTINGS INT'L & COMP. L. REV. 34, 46 (1988).

138. 726 F.2d 774, 823-27 (D.C. Cir. 1984).

139. *See id.* Both concerns were subsequently addressed by executive branch submissions in *Klinghoffer v. S.N.C. Achiile Lauro*, 739 F. Supp. 854, 858, 860 (S.D.N.Y. 1990) and in *Kadic*, 70 F.3d at 239 n.2, 240 n.4.

140. Judge Robb launched this fusillade against the application of international law in U.S. courts and the consequent reliance on the views of international law publicists:

> Courts ought not to serve as debating clubs for professors willing to argue over what is or what is not an accepted violation of the law of nations. Yet this appears to be the clear result if we allow plaintiffs the opportunity to proceed under § 1350. Plaintiffs would troop to court marshalling their "experts" behind them. Defendants would quickly organize their own platoons of authorities. The typical judge or jury would be swamped in citations to various distinguished journals of international legal studies, but would be left with little more than a numbing sense of how varied is the world of public international "law".

Tel-Oren, 726 F.2d at 827 (Robb, J., concurring).

Finally, just because an ATCA case may involve matters of foreign law or demand fact-finding abroad does not require dismissal as a political question. "[Q]uestions of foreign law are not beyond the capacity of our courts."[141] Likewise, to dismiss an ATCA case at the outset because of alleged difficulties in gathering evidence would require dismissal of all such cases, and courts have declined to apply the political question doctrine in such a manner.[142]

No court has dismissed an ATCA case on political question grounds. There is no unique or problematic element in a treaty rights case that would indicate that the executive branch should suggest to a court that it is deserving of such a fate. Even if the executive branch were to join a defendant in making such a suggestion in an ATCA case, I do not believe that a court should defer in such an instance. Whether the tortious violation of a "treaty of the United States" is sufficient to trigger the jurisdictional grounds of the ATCA would seem to be a question analogous to those related to the self-executing nature of an international agreement or those concerned with whether a treaty provides a specific cause of action to a particular claimant. As has already been discussed,[143] these cannot properly be characterized as political questions to which the courts must defer to executive branch positions, much less abstain from adjudication.

B. Environmental Litigation through Treaties

Litigation of international environmental norms has also notably increased in U.S. courts. In part, this trend is attributable to an increase in ATCA filings that assimilate environmental torts to various forms of human rights violations.[144]

---

141. Republic of Philippines v. Marcos, 862 F.2d 1355, 1361 (9th Cir. 1988); *see also* FED. R. CIV. P. 44.1 (determinations of foreign law).

142. *See, e.g.*, Paul v. Avril, 812 F. Supp. 207, 212 (S.D. Fla. 1993).

143. *See supra* notes 48-55 and accompanying text.

144. U.S. courts have concurred that, generally speaking, willful and intentional damage to the environment can rise to the level of a "violation of the law of nations." 28 U.S.C. § 1350 (1994). But claiming general principles does not win cases, and, to date, no ATCA case featuring an international environmental claim has proceeded to trial. *See, e.g.*, Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362 (E.D. La. 1997); Aquinda v. Texaco, Inc., 1994 U.S. Dist. LEXIS 4718 (S.D.N.Y. Apr. 11, 1994); Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668 (S.D.N.Y. 1991). *See also* Hari M. Osofsky, *Environmental Human Rights under*

But there have been some attempts by non-state actors to invoke U.S. environmental treaties to force action by U.S. government agencies to observe those obligations in their own conduct, or, alternatively, to require those U.S. agencies to effectively demand compliance from our treaty partners.

The *Japan Whaling Ass'n v. American Cetacean Society*[145] case was obviously the impetus for this sort of litigation. In that case, the plaintiff wildlife conservation groups sought to enforce international whaling quotas enacted pursuant to international agreements. An enforcement mechanism for the agreements had also been enacted by federal statute.[146] The domestic legislation forced the Secretary of Commerce to certify countries as being in non-compliance with these quotas, and upon such a certification, certain legal consequences (in the nature of trade sanctions) followed. The conservation groups thus sought to trigger the statute by forcing the Secretary to make the necessary certification.

The defendant Japanese whalers resisted this move and urged the Supreme Court to bar litigation of the case under the political question doctrine. The Court declined this invitation, making the general observation that not all foreign policy questions are political questions.[147] Making an abbreviated review of the *Baker* factors, the Court noted:

> As *Baker* plainly held . . . the courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts. It is also evident that the challenge to the Secretary's decision not to certify Japan for harvesting whales in excess of [International Whaling Commission] quotas presents a purely legal question of statutory interpretation. The Court must first determine the nature and scope of the duty imposed upon the Secretary by the Amendments, a decision which calls for applying no more than the traditional rules of

---

the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations, 20 SUFFOLK TRANSNAT'L L. REV. 335 (1997); Anastasia Khokhryakova, Casenote, Beanal v. Freeport-McMoRan, Inc.: *Liability of a Private Actor for an International Environmental Tort under the Alien Tort Claims Act*, 9 COLO. J. INT'L ENVTL. L. & POL'Y 463 (1998).

145. 478 U.S. 221 (1986).

146. *See* Pelly Amendment to the Fishermen's Protective Act of 1967, 22 U.S.C. § 1978 (1994).

147. *See supra* note 26 and accompanying text.

> statutory construction, and then applying this analysis to the particular set of facts presented below. We are cognizant of the interplay between these Amendments and the conduct of this Nation's foreign relations, and we recognize the premier role which both Congress and the Executive play in this field. But under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.[148]

It appears, then, that the primary reason the Court declined to bar adjudication of the case on political question grounds was that the international legal obligation at issue (quotas on whaling) had been implemented into domestic law through an effective administrative mechanism, which gave private parties a right of action.[149]

But change this combination somewhat, and one would have the very different result in *Province of British Columbia v. United States*.[150] Featured in this case was the Pacific Salmon Treaty of January 28, 1985 ("PST"),[151] which was implemented into U.S. law in the Pacific Salmon Treaty Act ("PSTA").[152] The plaintiffs here sought a variety of forms of injunctive and declaratory relief seeking to force the United States and the states of Washington and Alaska to fulfill the conservation measures adopted by a binational commission created pursuant to the treaty.

The United States moved to dismiss the case on political question grounds, further asserting that the treaty was non-self-executing, that there was no private cause of action under the treaty, and that the plaintiffs lacked standing.[153] As for the political question doctrine, the government principally relied on precedents involving the last in time rule, where earlier courts had noted that, if a treaty had been superseded by a later statute, the courts were powerless to command the executive

---

148. Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 222 (1986).

149. *See id.* at 230 n.4.

150. No. C97-1464C (W.D. Wash. Jan. 30, 1998) (Order).

151. Treaty Concerning Pacific Salmon, Jan. 28, 1985, U.S.-Can., T.I.A.S. No. 11,091.

152. 16 U.S.C. §§ 3631-3644 (1994).

153. *See* Federal Defendants' Memorandum in Support of Federal Motion to Dismiss, at 8, Province of British Columbia v. United States, No. C97-1464C (W.D. Wash. Jan. 30., 1998).

branch to obey the treaty.[154] Likewise, the government relied on the invocation of the political question doctrine in the treaty breach cases, where a party had sought to force a court to declare that a U.S. treaty partner was in breach of a treaty obligation.[155] I believe this is dubious authority for a more general proposition that treaty rights are, by their very character, nonjusticiable as against the federal government.

The United States proceeded to make a rather more palatable submission, however. It suggested that, to the extent plaintiffs were seeking a court's determination that the government had failed to observe an "equitable" division of the salmon quota between the United States and Canada, and that, consequently, the United States was in "jeopardy" of not fulfilling its international obligations, these were uniquely political determinations as understood in *Baker*.[156] The government suggested that in the absence of the Pacific Salmon Treaty prescribing a definitive standard of performance, the courts should not impose one. In short, there was "a lack of judicially discoverable and manageable standards for resolving" the political controversy.[157]

In response, the plaintiffs sought to characterize this case as one fundamentally of treaty interpretation,[158] and thus to rely on the language in *Japan Whaling Ass'n* that indicated that "the courts have the authority to construe treaties and executive agreements."[159] And just because the language of the PST was vague, plaintiffs submitted, did not mean that courts should abstain from interpreting and enforcing them.[160] Courts

---

154. *See id.* at 8-10 (citing Head Money Cases, 112 U.S. 580, 598 (1884); Canadian Transp. Co. v. United States, 663 F.2d 1081, 1092 (D.C. Cir. 1980); George E. Warren Corp. v. United States, 94 F.2d 597, 599 (2d Cir. 1938)).

155. *See id.* (citing Holmes v. Laird, 459 F.2d 1211, 1220 (D.C. Cir. 1972); Z & F Assets Realization Corp. v. Hull, 114 F.2d 464, 472 (D.C. Cir. 1940)).

156. *See id.* at 10-13.

157. Baker v. Carr, 369 U.S. 196, 217 (1962).

158. *See* Plaintiff's Response to Defendant's Motion to Dismiss at 54-57, Province of British Columbia v. United States, No. C97-1464C (W.D. Wash. Jan. 30, 1998).

159. Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 230 (1986).

160. *See* Plaintiff's Response to Defendant's Motion to Dismiss at 57-60, Province of British Columbia v. United States, No. C97-1464C (W.D. Wash. Jan. 30, 1998).

have in the past been confronted with vague language in treaties, and have still sought to apply it.[161]

But the district court, Judge Coughenour ruling,[162] applied the political question doctrine and dismissed the action. The court did recognize, though, that "[a]ny implementation of the PST recognizes, and is subject to, U.S. law,"[163] and that the precedent of *Japan Whaling Ass'n* would be suggestive that courts had the power to adjudicate disputes such as this. Nevertheless, the court ruled that while

> neither the PST, the Salmon Treaty Act, nor the Magnuson Act require an Executive officer to accept any recommendations, negotiate in faith, or anything else in the formulation of fishing regimes[, the treaty] does require the United States to create administrative mechanisms that would give effect to the regime it adopts. Therein lies the critical distinction [with *Japan Whaling Ass'n*]. The decision to adopt or reject any recommendation by the [Pacific Salmon] Commission is precisely the type of policy choice and value determination that the Court cannot intrude upon, especially when the PST, the Salmon Treaty Act, and the Magnuson Act grant unqualified discretion in making that decision.[164]

What is curious about this passage is that, while the court framed it in the idiom of political questions, the court appears to have ruled that the treaty was too vague to be judicially enforceable. In that sense, a finding of nonjusticiability can merge with a ruling that a treaty is either non-self-executing, imperfectly implemented into U.S. law, or does not provide a concrete cause of action. But by mixing these inquiries, the court sanctioned an expansive class of treaty rights that are simply not subject to adjudication, much less to effective construction and application.

---

161. *See, e.g.*, Saipan v. United States Dep't of Interior, 502 F.2d 90, 97 (9th Cir. 1974) (provision of the Trusteeship Agreement requiring the United States "to promote the economic advancement and self-sufficiency of the inhabitants" of the Pacific Trust Territories); Confederated Tribes & Bands of the Yakima Indian Nation v. Baldridge, 898 F. Supp. 1477, 1488 (W.D. Wash. 1995) (Indian treaty providing for a "fair" share of salmon).

162. *See* Province of British Columbia v. United States, No. C97-1464C (W.D. Wash. Jan. 30, 1998).

163. *Id.* at 4.

164. *Id.* at 7.

This can be especially mischievous for those treaty regimes that, like environmental accords, tend to be initiated as framework agreements and then (over time) elaborated in successive protocols and decisions by the administrative organs established by the treaty. At what point will a court rule that the treaty obligation is sufficiently clear as to give rise to judicial construction? Indeed, by framing judicial abstention in the form of the political question doctrine (as opposed to a ruling on the "merits" of the treaty being self-executing or granting a cause of action), are courts obliged to defer conclusively to executive branch positions on that subject? *British Columbia* may be indicative of a new trend in judicial resistance to enforcing forms of treaty rights.

C. Breard *and Undue Deference*

The recent controversy about the enforcement of the Vienna Convention on Consular Relations's requirement of consular notification[165] in cases where a foreign national is arrested in a U.S. jurisdiction has received substantial attention in the literature.[166] As is also known, this dispute has attracted the attention of the Supreme Court in *Breard v Greene*,[167] and is likely (at some juncture) to be resolved by the Court.[168] But the point I want to raise here is about the application of the political question doctrine to a related aspect of the *Breard* litigation: the government of Paraguay's attempt to

---

165. *See* Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36, 21 U.S.T. 77, 596 U.N.T.S. 261.

166. *See* William J. Aceves, *International Decision*, 92 AM. J. INT'L L. 517 (1998); Henry J. Richardson III, *The Execution of Angel Breard by the United States: Violating an Order of the International Court of Justice*, 12 TEMP. INT'L & COMP. L.J. 121 (1998); Detlev F. Vagts, Editorial Comment, *Taking Treaties Less Seriously*, 92 AM. J. INT'L L. 458 (1998); Carlos Manuel Vázquez, *Night and Day:* Coeur d'Alene, Breard, *and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L.J. 1 (1998); James A. Deeken, Note, *A New* Miranda *for Foreign Nationals? The Impact of Federalism on International Treaties that Place Affirmative Obligations in the Wake of* Printz v. United States, 31 VAND. J. TRANSNAT'L L. 997 (1998).

167. 118 S. Ct. 1352 (1998).

168. *But see* Faulder v. Texas, 119 S. Ct. 909 (1999) (denying certiorari in a case arising from Texas, involving a Canadian citizen, for an alleged violation of the Vienna Convention on Consular Relations); Federal Republic of Germany v. United States, 119 S. Ct. 1016 (1999) (refusing to exercise original jurisdiction in a case brought by Germany to vindicate a claim under the Vienna Convention on Consular Relations).

enforce the terms of the Vienna Convention against the Commonwealth of Virginia in federal court proceedings.[169]

Virginia and the United States first raised the political question bar before the court of appeals, the district court having dismissed Paraguay's action on Eleventh Amendment grounds.[170] Virginia, in its filings before the Fourth Circuit, simply suggested that "[t]he tasks of construing the treaties at issue, determining whether either or both were violated, and deciding whether the alleged violations warrant invalidating the state court criminal conviction of a third party, all involve 'political questions' from which the federal judiciary should abstain."[171] Virginia particularly relied upon *United States v. Alvarez-Machain* for the proposition that if Paraguay felt aggrieved by Virginia's conduct, its sole remedy was to file a diplomatic *demarche* with the United States.[172] The problem, of course, with relying upon *Alvarez* was that the Supreme Court *did* consider the merits of the treaty interpretation issue raised in that case, but concluded that the extradition treaty between Mexico and the United States did not actually prohibit forced abductions of criminal defendants.[173] So *Alvarez* is suspect authority at best for the notion that the political question doctrine bars courts from hearing a treaty rights case brought by a foreign sovereign.

The United States's submission before the Fourth Circuit[174] offered a more sophisticated plea for application of the political question doctrine. The nub of the United States's argument was that treaty disputes between governments are not

---

169. *See* Paraguay v. Allen, 949 F. Supp. 1269 (E.D. Va. 1996), *aff'd*, 134 F.3d 622 (4th Cir. 1998), *cert. denied sub nom.*, Breard v. Greene, 118 S. Ct. 1352 (1998). I should disclose that I served as counsel of record for Amicus Curiae Law Professors in a filing before the Fourth Circuit in this matter.

170. *See id.* at 1272-75. The Eleventh Amendment provides that "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. The district court ruled that, because the alleged treaty violation was not of a continuing character, Paraguay's suit was for retrospective relief barred by the Eleventh Amendment. *See* Vázquez, *supra* note 166, at 7.

171. Appellee's Brief at 21, Paraguay v. Allen, 134 F.3d 622 (4th Cir. 1998) (No. 96-2770).

172. *See* Appellee's Brief at 22, Paraguay v. Allen, 134 F.3d 622 (4th Cir. 1998) (No. 96-2770).

173. *See supra* notes 103-07 and accompanying text.

174. *See* Brief for the United States as Amicus Curiae, Paraguay v. Allen, 134 F.3d 622 (4th Cir. 1998) (No. 96-2770).

justiciable in domestic courts.[175] It did, however, qualify this sweeping assertion by noting that it was "asserting a far narrower point that a foreign state is in circumstances such as those present here limited to resort to diplomatic and international law remedies, and cannot bring an action in a domestic court seeking to overturn criminal proceedings, based on alleged treaty violations."[176]

The submission made by the United States in its *amicus* brief would have redrafted the Supremacy Clause to bar the justiciability of cases and controversies, otherwise justiciable under Article III of the Constitution, in cases where enforceable treaties are at issue. The United States nevertheless sought to characterize its submission as "limited,"[177] and confined to the context of "suit[s] brought by a foreign nation to enforce asserted treaty rights on its own behalf to overturn otherwise valid criminal justice proceedings."[178]

Had the United States's argument been countenanced in *Paraguay v. Allen*, it would have resulted in a marked erosion of judicial power allocated under the Constitution. The federal courts are specifically granted the power to hear "all Cases . . . arising under . . . Treaties made under the[] authority [of the United States]."[179] When read in conjunction with the other grant of power to hear "Controversies . . . between a State, or the Citizens thereof, and foreign States,"[180] it would have been manifest that Paraguay's action was cognizable under the very language of the Constitution itself.

After all, the threshold question implicated in all cases seeking the enforcement of treaty rights is whether the treaty provision in question can be characterized (in the absence of statutory implementing legislation) as "self-executing." If a treaty can indeed be considered self-executing, its provisions are actionable as cases or controversies brought under Article III of the Constitution, and that treaty is binding as part of the supreme law of the land under the Supremacy Clause.[181] That

175. *See id.* at 11.
176. *Id.* at 22.
177. *See id.* at 9, 22.
178. *Id.* at 22.
179. U.S. CONST. art. III, § 2, cl. 1.
180. *Id.*
181. For the origins of the self-executing treaty distinction, see *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829).

may still beg the question whether a private right of action exists under the treaty or whether a particular claimant has case or controversy standing to bring a suit. Yet it was undisputed in *Paraguay v. Allen* that the Vienna Convention on Consular Relations *was* a self-executing instrument. The United States did not appear to take issue with this, as indeed it could not, since it represented to the Senate (at the time of advice and consent) that the treaty was "entirely self-executing and [did] not require any implementing or complementing legislation."[182]

No court has ever held a right arising under a self-executing treaty to be nonjusticiable as a political question because it was asserted by a foreign government in a criminal proceeding. Confronted with the legal conclusion that the Vienna Convention on Consular Relations was self-executing, the United States was thus obliged to refashion the doctrine of nonjusticiability. It attempted to do so by a selective reliance on the *Head Money Cases*.[183] But that decision stands for nothing more than the proposition that, if Congress so intends, a later piece of federal legislation can render an earlier treaty unenforceable under the Supremacy Clause.[184] And that was precisely the factual context of the *Head Money Cases*: Congress had explicitly legislated against the terms of an earlier treaty. What the *Head Money Cases* Court was addressing, in the language seized upon by the United States in its *amicus* brief filed in the *Paraguay v. Allen* case, were the consequences that followed from the earlier treaty having been rendered domestically unenforceable by the later statute. On that score, the Supreme Court sensibly noted that the treaty continued in its international legal effect, and that the United States's breach of the instrument was actionable only by diplomatic redress or recourse to international arbitration, but *not* by the courts of the United States.[185]

The *Head Money Cases* and its progeny are simply irrelevant in a situation where Congress has not legislated against the terms of a treaty. No suggestion was made by the United

---

182. VIENNA CONVENTION ON CONSULAR RELATIONS, S. EXEC. REP. NO. 91-9, app. at 2, 5 (1969) (statement of J. Edward Lyerly, Deputy Legal Adviser).

183. 112 U.S. 580 (1884).

184. *See id.* at 599 ("The Constitution gives [a treaty] no superiority over an act of Congress . . . which may be repealed or modified by an act of a later date."); *see also supra* notes 36-45 and accompanying text.

185. *See* Head Money Cases, 112 U.S. 580, 598 (1884).

States in its submission in *Paraguay v. Allen* that such legislation has been enacted. The Vienna Convention on Consular Relations thus remained a "Treat[y] made . . . under the Authority of the United States"[186] for the purposes of the Supremacy Clause and, as an acknowledged self-executing instrument, its provisions may be actionable as a case or controversy under Article III of the Constitution.

In view of the United States's confirmation that the Vienna Convention on Consular Relations was self-executing and that it had not been later overturned by statute, it was difficult to see any relevance of the last-in-time rule of the *Head Money Cases*. But the United States may have actually been making a subtler point here, one that would have profound import for separation of powers: the Executive may claim the unilateral right to terminate the domestic effect of treaties otherwise enforceable under the Supremacy Clause. But this assertion was being made in the idiom of nonjusticiability, which obviously would divest the judiciary from even passing on the constitutionality of such action. If such a claim was being advanced in *Paraguay v. Allen*, it was apparently being made without the benefit of any indication that the executive branch intended to terminate the Vienna Convention. What the Executive apparently sought to achieve was a selective abrogation of judicial power under the Constitution: to permit (by executive acquiescence) certain sorts of treaty claims to be justiciable, while barring other sorts of claims by executive intervention as implicating political questions. The United States's argument appeared to reduce to the proposition that *any* case implicating a treaty right is, upon the election of the executive branch, capable of being characterized as a political question and thus rendered nonjusticiable.

Courts that have faced political question challenges in treaty cases unanimously have applied the *Baker* factors to determine that provisions of self-executing treaties are fully justiciable. In reference to the first three *Baker* factors (constitutional commitment, manageable standards, and avoidance of policy determinations), "the department to whom this issue has been 'constitutionally committed' is none other

186. U.S. CONST. art. VI, cl. 2.

than our own—the Judiciary."[187] After all, Congress legislated 28 U.S.C. § 1331, where the district courts were given original jurisdiction of "all civil actions arising under the . . . treaties of the United States."[188] And, as already noted, the Supreme Court, in *Japan Whaling Ass'n*, stated that, "under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones."[189]

One court has recently noted that "[t]he fourth through sixth *Baker* factors appear to be relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests."[190] Absent such manifest "prior decisions," there is no political question barring justiciability; once again, the United States had nowhere suggested that the rights at issue in article 36 of the Vienna Convention on Consular Relations have been questioned, disparaged, or denounced by our government.

What the executive branch really sought in the *Paraguay v. Allen* case was, without directly terminating the Vienna Convention on Consular Relations, to have the instrument recast as *non*-self-executing, and thus not part of the supreme law of the land and not directly enforceable in the courts of the United States. But the Executive may not unilaterally expunge the Convention from the law of the land by the expedient of situationally characterizing certain claims arising under it as political questions. This cannot be accomplished without doing substantial violence to the principle of separation of powers and the very terms of the Supremacy Clause.

Even if the nonjusticiability doctrine advanced by the United States in *Paraguay v. Allen* could have been limited in the way it suggested—to "suit[s] brought by a foreign nation to enforce asserted treaty rights on its own behalf to overturn otherwise valid criminal justice proceedings,"[191] I would still be

187. Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 49 (2d Cir. 1991) (quoting Baker v. Carr, 369 U.S. 186 (1962)).

188. 28 U.S.C. § 1331 (1994).

189. *Id.* at 230.

190. Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1995).

191. Brief for the United States as Amicus Curiae at 9, 22, Paraguay v. Gilmore, 523 U.S. 371 (1998) (Nos. 97-8214 (A-732), 97-1390 (A-738), 97-8660 (A-767) & 125 (Orig. A-771)).

troubled by the separation of powers concerns just described. But it cannot be so limited. The United States offered no intelligible limiting principle, and none exists in constitutional jurisprudence.

Indeed, it appears that the Supreme Court has consistently allowed foreign governments to raise treaty rights in reference to state court proceedings, including criminal prosecutions.[192] The United States attempted to distinguish these cases by noting that neither of these cases cast doubt on the *Head Money Cases*. In this, the United States was quite right: both *Wildenhus* and *Santovincenzo* are fully consistent with *Head Money Cases*'s later-in-time rule. In none of those three cases, as in *Paraguay v. Allen*, was a later statute said to have rendered unenforceable an earlier treaty.

The executive branch in *Paraguay v. Allen* thus acknowledged that there was no limiting principle, save its own judgement, which, it asserted, should be conclusive as a bar to justiciability.[193] The United States thus recharacterized the Vienna Convention on Consular Relations as non-self-executing and insisted that such a decision be insulated from judicial review under the political question doctrine. Nothing in the prudential doctrine of justiciability dictated such a result. Quite the contrary, the executive branch sought nothing less than to displace the judiciary as the proper organ for interpreting and enforcing those treaties that are enforceable as part of the law of the land under the Constitution's Supremacy Clause.

Happily, the Fourth Circuit rejected the assertion of a political question bar of justiciability. But it did so only indirectly: "[N]or do we consider the 'political-question' issue first raised on this appeal. [Although it is an] important issue [it is] better reserved for cases in which their resolution is critical to decision."[194] Like the district court, the court of appeals preferred to base the dismissal of Paraguay's case on the (relatively) narrower constitutional ground of the Eleventh Amendment prohibition of suing states in federal court for ret-

---

192. *See* Santovincenzo v. Egan, 284 U.S. 30 (1931) (action to enforce decedents' estate provisions of treaty); Wildenhus's Case, 120 U.S. 1 (1887) (consul challenging criminal prosecution in violation of treaty).

193. *See* Brief for the United States as Amicus Curiae at 9, 22, Paraguay v. Gilmore, 523 U.S. 371 (1998) (Nos. 97-8214 (A-732), 97-1390 (A-738), 97-8660 (A-767) & 125 (Orig. A-771)).

194. Paraguay v. Allen, 134 F.3d 622, 626-27 n.4 (4th Cir. 1998).

rospective forms of relief, absent a continuing treaty violation.[195]

Paraguay sought review in the Supreme Court, and, interestingly enough, the United States substantially blunted its political question arguments before the Court by choosing to emphasize the question of whether the Vienna Convention even offered a cause of action to Paraguay.[196] The Supreme Court concurred with this modified position of the United States: "Neither the text nor the history of the Vienna Convention clearly provides a foreign nation a private right of action in United States' courts to set aside a criminal conviction and sentence for violation of consular notification provisions."[197] The Court thus did not appear to embrace a political question bar to the adjudication of a treaty right. Additionally, the Court emphasized that Breard's and Paraguay's treaty claims were subject to procedural limitations recognized by the courts in this nation:

> First, while we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such, it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.... Second, although treaties are recognized by our Constitution as the supreme law of the land, that status is no less true of provisions of the Constitution itself, to which rules of procedural default apply. We have held "that an Act of Congress ... is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null."[198]

I suspect this passage will provide fertile ground for those that would criticize the Court and the authority it relies upon for this narrowing of the application of treaties in U.S. law.[199]

---

195. *See id.* at 627-29.

196. *See* Brief for the United States as Amicus Curae at 15-26, Breard v. Greene, 118 S. Ct. 1352 (1998) (No. 97-1390).

197. Breard v. Greene, 118 S. Ct. 1352, 1356 (1998).

198. *Id.* at 1354-55 (quoting Reid v. Covert, 354 U.S. 1 (1957) (plurality opinion)); *see also* Whitney v. Robertson, 124 U.S. 190 (1888).

199. *See id.* (citing Sun Oil Co. v. Wortman, 486 U.S. 717, 723 (1988); Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 700 (1988); SNIAS

It does not, however, attempt to resurrect a political question bar to adjudication of treaty rights. Indeed, the Court does not intimate that it should overtly defer to the executive branch when deciding whether a treaty provision provides a right of action or has been nullified by a later statute. This ruling is consistent with the observations I have already made as to the historic contours of judicial deference with this category of treaty cases.[200] *Breard* cannot, therefore, be regarded as expanding the zone of deference that the courts owe to executive branch treaty positions, nor as commanding abstention in a larger set of circumstances. It may well, of course, herald a *substantive* contraction of the exercise of treaty rights in U.S. courts.

IV. CONCLUSION: DEFERENCE AND DECEPTION

It is cold comfort, indeed, that U.S. courts are willing to assert their judicial prerogative to decide treaty right cases, but only to disclaim that a treaty right actually exists or can be claimed by a party. Nevertheless this exercise in exploring the outer limits of judicial deference—in identifying those treaty issues that responsible judges will not decide—is useful and important in developing any understanding of the foreign relations power and its exercise in this country. It would be extravagant to hope that treaty rights, as effectuated under the Supremacy Clause, could be divorced from the political branches' foreign relations power. Deference and abstention in treaty application and interpretation is not the outgrowth of a lazy or disinterested judiciary. Nor is it made inevitable because of the political character of international agreements. Rather, I think, the source of the problem is the unique character of treaties and the deceptive nature of the political question doctrine.

As to treaties, we know that they are the law of the land. Their provisions have as much force as statutes. Yet, unlike acts of Congress, treaties begin their life in constitutional ob-

---

v. United States Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 539 (1987)). See also the Court's subsequent discussion in *Federal Republic of Germany v. United States*, 119 S. Ct. 1016, 1017 (1999).

200. *See supra* notes 36-55 and accompanying text; *see also* Lori Fisler Damrosch, *The Justiciability of Paraguay's Claim of Treaty Violation*, 92 AM. J. INT'L L. 697 (1998).

scurity. They are the creation not of the lawmakers, but of the Executive, receiving only a limited form of legislative concurrence. Born into legal limbo, treaties live a double life: one half as part of the American legal system, the other as an expression of an international undertaking with other nations. This strange birth and schizophrenic life of treaties have led to their being considered something fundamentally *other* than public law. And the farther removed treaties appear to judges as part of the national legal order, the more likely courts will defer or abstain in their application and interpretation.

The political question doctrine can ruthlessly exploit the amorphous, alien, and different character of treaties. This abuse can be perpetrated because the political question doctrine is, as Professor Louis Henkin noted, deceptive in its packaging.[201] It appears principled, cautious, loyal, and modest. Consider this paean to the doctrine, penned by none other that Alexander Bickel, to whom Henkin was rejoining in his 1976 piece:

> Such is the basis of the political-question doctrine: the court's sense of lack of capacity, compounded in unequal parts of the strangeness of the issue and the suspicion that it will have to yield more often and more substantially to expediency than to principle; the sheer momentousness of it, which unbalances judgment and prevents one from subsuming the normal calculations of probabilities; the anxiety not so much that judicial judgment will be ignored, as that perhaps it should be, but won't; finally and in sum the inner vulnerability of an institution which is electorally irresponsible and has no earth to draw strength from.[202]

But just as Professors Henkin[203] and Franck[204] have generally rebutted the application of the doctrine, I have sought to show here its perilous and deceptive influence on the adjudication of treaty rights. Indeed, I would think that the grounds for applying the political question bar in a treaty rights case are far fewer, and far less compelling, than with any other aspect of the foreign relations power. Although, as I acknowledge

---

201. *See* Henkin, *supra* note 1, at 622.

202. *See* BICKEL, *supra* note 2, at 75.

203. *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 143-48 (2d ed. 1996); Henkin, *supra* note 1.

204. *See* FRANCK, *supra* note 11.

here,[205] treaty cases can implicate the recognition power granted to the President, along with his general ability to manage the nation's foreign relations, I consider these cases to be truly exceptional. More importantly, the courts regard them as exceptional. The run-of-the-mill treaty case simply does not present those concerns.

Despite all this, I believe that what makes the political question doctrine so subversive of ordered liberty is that it psychologically licenses deference. It is no accident that the very structure of argument that governmental parties use in treaty rights cases strongly urges the same result: the treaty right is dismissed. The political question doctrine is invoked to lecture and warn the court of the very danger of ruling on the matter. But then a more modest solution is offered: "Rule on the merits, if you insist," the brief might as well read, "but be sure to rule in our favor." It has become a variant on the now-legendary mantra that the Solicitor General's office was known to trot out in close cases involving the foreign relations power: "*Curtiss-Wright*—and we're right."[206] The political question doctrine has simply become an aperitif for the judge's main course of deference.

---

205. *See supra* notes 56-78 and accompanying text.

206. HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 94 (1990) ("Among government attorneys, Justice Sutherland's lavish description of the president's powers is so often quoted that it has come to be known as the '*Curtiss-Wright*, so I'm right' cite.").