1982

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JUSTICIABILITY AND THE LIMITS OF PRESIDENTIAL FOREIGN POLICY POWER

INTRODUCTION

It is "the province and duty of the judicial department, to say what the law is."\(^1\) With this awesome power the federal courts may strike down any governmental act they deem to be unconstitutional.\(^2\) Yet, when the exercise of this power might affect United States foreign relations, the courts have hesitated to employ it.\(^3\) This hesitation derives from the courts’ cognizance that their role is not to make foreign policy.\(^4\) The federal courts have turned away cases involving

1. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). In the entire passage, Chief Justice Marshall justified the power of judicial review:
   It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case, conformable to the law, disregarding the constitution; or conformable to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case: this is of the very essence of judicial duty. If then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply. Id. at 177-78.

2. Id. at 178. For an analysis of Marshall’s reasoning, see L. Tribe, American Constitutional Law 21-23 (1978) [hereinafter cited as Tribe]. Some scholars suggest that the power of judicial review is supported by the supremacy clause, U.S. Const. art. VI, cl. 2. See, e.g., Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 3-5 (1959). Cf. A. Bикle, The Least Dangerous Branch 11-12 (1962).

3. It should be clear that this power does not extend to the making of foreign policy itself. See infra note 4. Although this note speaks in terms of foreign policy decisions, only those plaintiffs who have a claim founded on common law, statute, or the Constitution may invoke the judicial process. See infra note 44.

4. The Supreme Court has indicated this point in such sweeping dicta that the reader might reasonably conclude that the courts must reject any case that involves foreign affairs: “[T]he conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government; . . . the propriety of the exercise of that power is not open to judicial inquiry.” United States v. Pink, 315 U.S. 203, 222-23 (1942) (citing United States v. Belmont, 301 U.S. 324, 328 (1937)). See also Oetjen v. Central Leather Co., 246 U.S. 297, 303 (1918) (judiciary could not question revolutionary government’s seizure of property after the United States had extended official recognition of government). The Supreme Court has also suggested that the courts lack the “aptitude, facilities [and] responsibility” to make such
foreign affairs when the controversy failed to yield to standards by which they could resolve the dispute, when the possibility existed that judicial resolution of a dispute might embarrass the President or Congress, and when the power to make the decision was vested in another branch of government.

This note examines the role that the courts should play in determining the extent of presidential power abroad. It begins with a review of the cases dealing with foreign affairs that the courts traditionally have heard. Next, it explores some of the barriers that litigants must overcome to obtain a court adjudication and suggests types of actions that might never be suitable for a judicial decision on their merits. Finally, it examines one of the most important barriers to judicial intervention in the field of foreign relations—the political question doctrine.

The scope of the political question doctrine is currently in controversy. Several decisions appear to suggest that the political question doctrine absolutely prohibits the courts from hearing cases concerning foreign affairs; but this is not so. The courts do, indeed, have a role to play in seeking the limits of the President's foreign policy power. That role is to enforce the separation of powers mandated by the Constitution and deemed by its drafters to be necessary for the preservation of a democratic form of government.

6. See, e.g., Goldwater v. Carter, 444 U.S. 996 (1979) (plurality opinion) (order vacating 617 F.2d 697 (D.C. Cir. 1979)); see also Baker v. Carr, 369 U.S. 186, 217 (1962). This factor can be best illustrated by Goldwater. There, plaintiffs sought to reverse President Carter's termination of the Taiwan mutual defense treaty on the ground that President Carter failed to obtain Senate consent for the termination. The President had terminated the treaty as part of his recognition of communist China. He might have suffered international embarrassment had his action been invalidated.
8. See cases cited supra note 6.
9. For a discussion of the courts' role in this area, see infra notes 12-24 and accompanying text.
10. Although courts also have a role in protecting individual liberties where foreign policy is implicated, the primary focus of this note will be on the courts' role in preserving the separation of powers.
11. James Madison thought that the "accumulation of all powers, legislative, executive and judicial, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST No. 47, at 301 (J. Madison) (C. Rossiter ed. 1961). Madison feared that the exercise of such power would be arbitrary. Unlike Hamilton, Madison did not explicitly state that the
This role, far from being barred by the political question doctrine, is compelled by it.

**JUDICIAL INTERVENTION IN FOREIGN AFFAIRS**

Protection of individual rights is perhaps the essence of judicial duty. The fact that federal courts function to a great extent outside of the political process enables them to fulfill this duty. As Alexander Hamilton pointed out, the "independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures sometimes disseminate courts should be the enforcer of the separation of powers. He analyzed a Pennsylvania experiment that set up a council of censors whose function was to determine whether "the legislative and executive departments had encroached on each other." *Id.* No. 50, at 318. Madison felt that the council was ineffective because its members were state politicians at a time when there was such a violent split between the political parties that the temper of the proceedings was marked more by passion than reason. *Id.* at 319. Madison concluded that there was no fully satisfactory manner of guaranteeing the separation of powers; he thought that the best hope was for the branches to keep each other in their proper place through "their mutual relations." *Id.* No. 51, at 320. Cf. *id.* No. 78, at 468 (A. Hamilton) (Hamilton said that the courts must adhere to the Constitution and disregard conflicting legislation). Justice Frankfurter emphasized the continuing importance of this separation when he concurred with the Supreme Court's decision against the President in the *Steel Seizure Case*:

"[D]emocracy implies the reign of reason on the most extensive scale . . . . [I]f a society is to be at once cohesive and civilized, [there is a] need for limitations on the power of governors over the governed. To that end [the Framers] rested the structure of our central government on the system of checks and balances. For them the doctrine of separation of powers was not mere theory; it was a felt necessity . . . . The experience through which the world has passed in our own day has made vivid the realization that the Framers of our Constitution were not inexperienced doctrinaires. These long-headed statesmen had no illusion that our people enjoyed biological or psychological or sociological immunities from the hazards of concentrated power . . . . The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.

*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593-94 (1952) (Frankfurter, J., concurring).

Justice Brandeis also pointed out the importance of the separation doctrine in words suggesting that the separation of powers should not be sacrificed to considerations of expediency:

The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.


among the people themselves . . . .”13 The courts, consequently, have not hesitated to adjudicate the constitutional rights of individuals merely because a controversy potentially affects foreign relations.14 The extent of these rights may differ according to the context,15 but the President and Congress, acting pursuant to their foreign affairs powers, are clearly constrained by constitutional prohibitions.16

In its role as arbiter of these constitutional prohibitions, the Supreme Court has, for example, held that civilians accompanying United States servicemen may not be tried by a court martial despite a treaty to the contrary,17 upheld the internment of Japanese Americans during World War Two,18 and invalidated congressional attempts to take away the citizenship of those voting in foreign elections.19 The Court has examined the conditions under which the Secretary of State may revoke an American passport.20 In addition, the Court has adjudicated claims alleging that the federal government effected a taking of overseas property without just compensation,21 and considered challenges to military policy regarding sex

14. See infra notes 17-24 and accompanying text.
15. See Rostker v. Goldberg, 101 S. Ct. 2646, 2653 (1981) (Congress has power to require male-only draft registration); Middendorf v. Henry, 425 U.S. 25 (1976) (neither sixth, nor fifth, amendments require servicemen to be provided counsel in summary court martial); Parker v. Levy, 417 U.S. 733 (1974) (Congress may legislate with greater breadth when adopting rules for military than when enacting criminal statutes for civilians); see also infra notes 17-24 and accompanying text.
16. E.g., Rostker v. Goldberg, 101 S. Ct. 2646, 2653 (1981); Reid v. Covert, 354 U.S. 1, 5-7 (1957) (plurality opinion).
17. Reid v. Covert, 354 U.S. 1 (1957) (plurality opinion) (treaties are limited by the Bill of Rights; treaty may not provide for court martial of American civilians living abroad with American armed forces). See also Kinsella v. United States ex rel. Singleton, 361 U.S. 234 (1960) (applying Reid to noncapital case); Grisham v. Hagan, 361 U.S. 278 (1960) (applying Reid to prevent court martial of civilian army employee in murder case).
20. See Haig v. Agee, 101 S. Ct. 2766, 2783 (1981) (Secretary permitted to revoke passport of former CIA agent under regulation permitting such revocation, where Secretary believes that citizen's activities are likely to cause or are causing serious damage to United States foreign policy or security). The Supreme Court has also considered the circumstances under which the Secretary may deny a passport. See, e.g., Zemel v. Rusk, 381 U.S. 1, 14-15 (1965); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Kent v. Dulles, 357 U.S. 116 (1958).
discrimination.  

The most dramatic instance of the courts’ willingness to adjudicate claims founded upon the rights of individuals, regardless of the potential impact on foreign policy, came at the conclusion of the Iranian hostage crisis. The executive agreement that freed the hostages required that lawsuits filed against Iran be terminated, judgments already rendered against Iran be nullified, and other American interests in Iranian assets be revoked. Numerous court actions challenged the agreement on the ground that its terms were beyond the power of the President. The Supreme Court decided the case on the merits in favor of the President on the ground that Congress, through its silence, had acquiesced in this long standing practice of claims settlement.  

While the courts may not always decide in favor of individuals challenging the government, they have always been willing to adjudicate their claims. The courts are unwilling to abdicate their role as ultimate interpreters of the Constitution when individuals claim that their constitutional rights have been violated. To avoid reaching the merits would be to allow the political branches to determine the scope of constitutional liberties. Rather than permit such a result, the courts have carefully defined the limits of governmental imposition upon individual rights.  

In addition to cases concerning individual constitutional rights, other controversies affecting foreign affairs may require adjudication

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22. Rostker v. Goldberg, 101 S. Ct. 2646 (1981); Schlesinger v. Ballard, 419 U.S. 498 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973). Deciding these claims can have a far reaching impact upon foreign affairs. In Rostker, for example, the Court decided that it was not a violation of the equal protection clause, U.S. CONst. amend. XIV, § 1, for Congress to require only men to register for the draft. One of the reasons asserted for that discrimination was that only men were permitted into combat. Rostker, 101 S. Ct. at 2657-58. The Court did not question the man-only combat policy, but since the combat exclusion was a justification for the men-only registration, the Court implicitly approved that policy. The Court might have decided that the male registration was invalid because the policy it was premised upon was constitutionally defective. Thus, implicitly, the Supreme Court decided that it was permissible to exclude women from combat.


24. Dames & Moore v. Regan, 101 S. Ct. 2972, 2989-90 (1981). The Court considered several statutory schemes giving the President the power to deal with the emergency. Although the Court found none of them explicitly applicable, it did show, according to the Court, an unwillingness on the part of Congress to limit the powers of the President. Id. The Court left open the plaintiff's contention that the suspension of claims violated the fifth amendment. The Court decided that these claims were not yet ripe. Id. at 2991-92.

25. See supra notes 15-24 and accompanying text.
by the federal courts. In 1976, Congress enacted the Foreign Sovereign Immunities Act\(^6\) providing that foreign governments lacking immunity under 28 U.S.C. sections 1604-1607 may be sued in federal district courts.\(^7\) This legislation demonstrates Congress' willingness to permit the courts to adjudicate matters touching upon foreign affairs. It was passed despite the fact that forcing foreign governments to appear before federal courts may have disastrous effects upon the administration's foreign policy; the state department may be powerless to have the dispute settled by diplomatic rather than legal means.\(^8\)

The federal courts have jurisdiction over controversies arising under treaties.\(^9\) This, of course, provides another area for judicial involvement in matters affecting our nation's foreign affairs. The


\(^{27}\) 28 U.S.C. § 1330(a) (1976). 28 U.S.C. §§ 1605-1607 delineate the circumstances in which a foreign government is subject to federal court action. The Act is supported by article III of the Constitution which extends judicial power to all cases "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. CONST. art. III, § 2, cl. 1. Despite the fact that the Constitution and current statutory scheme extend judicial power to suits involving foreign governments, this was not always the case. At one point, the Supreme Court adopted a rule that foreign states were absolutely immune from federal lawsuits. Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812). The complete bar fell in 1952 when the State Department announced that it would no longer assert immunity in suits arising from private or commercial controversies. See, e.g., Carl, Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice, 33 Sw. L.J. 1009, 1011-12 (1979).

\(^{28}\) Carl, supra note 27, at 1063. Carl suggests that for this reason the entire scheme may be an unconstitutional delegation of executive power to the courts. Id. at 1063-64. Cf. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972) (the principled nature of judicial opinions can only serve "foreign policy grossly and spasmodically . . . [It] cannot provide [the] flexibility, completeness, and comprehensive coherence" needed for effective foreign policy). Id. at 220.

\(^{29}\) This is commanded by the Constitution and statute. "The judicial power shall extend to all cases, in Law and Equity, arising under . . . treaties made, or which shall be made." U.S. CONST. art. III, § 2, cl. 1. "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States." 28 U.S.C. § 1331 (1980) (amending 28 U.S.C. § 1331 (1976)), reprinted in 28 U.S.C.A. § 1331 (West Supp. 1982) (emphasis added). The courts will treat a treaty as equivalent to legislation where the treaty is self-executing. See, e.g., Foster v. Neilson, 27 U.S. 253, 314 (1829). A treaty is not self-executing to the extent that it calls on the government to take action requiring congressional enactment. To the extent that a treaty contains provisions for private enforceable rights, it is self-executing and equivalent to a statute. See The Head Money Cases, 112 U.S. 580, 598-99 (1884). The question is one of the intent of the signators. Diggs v. Richardson, 555 F.2d 848 (D.C. Cir. 1976) (United Nations resolution held not self-executing because it conferred no rights to individual citizens and provided no specific standards); cf. Asakura v. Seattle, 265 U.S. 332 (1924) (treaty with Japan providing resident Japanese nationals with right to trade created enforceable right to operate pawn broker business despite municipal ordinance to contrary).
courts have exercised their authority to decide the extent of treaty power. The Supreme Court has determined the validity of treaties and executive agreements challenged as inconsistent with state law. Furthermore, the Court has decided that where federal law and a treaty conflict, the most recently enacted will control. Finally, the courts have adjudicated the very bounds of foreign policy power. The Supreme Court, in the Steel Seizure Case, limited the power of the President in relation to Congress. The Court determined that the presidential war power did not extend so far as to allow the President to seize the nation's steel mills despite the President's claim that a crippling strike might hamper the Korean war effort. In Wiener v. United States, the Court held that the President did not have the power to remove a member of the War Claims Commission at will, because the War Claims Act of 1948 precluded the President from influencing the Commission in its processing of claims.

More often, the courts have upheld particular exercises of presidential foreign affairs power. They have interpreted the scope of his war powers and reached the merits of challenges to the Vietnam War. They have also determined the extent of domestic regu-


31. See, e.g., United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937). Pink and Belmont are representative of a judiciary affecting foreign affairs. The Court decided both of these cases on the merits, thereby using the agreements to decide the legal rights between individuals in the face of contrary state policy. The Court not only decided these cases which could have had international ramifications, but it set itself up as the arbiter of the scope of the executive agreement power.

32. Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1889).


34. Id. at 587.


37. See, e.g., United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950) (President has power to exclude aliens); Lincoln v. United States, 197 U.S. 419 (1905), reaffirmed, 202 U.S. 484 (1906) (President has power to impose tariffs on goods coming in to occupied island.)

38. The President has power to respond to invasions. The Prize Cases, 67 U.S. (2 Black) 635, 671 (1862); Martin v. Mott, 25 U.S. (12 Wheat.) 19, 28 (1827). See Tribe, supra note 2, at 172-81.

39. The Second Circuit, for example, took the position that Congress had authorized the war despite the fact that Congress never issued a formal declaration of war. Orlando v. Laird,
lation permitted by a declaration of war\textsuperscript{40} and the permissible length of time such regulation may continue after hostilities have ceased.\textsuperscript{41} In short, the courts have long been deciding cases involving foreign affairs. These cases illustrate the truth of Justice Brennan's statement in\textit{Baker v. Carr}\textsuperscript{42} that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."\textsuperscript{43}

\section*{JUSTICIABILITY}

Though the federal courts will intervene in matters that happen to touch upon foreign affairs, any plaintiff seeking to challenge presidential action in the courts must overcome a number of justiciability problems.\textsuperscript{44} These barriers derive from two sources: article III of the

\begin{itemize}
\item \textsuperscript{40} 443 F.2d 1039, 1043 (2d Cir.), \textit{cert. denied}, 404 U.S. 869 (1971). Accord Massachusetts v. Laird, 451 F.2d 26, 30 (1st Cir. 1971). The Second Circuit noted that there was "an abundance of continuing mutual participation in the prosecution of the war." Orlando v. Laird, 443 F.2d at 1042. The court held that there was no constitutional violation if there was "some mutual participation between the Congress and the President." \textit{Id.} at 1043 (emphasis in original). The court refused to consider the propriety of the means Congress chose "to ratify and approve the protracted military operations," \textit{id.}, holding this latter issue to be a political question. \textit{Id.} Thus, while finding that a political question was contained in the controversy, namely the propriety of the means that Congress chose to ratify the hostilities, the court did find that Congress had, in fact, authorized the conflict. Thus, the court reached the merits of the case. \textit{Id.}
\item This position was later affirmed after Congress revoked the Gulf of Tonkin Resolution. DaCosta v. Laird, 448 F.2d 1368 (2d Cir. 1971) (per curiam). Later, the Second Circuit refused to allow a district court to determine whether an escalation was beyond the scope of the congressional authorization it had found in\textit{DaCosta}. DaCosta v. Laird, 471 F.2d 1146 (2d Cir. 1973). The circuit then seemed to abandon reaching the merits under any circumstances. Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), \textit{cert. denied}, 416 U.S. 936 (1974) (challenge to President Nixon's bombing of Cambodia).
\item Other circuits took other positions. For a complete catalogue of these decisions, see Sugarman, Book Review, 13 \textit{COLUM. J. TRANSNAT'L L.} 470 (1974). \textit{See also} Henkin, \textit{Viet-Nam in the Courts of the United States}, 63 \textit{Am. J. INT'L L} 284 (1969).
\item \textsuperscript{41} \textit{See}, e.g., Yakus v. United States, 321 U.S. 414 (1944) (upholding World War Two price controls).
\item \textsuperscript{42} Woods v. Miller Co., 333 U.S. 138 (1948) (Rent Control Act of 1947, enacted under war powers, permissible despite presidential proclamation terminating hostilities).
\item \textsuperscript{43} 369 U.S. 186 (1962).
\item \textsuperscript{44} \textit{Id.} at 211 (dicta).
\item For a survey of these barriers, see Tribe, supra note 2, at 20-252. For a discussion of the standing and ripeness obstacles, see infra notes 50-135 and accompanying text.
\item The plaintiff must also have a substantive claim. The plaintiff cannot challenge presidential foreign policy because he simply does not agree with it. \textit{See} Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165-66 (1803). Most foreign policy is not subject to review because it breaches no rule of law. This note, however, deals with the situation where the plaintiff claims that the President's action is proscribed by the Constitution or a statute.
\end{itemize}
Constitution, particularly the case and controversy requirement, and the courts’ own perceptions as to whether exercise of the power they possess is prudent. Thus, each barrier must be examined on two levels. On the constitutional level, the requirements generally will be less stringent than those founded on prudential considerations. This is so because constitutional limitations are inflexible, while judicially created prudential limitations can be used as the sit-

45. U.S. Const. art. III, § 2, cl. 1:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

46. See Tribe, supra note 2, at 20.

47. See, e.g., Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 81 (1978); Ashwander v. TVA, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring); see also Tribe, supra note 2, at 53. Justice Brandeis issued the virtual bible of such rules:

1. The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding, declining because to decide such questions “is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals . . . .”

2. The Court will not “anticipate a question of constitutional law in advance of the necessity of deciding it . . . .”

3. The Court will not “formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . . .”

4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter . . . . Appeals from the highest court of a state challenging its decision of a question under the Federal Constitution are frequently dismissed because the judgment can be sustained on an independent state ground . . . .

5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation . . . . Among the many applications of this rule, none is more striking than the denial of the right of challenge to one who lacks a personal or property right. Thus, the challenge by a public official interested only in the performance of his official duty will not be entertained. . . .

6. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits . . . .

7. “When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”

Ashwander v. TVA, 297 U.S. at 346-48 (Brandeis, J., concurring) (citations omitted).
vation demands. The article III's limitations set out the perimeter of the Supreme Court's judicial power. An overly broad interpretation of the judicial barriers found in article III could, therefore, prevent the Supreme Court from ever reviewing decisions of state courts that ought to be overturned. The limits of article III only apply to the federal courts. It is, therefore, unsurprising that the decisions interpreting the article III justiciability barriers focus on whether the case presents "a real and substantial controversy." 49

Standing

The requirements of standing, which focus on whether the plaintiff is an appropriate individual to press a particular claim before the courts, 50 prevent most individuals from bringing actions to challenge foreign policy. These requirements arise from both the article III case and controversy mandate 51 and self-imposed restraints. 52 Every plaintiff must allege an injury sufficient to show "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." 53 The cause of this injury must be "fairly traceable to the defendant's acts or omissions," 54 and "the interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 55

48. U.S. CONST. art. III.
49. Tribe, supra note 2, at 56 (quoting Poe v. Ullman, 367 U.S. 497, 509 (1961) (Brennan, J., concurring)).
52. Scholars have attacked the notion that article III imposes standing requirements. See Berger, Standing to Sue in Public Actions: Is it a Constitutional Requirement?, 78 YALE L.J. 816 (1969) (Berger attacks such requirements as unsupported by the founders' intent and prior history); Jaffe, The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff, 116 U. Pa. L. Rev. 1033 (1968).

Congressionally Created Standing.—Congress may, through legislation, provide standing for those who meet the standing requirements imposed by article III, but who would otherwise be barred by prudential standing rules. These prudential rules arise from considerations of judicial self-restraint. They include, for example, the courts’ refusal to adjudicate ‘‘generalized grievance[s]’’ shared in substantially equal measure by all or a large class of citizens,” and the requirement that the plaintiff “cannot rest his claim to relief on the legal rights or interests of third parties.”

Although a congressional statute can grant standing when the prudential requirements are not satisfied, the plaintiff must still “allege a distinct and palpable injury to himself” to satisfy the article III provision. This limitation, however, is nominal, considering that the injury giving rise to standing may be merely the deprivation of the right created by the statute providing standing. The Supreme Court has broadly defined the extent of congressional power to create such rights. Thus, for example, in Federal Communications Comm’n v. Sanders Bros. Radio, Congress could extend to a licensed radio station the right to appeal the granting of a license to another radio station, despite the appellant’s inability to show that the grant would cause it economic harm. This decision has been interpreted by one commentator as indicating that the injury requirement limits only the power of the “federal courts to confer standing in the absence of statute . . . .”

The Supreme Court has insisted, however, that in “broadening the categories of injury” the requirement has not been abandoned. It is unclear whether, in fact, this is true. In Sierra Club v. Morton, the club brought an action under section 10 of the Administr-

57. Warth v. Seldin, 422 U.S. 490, 499 (1975). This requirement comes close to a political question. A harm that affects a large class of people may be easily remedied in the political process.
58. Id.
59. Id. at 501; see also Sierra Club v. Morton, 405 U.S. 727, 732 (1972).
61. 309 U.S. 470, 477 (1940). One commentator construes the decision as recognizing a congressional grant of a right to be free from illegal competition. Jaffe, supra note 51, at 1036.
62. Tribe, supra note 2, at 80 (emphasis added).
64. 405 U.S. 727 (1972).
tive Procedure Act\textsuperscript{65} to prevent the building of an addition to Disneyland in the Mineral King National game refuge. The Supreme Court dismissed the action for lack of standing, noting that the club "failed to allege that it or its members would be affected in any of their activities or pastimes . . . ."\textsuperscript{66} In \textit{United States v. SCRAP},\textsuperscript{67} the Court construed the same statute and held that Washington D.C. law students could challenge an ICC surcharge on recyclable goods. The students alleged that the surcharge increased the use of nonrecyclable goods, causing an adverse environmental impact on the District of Columbia's forests and streams which the students used. It was the claim that the students' use and enjoyment of these natural resources would be impaired that gave them sufficient injury to obtain standing.\textsuperscript{68} At first blush, it appears that juxtaposition of these two cases substantiates the continued necessity of injury as a requirement for standing. Yet, it would seem that the Sierra Club failed to obtain standing merely due to improper pleading. Arguably, these two decisions reveal that the injury requirement may be relegated to little more than a pro forma necessity in pleading.

A determination of whether Congress has created standing in a statute where standing is not expressly provided turns on congressional intent.\textsuperscript{69} In \textit{Cort v. Ash},\textsuperscript{70} the Supreme Court indicated several relevant factors it would look to when ascertaining intent: (1) whether the plaintiff is a member of a class for whose benefit the statute was enacted; (2) whether there is evidence that the legislature intended to create a private remedy; (3) whether a private remedy is consistent with the underlying purpose of the statute; and (4) whether the cause of action is one traditionally relegated to state law.\textsuperscript{71}

Another factor that frequently influences the Supreme Court's finding of no standing is the availability of other remedies.\textsuperscript{72} The

\begin{thebibliography}{99}
\bibitem{65} Pub. L. No. 89-554, 80 Stat. 378 (1966) (current version at 5 U.S.C. § 702 (1976)): "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."
\bibitem{66} 405 U.S. at 735.
\bibitem{67} 412 U.S. 669 (1973).
\bibitem{68} Id. at 685.
\bibitem{70} 422 U.S. 66 (1975).
\bibitem{71} Id. at 78.
\bibitem{72} See Middlesex County Sewerage Auth. v. National Sea Clammers Assoc., 101 S.
Court recently held\(^7\) that fishermen had no standing to challenge offshore dumping under the Federal Water Pollution Control Act\(^7\) and Marine Protection Research and Sanctuaries Act of 1972.\(^7\) The Court noted that the Acts' elaborate enforcement provisions indicated that Congress had provided the precise remedies it believed to be necessary. The same reasoning was applied in the earlier *Amtrak* case.\(^7\) There, the Court held that passengers had no standing to challenge the discontinuance of certain trains under the Rail Passenger Service Act of 1970,\(^7\) because section 307(a) of the Act\(^7\) conferred standing upon the Attorney General or an employee in the event of a labor dispute.

The existence of some remedy, however, does not necessarily preclude the possibility of implied standing. For example, the Voting Rights Act of 1964\(^7\) yields an implied right to sue despite provisions allowing the Attorney General to enforce it.\(^8\) This is so because private enforcement is consistent with the broad purposes of the Act.\(^8\)

**Taxpayer and Citizen Standing.**—Those who challenge the President and Congress on constitutional grounds have often met stiff standing opposition. For example, plaintiffs who have tried to challenge government conduct on the basis of their status as taxpayers have met with little success.\(^8\) In order to obtain standing, the

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\(^7\) 33 U.S.C. § 1401 (1976). Although the *Sea Clammers* Court noted that the Act allows private individuals standing to obtain an injunction where proper procedures are followed, the *Sea Clammers* plaintiffs failed to follow those standards. 101 S. Ct. at 2623.


\(^7\) 45 U.S.C. § 547(a) (1976).


\(^8\) Id. at 555-57.

\(^8\) In *Frothingham* v. Mellon, 262 U.S. 447 (1923), the Supreme Court ruled that taxpayers could not challenge congressional spending on the basis that it violated constitutional limitations on Congress. Mrs. Frothingham claimed that the Federal Maternity Act of 1921, 42 Stat. 224, infringed upon the states' reserve power under the tenth amendment, U.S. CONST. amend. X, and resulted in an increase in her federal tax burden which amounted to a taking of "her property without due process of law." 262 U.S. at 486. The Court rejected this basis of taxpayer standing, reasoning that the taxpayer's interest in the moneys of the treasury is "comparatively minute and indeterminable; and the effect upon future taxation . . . [is] remote, fluctuating and uncertain." Id. at 487.

Taxpayers were not denied all access, however. In *Flast* v. Cohen, 392 U.S. 83 (1968), the Supreme Court decided that *Frothingham* did not absolutely bar taxpayer suits. Id. at 101-06.
taxpayer is required to establish a logical link between taxpayer status and the legislation attacked. This means "a taxpayer will be a proper party to allege the unconstitutionality only of exercises of the Congressional power under the taxing and spending clause of the Constitution." Accordingly, taxpayer status, by itself, could never be used to challenge an unconstitutional exercise of presidential powers in foreign affairs.

The claim that citizenship confers standing is equally unavailing. In *Schlesinger v. Reservists Committee to Stop the War*, the Supreme Court rejected the standing claim of citizens who charged that congressmen were serving in the armed reserves in violation of the incompatibility clause of the Constitution. The Court held that a citizen may not maintain an action if his interest is "undifferentiated" from that of all other citizens. The Court reasoned that the plaintiff's "personal stake" permits a court to obtain a "complete perspective upon the adverse consequences flowing from the specific set of facts undergirding his grievance" and ensures that the adjudication does not take place unnecessarily.

The conclusion that taxpayer status may not be used to challenge the President is supported by the Supreme Court's decision in *United States v. Richardson*, 418 U.S. 166 (1974). There, a taxpayer challenged the provisions of the Central Intelligence Agency Act of 1949, 50 U.S.C. § 403j(b) (1976), that allow certain agency expenditures to not be publicly reported. The taxpayer challenged this statute on the ground that it violated the statement and accounts clause of the Constitution, U.S. Const. art. I, § 9, cl. 7. That clause limits treasury money to be spent except "in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." The Court concluded that taxpayer status could be used to challenge an accounting statute. 418 U.S. at 173-75. These precedents close the door to the possibility of taxpayer challenges to presidential actions abroad. See, e.g., *Pietsch v. President of the United States*, 434 F.2d 861, 863 (2d Cir. 1970), cert. denied, 403 U.S. 920 (1971) (citizen-taxpayer lacked standing to challenge constitutionality of Vietnam War under *Flast* test).

84. *Id.*
85. *Flast* also requires a nexus between the taxpayer status and "the precise nature of the constitutional infringement alleged." *Id.* at 102. Thus, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by article I, § 8, U.S. Const. art. I, § 8. *Flast*, 392 U.S. at 102.

86. *Id.*
87. U.S. Const. art. I, § 6, cl. 2: "[N]o Person holding any Office under the United States, shall be a Member of either House [of Congress] during his Continuance in Office."
89. *Id.* at 221. This logic is based on the separation of powers. As the Supreme Court noted, citizen standing would "distort the role of the Judiciary in its relationship to the Executive and Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'" *Id.* at 222.
Therefore, individuals harmed by government action will have standing provided they show "a distinct and palpable injury" that is caused by the challenged party's conduct. The Flast v. Cohen subject matter nexus need not be shown where the plaintiff claims standing based on an injury, rather than mere taxpayer status. The courts have, for example, considered challenges to presidential action in southeast Asia without even questioning standing when the action was brought by servicemen. In addition, the Supreme Court recently decided that the Military Selective Service Act was constitutional, also without considering whether the men who brought the suit had standing to do so.

Legislator Standing.—Another class of plaintiffs that might have standing are congressmen suing to vindicate their constitutional prerogatives as congressmen. Their status confers standing to sue derivatively on an interest shown to be that of the Congress as a whole. Congressmen, per se, have "no special standards." Rather, the required injury arises when the legislature suffers a loss of power and, consequently, the legislator is now a member of a weaker institution.

In Mitchell v. Laird, thirteen congressmen sought to enjoin the executive branch from continuing the Vietnam War unless specifically authorized by legislation. The court held that congressmen were entitled to sue because the outcome

91. See Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); see also Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 78-79 (1978). In Duke Power, the Court held that individuals living near nuclear power plants had standing to challenge the Price Anderson Act, 42 U.S.C. § 2210 (1976). The Act limits the tort liabilities of a utility company arising from a nuclear accident. The Court was swayed by both the environmental impact of a nuclear plant upon the area surrounding it, and by the probability that the nuclear industry would not survive but for the limitation of liability provided by the Price Anderson Act. 438 U.S. at 72-78.
94. See, e.g., Berk v. Laird, 429 F.2d 302 (2d Cir. 1970), cert. denied, 404 U.S. 869 (1971) (subsequently dismissed on grounds that both branches of federal government cooperated in Vietnam War, thus defeating Berk's claim that President had usurped power); see also cases cited supra note 39.
100. 488 F.2d 611 (D.C. Cir. 1973).
would bear upon the duties of plaintiffs to consider whether to impeach defendants, and upon plaintiffs' quite distinct and different duties to make appropriations to support the hostilities, or to take other legislative actions related to such hostilities, such as raising an army or enacting other civil or criminal legislation.\textsuperscript{101}

The same circuit later took a somewhat different approach, without even citing \textit{Mitchell}, in the \textit{Pocket Veto Case}.\textsuperscript{102} The court granted standing to Senator Kennedy to challenge the veto of legislation during a congressional recess, allegedly depriving Congress of the opportunity to override the veto. The court reasoned that Senator Kennedy's interest in the legislative process was sufficient to provide the injury conferring standing.\textsuperscript{103} Subsequent suits by congressmen seeking to vindicate different interests were turned away when the injuries they claimed did not go to their voting power.\textsuperscript{104} The same circuit held that Senator Goldwater had standing to challenge President Carter's unilateral termination of the Taiwan mutual defense treaty.\textsuperscript{105} Congressmen were not permitted, however, to challenge the constitutionality of the appointments process of the Federal Open Market Committee, a process created by statute.\textsuperscript{106} Therefore, the essential test for congressional standing seems to be whether the plaintiff congressman can show that his voting power has been diminished.

One recent case, \textit{Riegle v. Federal Open Market Committee},\textsuperscript{107} followed this approach. In light of the Supreme Court's failure to use standing as a basis for its decision in \textit{Goldwater v. Carter},\textsuperscript{108} however, the circuit court removed the analysis from the standing category and instead attributed it to "a doctrine of circumscribed

\textsuperscript{101} Id. at 614.
\textsuperscript{102} Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974).
\textsuperscript{103} Id. at 436.
\textsuperscript{105} Goldwater v. Carter, 617 F.2d 697 (D.C. Cir.), vacated, 444 U.S. 996 (1979) (plurality). The Supreme Court did not address the question of standing. The Justices, voting for vacating prior to a plenary hearing, did so on the grounds of political question and ripeness. \textit{See infra} notes 123-28 and accompanying text.
\textsuperscript{107} 656 F.2d 873 (D.C. Cir. 1981).
\textsuperscript{108} 444 U.S. 996 (1979) (plurality) (vacating Goldwater v. Carter, 617 F.2d 697 (D.C. Cir. 1979)).
equitable discretion." The court expressed that it would be improper for federal courts to become involved in disputes between legislators where the "[j]udges are presented not with a chance to mediate between two political branches but rather with the possibility of thwarting Congress's will by allowing a plaintiff to circumvent the processes of democratic decisionmaking." This concern harmonizes the Court's congressional standing decisions. Those cases where standing was denied, Reuss v. Balles, Harrington v. Bush, and Riegle, involved challenges to activity conducted under a Congressionally enacted scheme. Those cases where standing was permitted, Mitchell, Goldwater, and the Pocket Veto Case, involved challenges to executive activity that were not conducted pursuant to a statute. It can be drawn from these cases that voting power is the essential right which once deprived creates legislator standing. Where the executive acts pursuant to a Congressionally enacted statute, the executive cannot be infringing congressional voting power and, therefore, there can be no legislator standing.

Consider the situation where a congressman initiates an action to enjoin the President from violating the War Powers Act. The injury to Congress that would follow from such presidential conduct is obvious: The ability of the President to ignore the War Powers Act would result in a grave loss of Congress' war making power. Congress, pursuant to the war powers it claims to possess, enacted legislation designed to preserve its power to declare war. Congress has made it clear that congressional inaction shall be interpreted as congressional disapproval through the enactment of the automatic withdrawal provision. Thus, a violation of the War Powers Act would constitute an article III injury. It would deny congressmen the right
to compel the executive to come to Congress for authorization before engaging in war type activities. The congressional plaintiff, therefore, would suffer essentially the same injury as that sustained by Senator Kennedy in the *Pocket Veto Case*\(^{117}\)—the loss of institutional power.

Notwithstanding the somewhat general easing of standing requirements, it is still evident that they serve to filter out a number of prospective challenges to presidential foreign policy decisions. Standing requirements still prevent individuals from challenging presidential foreign policy when they can cite no more injury than their disagreement with the President's policy. There are individuals, however, who will be able to bring claims against the President. Decisions such as *Duke Power Co. v. Carolina Environmental Study Group, Inc.*\(^{118}\) and *Berk v. Laird*,\(^{119}\) reveal, for example, that individuals drafted and sent to fight in an allegedly unconstitutional war could bring their constitutional challenges to the courts. Such claims, however, are not at variance with the courts' traditional function of protecting the rights of individuals.\(^{120}\) Thus, standing, by requiring the courts to hear only those plaintiffs who have a real injury, serves to prevent the courts from assuming the role of general overseer of government functions.

**Ripeness**

Another barrier that may prevent adjudication of a dispute affecting foreign policy is the requirement that the dispute has ripened into a litigable controversy. This barrier is known as the doctrine of *ripeness*. It derives from both article III requirements\(^{121}\) and prudential considerations focusing on the proper institutional function of

\(^{117}\) See *Kennedy*, 511 F.2d at 436. Additionally, the requirement set by Riegle v. Federal Open Mkt. Comm., 656 F.2d 873 (D.C. Cir.), *cert. denied*, 102 S. Ct. 636 (1981), would be met unless the President was acting pursuant to statute.

\(^{118}\) 438 U.S. 59, 81 (1978).


\(^{121}\) The ripeness requirement derives from the prohibition of advisory opinions. See United States v. Fruehauf, 365 U.S. 146, 157 (1961); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937); Muskrat v. United States, 219 U.S. 346, 356-59 (1911). This prohibition is imposed by the case and controversy language of article III. *U.S. Const.* art. III, § 2, cl. 1. See Tribe, *supra* note 2, at 60. The case and controversy requirement necessitates only that, in all likelihood, the required injury will occur, even if the harm is delayed. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974); Pennsylvania v. West Virginia, 262 U.S. 553, 593 (1923).
Ripeness may have increasing importance as a barrier to lawsuits affecting foreign affairs in light of the concurring opinion of Justice Powell in *Goldwater v. Carter.* The *Goldwater* plurality held that reaching the merits of Senator Goldwater's challenge to President Carter's unilateral termination of the Taiwan mutual defense treaty would raise a nonadjudicable political question. Justice Powell, concurring, voted to dismiss the case without reaching the merits, because the Senate, as a whole, had not asserted its own constitutional claim to participate in treaty terminations. According to Justice Powell, prudential ripeness considerations should require Congress to assert its constitutional authority before seeking judicial intervention. Justice Powell felt that unless judicial review was limited to those instances when the branches had reached a constitutional impasse, the commonplace differences between the branches would be settled by legal, rather than political, considerations. Powell's approach, therefore, would require the political system to resolve the dispute, leaving court intervention only for crisis situations.

This approach is not without its difficulties. Absent a major confrontation, a serious constitutional violation still may occur. If, as Senator Goldwater claimed, the advice and consent clause of the Constitution requires Senate approval for treaty terminations, then, presumably, proposed treaty termination could be foiled by any

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122. Tribe, *supra* note 2, at 60. These considerations seem particularly aimed at insuring the proper presentation of the legal issue. In Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 81-83 (1978), the Supreme Court adjudicated a due process challenge to the Price Anderson Act, 42 U.S.C. § 2210, which limits the liability of nuclear power plant owners in the event of an accident. See *supra* note 91. The Court reasoned that it need not wait for such a disaster because such an incident would not "significantly advance our ability to deal with the legal issues presented nor aid us in their resolution." 438 U.S. at 82. The Court also considered the hardship that a delay might have on the parties. *Id.* Additionally, postponing resolution of the issue would foreclose relief prior to a nuclear accident, and would frustrate the policy behind the Act to eliminate industry doubts about the scope of private liability. *Id.* Cf. United Public Workers v. Mitchell, 330 U.S. 75, 89 (1947) (Court refused to consider government employees' objections to Hatch Act, 7 U.S.C. § 361 (1976), because attack was on "political expediency" of Act, rather than presentation of legal issues). 123. 444 U.S. 996, 997 (1979) (Powell, J., concurring).

124. The plurality, per Justice Rehnquist, decided that the controversy presented a political question and should therefore be dismissed. *Id.* at 1002. *See infra* notes 214-23 and accompanying text.

125. 444 U.S. at 997-98 (Powell, J., concurring).

126. *Id.*

127. U.S. CONST. art. II, § 2, cl. 2: "[The President] shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur."
number of senators exceeding one-third of those present and voting. That fraction, however, lacks the power to force a majority to pass a resolution to assert the Senate's power. Therefore, under Justice Powell's test of ripeness, those senators would be denied their constitutional franchise without a judicial remedy.  

Another practical effect of forcing Congress to assert its authority before any of its members can bring a court action, is the shifting of power away from Congress and toward the President. Many legislators who would otherwise defend the powers of their branch may be reluctant to challenge the President when such a confrontation could push the United States to the brink of a foreign policy crisis. Imagine the danger posed by the President declaring that the United States was not bound to defend Taiwan, while Congress insisted that we were so bound. Consider the effect that such a contradiction would be likely to have on United States relations with mainland China. A relatively quick judicial determination, however, could avoid this confrontation between the President and the legislature. Instead, Justice Powell's formula compels Congress, seeking to protect its power, to declare the President's action void. In doing so, Congress is forced to assume the risk of creating an international crisis while it battles with the President over the limits of the President's powers.

In addition, Justice Powell's use of the ripeness doctrine leaves unclear exactly what action the Senate must take in order to make a controversy ripe for judicial decision. If the President acted contrary to legislation already enacted by Congress, would Congress be forced to pass an additional resolution to assert its authority and declare the President's action void? Such a requirement would limit the power

128. Apart from the usual problems associated with passing legislation, foreign affairs may present additional difficulties. For example, congressmen may not be willing to undercut the President's foreign policy. As Judge Sweigert expressed it:

Many members of Congress, faced with a presidential fait accompli, claim that they are constrained to vote for military draft and supportive military appropriations, not because they really approve the war, but, expediently, to protect men already committed to battle or for other expedient reasons unrelated to the approval of the war as such.


129. The Supreme Court was, indeed, ready to make such a quick determination. See Dames & Moore v. Regan, 101 S. Ct. 2972 (1981).

130. The ripeness test might have had a decisive effect on Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case), 343 U.S. 579 (1952). In the Steel Seizure Case, the President was challenged by individuals whose steel mills had been seized without congres-
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of Congress and its legislation in the foreign policy area. This is so because in order for Congress to successfully assert its foreign policy powers via legislation, it would need to muster a congressional majority twice: once, to initially pass the bill, and a second time, when Congress seeks to have the bill enforced in the courts.

This possibility is illustrated by litigation recently brought to enjoin President Reagan from sending military advisors to El Salvador.\(^{131}\) The suit was initiated, in part, upon an alleged violation of the War Powers Act.\(^{132}\) The defendants maintain that the ability of the plaintiff congressmen to seek, under the Act, a congressional resolution terminating the hostilities, makes the litigation inappropriate.\(^{133}\) Under Justice Powell's theory, the district court might well require a congressional resolution before adjudicating such a case. The War Powers Act, however, requires the executive to terminate the use of American troops within sixty days unless Congress has "extended by law such sixty day period."\(^{134}\) Thus, declining to decide the question after the sixty day period has expired, because Congress has failed to affirmatively voice its disapproval, would be ignoring this automatic termination provision.

The prudential ripeness doctrine that Powell proposes must, therefore, be sharply curtailed. Otherwise, the court will be permitted to use a discretionary doctrine of judicial self-management to thwart the will, and perhaps the constitutional power, of the United States Congress.

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\(^{132}\) 50 U.S.C. §§ 1541-1548 (1976). The War Powers Act was passed on November 7, 1973 over a presidential veto. The Act requires the President to report to specific members of Congress, in writing, whenever American armed forces are introduced without a declaration of war "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." \(\text{Id. at } \$ 1543(a)(1)\). This report must indicate the circumstances necessitating the President's action, the constitutional or legislative provisions granting him the authority to take that action, and the estimated duration and scope of the involvement. \(\text{Id. at } \$ 1543(a)(A)-(C)\). The Act also provides that the use of United States forces must be terminated within sixty days after the report is submitted or required, unless Congress has declared war, specifically authorized the use of armed forces, extended the sixty day period, or is physically unable to meet as a result of an armed attack. \(\text{Id. at } \$ 1544(b)\). Congress may, at any time, direct the removal of armed forces engaged in hostilities by passing a concurrent resolution. \(\text{Id. at } \$ 1544(c)\).


\(^{134}\) 50 U.S.C. § 1544(b) (1976).
The standing and ripeness requirements can and do have an important function in screening out the kind of court challenges to presidential foreign policy that could threaten the proper role of the courts. The standing and ripeness requirements ensure that only aggrieved individuals reach the courthouse door. Furthermore, barriers such as standing and ripeness are informed by prudential, as well as constitutional, policies. They provide the courts with the kind of flexibility needed to avoid being enmeshed in political disputes where they do not belong. The political question doctrine, in comparison, ensures that the courts, when faced with a proper dispute, do not overstep their power and assume executive or legislative functions in coming to the aid of plaintiffs.

**POLITICAL QUESTION DOCTRINE**

Barriers such as standing and ripeness are informed by the courts' regard for their own proper role in the constitutional scheme of divided power. The political question doctrine, the "principle under which the courts defer the determination of an issue to the political branches of government," is fueled primarily by this separation concern. The scope of the doctrine is currently in controversy. Some commentators adhere to the classical view illustrated by Chief Justice Marshall's dictum that the courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." Under this view, the existence of a political question is determined by "whether the Constitution has committed to another agency of government the autonomous determination of the issue." Thus, the court must first decide the constitutional separation claim before deciding that a question is political. Therefore, a political question determination only concerns

135. See Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 215-16 (1974); see supra notes 86-89 and accompanying text. Surprisingly, the Supreme Court later indicated that the Schlesinger decision was prudential rather than constitutionally mandated. See Warth v. Seldin, 422 U.S. 490, 499 (1975).


140. Wechsler, supra note 2, at 7-8.

the resolution of one issue in a controversy. Nonetheless, resolution of this one issue often results in the exclusion of the entire case from the federal courts. Only in the past several years have cases touching foreign affairs been dismissed on the political question doctrine without even reaching the merits of the constitutional dispute: namely, which branch of the government, if any, may properly exercise the disputed power?\footnote{142. See, e.g., Goldwater v. Carter, 444 U.S. 996 (1979); Luftig v. McNamara, 373 F.2d 664 (D.C.Cir.) (per curiam), cert. denied, 387 U.S. 945 (1967); Atlee v. Laird, 347 F. Supp 689 (E.D. Pa. 1972), aff'd sub nom. without opinion Atlee v. Richardson, 411 U.S. 911 (1973).}

Another view is that the political question doctrine reflects additional prudential considerations. Some scholars believe that the doctrine grants the courts license to weigh the consequences that a particular case might have on the judicial institution before the courts tackle the merits of the claim.\footnote{143. See A. BICKEL, supra note 2, at 183-98; C. POST, THE SUPREME COURT AND POLITICAL QUESTIONS (1969); P. STRUM, THE SUPREME COURT AND "POLITICAL QUESTIONS": A STUDY IN JUDICIAL EVASION 140-45 (1974); Finkelstein, Judicial Self-Limitation, 37 HARV. L. REV. 338, 344-47 (1924). Some of these commentators would consider pure expediency. Post contends that the separation of powers language behind the political question decisions is simply “the legal basis” for such practical considerations as the political climate surrounding the case. Post, supra, at 107. Finkelstein also feels that the political question doctrine is founded on expediency concerns: Sometimes this idea of inexpediency will result from the fear of the vastness of the consequences that a decision on the merits might entail. Sometimes it will result from the feeling that the court is incompetent to deal with the particular type of question involved. Sometimes it will be induced by the feeling that the matter is “too high” for the courts. But always there will be a weighing of considerations in the scale of political wisdom. Finkelstein, supra at 344-45 (footnotes omitted). Bickel's concern is that if the Court follows only principled grounds of decision, it may legitimize practices that do not warrant the Court's stamp of approval. Bickel refers to this as "Plessy v. Ferguson's Error, after the case that legitimated segregation in 1896." BICKEL, supra note 2 at 197. Thus, he insists that the Court remain disinterested so as to preserve "one of the chief factors in the formation of principled judgments." Id. He would base the political question doctrine upon the Court's sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally ("in a mature democracy"), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from. Id. at 184.}
courts no additional discretion. Still another commentator suggests that the political question doctrine should be influenced by those functional limitations of the judicial process which make a judicial decision on the merits difficult.

A new theory has been interjected into this debate by Professor Jesse Choper. Professor Choper believes that the fundamental role of the national judiciary in constitutional adjudication is to protect individual rights "not adequately represented in the political processes." Professor Choper theorizes further that it is unnecessary for the courts to decide questions arising from separation of powers disputes between the President and Congress. This position follows from his belief that such claims could be decided better in


Henkin, for example, concludes that 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." Henkin, supra, at 622. He suggests that political questions are properly confined if the courts will substitute the following propositions in its place:

1. The courts are bound to accept decisions by the political branches within their constitutional authority.
2. The courts will not find limitations or prohibitions on the powers of the political branches where the Constitution does not prescribe any.
3. Not all constitutional limitations or prohibitions imply rights and standing to object in favor of private parties.
4. The courts may refuse some (or all) remedies for want of equity.
5. In principle, finally, there might be constitutional provisions which can properly be interpreted as wholly or in part "self-monitoring" and not the subject of judicial review.

Id. at 622-23. Henkin disagreed with the courts' political question dismissal of several cases challenging the war in Vietnam. Id. at 623-24. He noted that "[c]laims that the President had usurped congressional authority, or Congress the President's, were heard and adjudicated in several majority cases in our history without a suggestion that the courts are barred by some political question doctrine." Id. at 624 (citing Buckley v. Valeo, 424 U.S. 1 (1976); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Myers v. United States, 272 U.S. 52 (1926); Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 523 (1838)).

145. Scharpf, Judicial Review and the Political Question: A Functional Analysis, 75 Yale L.J. 517, 566 (1966). Scharpf's "functional analysis" would consider factors such as judicial access to information, id. at 567, a desire to maintain uniformity of decision, id. at 573, and deference to the political branches in carrying out their wider responsibilities, id. at 578. Judicial access to relevant information is significant in foreign policy cases. Unavailability of information might result in a problem of burden of proof. Plaintiffs, bearing such a burden, where the information is unavailable, would always lose on the merits.

146. J. Choper, supra note 12.
147. Id. at 2.
148. Id. at 175, 263.
the political process and that such decisions dangerously deplete a finite quantity of "institutional capital" needed by the Supreme Court to protect individual rights. He believes that the participants in the political process have the tools to protect their interests without resorting to the courts. Congress, for instance, has the power to cut off funds from a presidential project it disfavors.

Professor Choper's model would expand the foreign policy power of the President. Where litigants, without pointing to conflicting legislation, challenge presidential conduct on the grounds that the President has usurped congressional authority, Professor Choper would have the courts "simply accept the presidential assertion of constitutional authority and carry out [the presidential] mandate accordingly, irrespective of the consequences to individuals subject to the challenged action." Thus, unless individuals can claim that the presidential action deprived them of their individual rights in a manner constitutionally forbidden to both the President and Congress, those individuals would be without judicial recourse.

The debate over the objectives, source and confines of the political question doctrine has led one treatise writer to characterize the doctrine as "in a state of some confusion." This confusion may have been generated by Baker v. Carr, where the Supreme Court surveyed the doctrine. The Court first analyzed the doctrine in classical separation of powers terms. The Court noted that the political question was "primarily a function of the separation of powers," requiring the Court, as "ultimate interpreter of the Constitution," to determine "whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed . . . ." The Court delineated various factors that have been

149. Id. at 203, 263.
150. Id. at 169-70. This "institutional capital," explains Choper, is the Court's ability to persuade "people to transcend their immediate interests in favor of allegiance to traditional values and to reconsider the merit and virtue of previously formulated popular decisions." Id. at 138. When such capital is depleted, the Supreme Court risks defiance of its decisions. Id. at 140-56.
151. Id. at 282-85.
152. Id. at 320.
153. Id. at 202.
154. Tribe, supra note 2, at 71.
156. Id. at 208-11.
157. Id. at 210.
158. Id. at 211.
"Prominent on the surface of any case held to involve a political question." These factors appear to contain both functional and prudential considerations:

Prominent on the surface of any case held to involve a political question is found a textually demonstratable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

By including prudential considerations under the political question label, the Supreme Court made the doctrine more uncertain. This uncertainty would later change the contours of the political question doctrine.

*Separation of Power: The Origin of the Political Question Doctrine*

The courts have been wrestling with the boundaries of their powers for hundreds of years. The notions that have culminated in modern judicial self-restraint and, especially, the deference that later became the political question doctrine, emerged from the monarchical idea that the king may do no wrong and may not be questioned by the courts. The American Revolution and the adoption of the

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159. *Id.* at 217 (emphasis added). The Court noted that there were several varying formulations, but each could be identified by its elements as "a function of the separation of powers." *Id.*

160. *Id.*

161. It has been argued that the Baker factors are all functions of separation of power as the Court had indicated. See Firmage, *supra* note 136, at 77-78.

162. Some commentators attribute the American origins of the political question doctrine to the case of Penn v. Lord Baltimore, 27 Eng. Rep. 1132 (1750). See, e.g., Finkelstein, *supra* note 143, at 339-40. The English Court of Chancery was faced with a dispute between William Penn and Lord Baltimore over the boundaries of their respective settlements. The court seemed perplexed as to what its role ought to be in view of the nature of the case. The court noted that the case was "of a nature worthy of the judicature of a Roman senate rather than of a single judge." *Penn*, 27 Eng. Rep. at 1134. The court resolved its dilemma by deciding the case under its equity jurisdiction, subject to review by the King. *Id.* at 1139. Like the political question cases that were to follow, this colonial case demonstrates the courts' concern that they not invade the powers of the political head of government.

163. See 3 W. *Blackstone, Commentaries* 254-55; Finkelstein, *supra* note 143, at
Constitution intensified this concern. The Constitution divided the powers of the federal government among the executive, legislative, and judicial branches. Left unclear was which branch was to enforce this separation of powers scheme. This set the stage for the courts to consider their authority with regard to the political branches of government.

The Supreme Court claimed the power of judicial review in *Marbury v. Madison* when it struck down a statute giving the Court original jurisdiction to issue writs of mandamus. In the

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There is, however, ample authority to support the proposition that the drafters of the Constitution intended the Supreme Court to have judicial review power. See P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 9-12 (2d ed. 1973); L. Pollak, The Constitution and the Supreme Court 156-58 (1966).

Alexander Hamilton strongly supported judicial review power when he wrote, “whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.” *The Federalist* No. 78, at 468 (A. Hamilton) (C. Rossiter ed. 1961). Hamilton believed that without judicial review power, “all the reservations of particular rights or privileges would amount to nothing.” *Id.* at 466.

Hamilton also answered those who question why no words clearly providing judicial review were inserted into the Constitution: He suggested that the failure to provide such a specific grant might keep the courts from abusing their powers. In *The Federalist* No. 81, Hamilton responded to the objection that “[t]he power of construing the laws according to the spirit of the Constitution will enable that Court to mould them into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body.” *Id.*, No. 81, at 482 (emphasis in original). Hamilton’s first answer was that “there is not a syllable in the plan under consideration which directly empowers the national courts to construe the laws according to the spirit of the Constitution.” *Id.* (emphasis in original). It is not beyond the genius of the constitutional drafters, who throughout the Federalist expressed fears that each branch of the government might try to exceed its power, to provide the courts with judicial review power, yet provide such power in such an uncertain manner that the courts would be constrained not to abuse it.

165. 5 U.S. (1 Cranch) 137 (1803).

166. Congress granted the Supreme Court original mandamus jurisdiction under § 13 of the Judiciary Act of 1789. It is unclear, however, whether the Act actually provided the Supreme Court with original jurisdiction over mandamus as Chief Justice Marshall had assumed. The statute read:

[T]he Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction . . . . The Supreme Court shall also
opinion, Justice Marshall expressed his position regarding judicial scrutiny of actions taken by the executive branch.\textsuperscript{167}

If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction . . . .

By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his

have appellate jurisdiction from the circuit courts and courts of the several states, in the cases hereinafter specially provided for; (b) and shall have power to issue writs of prohibition (c) to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus, (d) in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.

1 Stat. 73, 80-81. To reach the constitutional issue, Chief Justice Marshall had to read the grant of mandamus powers as also a grant of original jurisdiction. See Van Alstyne, supra note 164, at 15.

\textsuperscript{167}. 5 U.S. (1 Cranch) at 165-66. The Marbury decision can be read narrowly to mean only that the Supreme Court may not be compelled to take cases outside of its article III powers, not that it has power to command other branches to act in conformity with the Constitution.

Chief Justice Marshall had to be especially concerned with the Court's relationship with the political branch considering the strife surrounding the decision. The Federalist party had just been replaced in power by the Republicans, who were led by Thomas Jefferson. The Federalists decided to enlarge the judiciary and named a number of new judges including John Marshall. When Jefferson took power, he ordered that a majority of the few remaining undelivered commissions be halted, including a commission to Marbury. Marbury's petition to the Supreme Court was seen by the Republicans as a challenge designed to intimidate them into not repealing the Judiciary Law that permitted the appointment. 1 C. Warren, The Supreme Court in United States History 205 (1926); C. Haines, The Role of the Supreme Court in American Government and Politics 246 (1944). The Federalists saw the battle as having the ultimate objective of abolishing the Supreme Court. 1 C. Warren, supra at 211. The emotions ran high, and some charged that it even had an adverse affect on the real estate market. A Washington correspondent at the time wrote:

The public mind is highly agitated here . . . . [T]he prospect of a dependent Judiciary and of Judges who are to be the creatures and puppets of the Virginia party prevents the sale of landed property here. Many of the sober-minded men of Virginia are endeavoring to sell their lands and slaves and contemplate moving to New England. From the violation of the Constitution, disunion, they think, must ensue; and when it shall, they mean to be on the safe side of the boundary . . . . The men who govern in these evil times are full of vengeance. They were never friends of the National Constitution and it will meet with no mercy at their hands.

Id.

The Republicans, fearing that their repeal of the Judiciary Act would provoke the Court into questioning the constitutionality of the Repeal Law and claiming judicial review power, effectively cancelled the Supreme Court's 1802 term. See id. at 222-23; C. Haines, supra at 242-43. After the Supreme Court had asserted its authority in Marbury, Jefferson was so angry that he commenced a campaign to, in the words of the Federalists, "wreck the Judiciary." Id. at 260. This battle went so far as to generate several articles of impeachment against various federal judges, including Supreme Court Justice Samuel Chase.
country in his political character, and to his own conscience. The subjects are political: they respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The acts of such an officer, as an officer, can never be examinable by the courts. But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot, at his discretion, sport away the vested rights of others.  

Marshall’s “political question” placed beyond judicial control acts of a political branch falling within that branch’s constitutional scope of powers. Marshall’s analysis was an extension of the separation of powers scheme; judicial deference was based upon the constitutional separation of powers, rather than on notions of judicial discretion.

This political question doctrine, as first applied, did not prevent the courts from adjudicating a dispute. It merely directed the courts to treat as conclusive a determination made by a political branch in the exercise of that branch’s constitutional power. In Foster v. Neilson, the Supreme Court refused to recognize the plaintiff’s title to land based on an 1804 Spanish land grant, because the legislative and executive branches had taken the position that such grants were presumptively void. In Williams v. Suffolk Insurance Company, a ship owner sought compensation for his ship that had been captured by the government of Buenos Ayres as it sailed around the Falkland Islands on a seal hunt. The defendant insurance company denied liability, claiming that the captain of the ship had been negligent for sailing the vessel into an area subject to a territorial dispute. The Supreme Court held that the captain had not been negligent for sailing into Buenos Ayres’ territorial waters because the executive branch had not recognized Buenos Ayres’ claim to the territory in dispute. The Court reasoned that it had to defer to this executive decision because the executive determination over the sovereignty of a foreign island “is conclusive on the judicial department.”

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172. Id. at 419.
173. Id. at 419-20 ("[C]an there be any doubt, that when the executive branch of the government, which is charged with our foreign relations, shall, in its correspondence with a foreign nation, assume a fact in regard to the sovereignty of any island or country, it is conclu-
Luther v. Borden\(^{174}\) applied the political question doctrine to bar a constitutional claim. Luther, a citizen of Rhode Island, brought a trespass action against the defendant for breaking into his house. Borden successfully defended on the ground that he had been authorized by the Rhode Island government to break into Luther's house and place him under arrest. The trial court refused to hear Luther's claim that the Rhode Island government had been superseded by a new government, which, though organized by a constitutional convention and duly elected, was unrecognized by the established government. The jury found for Borden, and Luther appealed to the Supreme Court claiming that it was bound to recognize the new government under the guarantee clause of the United States Constitution.\(^{175}\) The Supreme Court noted that the political branches have always determined whether proposed constitutional amendments have been ratified by the people and that the courts have followed these decisions.\(^{176}\) Accordingly, the Court held that the United States Congress had the authority under the guarantee clause to recognize the legitimacy of state governments, and, therefore, the Supreme Court was bound to follow the congressional decision.\(^{177}\)

These early cases gave birth to the classic interpretation of the political question doctrine: that the courts' power of review is limited by the powers vested in the other branches of government. A political question did not preclude decision of an issue because of its political implications;\(^{178}\) a political question merely denoted an issue, the decision of which was delegated constitutionally to a political branch of the government.\(^{179}\) Under this doctrine, the courts, when dealing with issues involving foreign affairs, began deferring to the President for the resolution of factual disputes that were within the power of the President to determine.\(^{180}\) This "political question," however, did

\(^{174}\) 48 U.S. (7 How.) 1 (1849).

\(^{175}\) Id. at 25 (Brief of Plaintiff in Error). The guarantee clause provides: "The United States shall guarantee to every State in this Union a Republican Form of Government." U.S. CONST. art. 4, § 4.

\(^{176}\) 48 U.S. (7 How.) at 42.

\(^{177}\) Id. at 45. This point is now well established. See, e.g., Highland Farms Dairy v. Agnew, 300 U.S. 608 (1937); Ohio ex rel. Bryant v. Akron Metropolitan Park Dist., 281 U.S. 74 (1930); Mountain Timber Co. v. Washington, 243 U.S. 219 (1917); Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912); Marshall v. Dye, 231 U.S. 250 (1913).

\(^{178}\) Nixon v. Herndon, 273 U.S. 536, 540 (1927) ("[t]he objection that the subject matter of the suit is political is little more than a play upon words").

\(^{179}\) See Wechsler, supra note 2, at 9.

\(^{180}\) In Jones v. United States, 137 U.S. 202 (1890), the Court recognized that "[w]ho
not compel dismissal of the entire suit without reaching its merits; rather, it required the judicial branch to look to one of the political branches for the answer to only one issue in the entire dispute.\textsuperscript{181}

This limited concept of political question, however, has shown signs of giving way to a new kind of political question: a doctrine that allows the court to dismiss an entire lawsuit without determining whether the actions of the political branch being challenged were within the scope of that branch's powers. The roots of this doctrine might erroneously be traced to \textit{Chicago & Southern Air Lines v. Waterman Steamship Corp.},\textsuperscript{182} where the Supreme Court dismissed an entire lawsuit on political question grounds without reaching the merits of the case. That outcome, however, was only the result of the question presented: whether the Court had statutory jurisdiction. The question arose because the case involved the granting of foreign air routes, a decision over which the President had final authority.\textsuperscript{183}

The Court reasoned that since no decision became final until the President approved or disapproved it, and that since such approval was within the President's discretion, the statute in question could not have conferred jurisdiction on the courts to review those administrative decisions.\textsuperscript{184} Although \textit{Waterman} has been read so broadly as to suggest that the courts must dismiss any case dealing with foreign is the sovereign, \textit{de jure or de facto}, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government.” \textit{Id.} at 212. The Court adhered to the executive recognition of a foreign government even where that issue conclusively determined property rights within the United States. \textit{Id.} at 213. In \textit{Oetjen v. Central Leather Co.}, 246 U.S. 297, 301 (1918), the Supreme Court held that executive department recognition of the Carranzo regime in Mexico was conclusive against a plaintiff. The plaintiff's leather hides had been seized in Mexico by the regime and then sold to another individual who subsequently brought them into the United States. The Court noted that

\begin{quote}
[i]f[...]he conduct of the foreign relations . . . is not subject to judicial inquiry or decision . . . To permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would certainly “imperil the amicable relations between governments and vex the peace of nations.”
\end{quote}

\textit{Id.} at 304. In \textit{Banco Nacional de Cuba v. Sabbatino}, 376 U.S. 398 (1964), however, the Court held that the \textit{Oetjen} commitment of foreign policy power to the political branches did not limit the jurisdiction of the courts. \textit{Id.} at 423. The Court noted that such a limitation would leave the state courts dangerously free to formulate their own rules affecting foreign policy. \textit{Id.} at 424.

\begin{itemize}
  \item 181. See supra note 180 and cases cited therein.
  \item 182. 333 U.S. 103 (1948).
  \item 183. \textit{Id.} at 104.
  \item 184. \textit{Id.} at 113-14.
\end{itemize}
affairs, the case actually was dismissed on the much narrower issue of the scope of review power granted by the Civil Aeronautics Act. Thus, the facts of Waterman, despite language suggesting that the courts are totally unfit to review any decision affecting foreign policy, do not support a broadly based political question doctrine.

The courts, after Waterman, have continued to decide cases touching upon foreign affairs. Four years after Waterman, for example, the Supreme Court, in the Steel Seizure Case, held that President Truman had exceeded his constitutional authority in seizing the nation's strike-closed steel mills, despite the President's claim that the seizure was crucial to the Korean War effort. Nine years after Waterman, the Supreme Court held that the federal treaty power was limited by the Bill of Rights. Other post-Waterman separation of powers cases were decided on their merits in favor of the executive, rather than reaching for the political question label. Six years after Waterman, the Supreme Court inquired into the scope of the President's power to commission officers and turned down the habeas corpus petition of a doctor who had been drafted into the army, but not commissioned as an officer. The Supreme Court also refused to come to the aid of an enemy alien threatened with expulsion from this country, but only after the Court carefully considered the President's statutory basis for the wartime expulsion. In short, the Supreme Court, after Waterman, continued to

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187. The Court stated:
[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. 333 U.S. at 111.
189. Id. at 585-86.
190. Id. at 582-83.
191. Reid v. Covert, 354 U.S. 1 (1957) (civilian American citizen abroad may not be tried by military court martial for crime against military personnel, despite treaty to contrary).
193. Ludecke v. Watkins, 335 U.S. 160 (1948). The Court decided that the statute was not offensive to the Bill of Rights, id. at 170-73, and the factual question of whether the nation was still at war was left to the political branches, id. at 168. Cf. Johnson v. Eisentrager, 339 U.S. 763 (1950) (prisoners of war tried and held outside of United States may not apply for habeas corpus).
follow the classical political question doctrine.

The Vietnam War added a new twist to the political question doctrine. Many of the lawsuits challenging the war were dismissed on the theory that the political question doctrine precluded the courts from reaching the merits of the cases.\textsuperscript{194} The courts, in reaching their decisions, refused to consider whether the President was acting within the scope of his powers.\textsuperscript{195} The three judge district court opinion in \textit{Atlee v. Laird},\textsuperscript{196} presented the most detailed analysis of this revised approach to the political question doctrine. The judges dismissed a challenge to the Vietnam War, refusing to consider whether Vietnam was, in fact, a war,\textsuperscript{197} whether Congress had taken sufficient action to authorize a war, or whether the President was justified in maintaining American forces in Southeast Asia. The \textit{Atlee} court relied on the factors set out in \textit{Baker v. Carr}\textsuperscript{198} and concluded that deciding the case “could lead to consequences in our foreign relations completely beyond the ken and authority of this Court to evaluate.”\textsuperscript{199} The court also concluded that it lacked “judicially manageable standards to apply to reach a factual determination whether we are at war.”\textsuperscript{200} The court noted that the “data necessary for such an evaluation regarding the nature of our military presence would be overwhelming.”\textsuperscript{201} For the first time, the political question doctrine prevented the courts from considering a separation of powers issue,\textsuperscript{202} specifically, whether the President had the power to pursue the Vietnam War without congressional approval. Although the court held that the war making powers were committed to the political branches, it failed to decide whether the President had the power to wage war without congressional approval.

\textsuperscript{195} As commanded by \textit{Baker v. Carr}, 369 U.S. 186 (1962). \textit{See infra} notes 200-06 and accompanying text.
\textsuperscript{197} \textit{Id.} at 705-06. Neither branch was on record as to whether Vietnam was a war.
\textsuperscript{198} 339 U.S. 186 (1962).
\textsuperscript{199} \textit{Atlee}, 347 F. Supp. at 705.
\textsuperscript{200} \textit{Id.}
\textsuperscript{201} \textit{Id.} at 707.
Many judges believed that this new approach was unsupported by prior case law and was unsound as a matter of expediency. It was pointed out that even in the event that the war was declared unconstitutional, the President could still seek a declaration of war from Congress. District Judge Sweigert noted that the court's refusal to decide whether the President was usurping war making power only added to the confusion and controversy surrounding the Vietnam War and prevented the political process from working.

The Supreme Court has never issued a majority opinion adopting the Atlee approach. A plurality led by Justice Rehnquist, however, attempted to stretch the political question doctrine even further in Goldwater v. Carter. This case concerned Senator Goldwater's challenge to President Carter's unilateral termination of the Taiwan mutual defense treaty. The plurality decided that the Court had been presented with a political question because the case involved "the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President." Justice Rehnquist noted that the dispute was between coequal government branches, each having resources to assert and protect its own inter-


205. Campen v. Nixon, 56 F.R.D. 404, 407 (N.D. Cal. 1972); Mottola v. Nixon, 318 F. Supp. 538, 553 (N.D. Cal. 1970), rev'd on other grounds, 464 F.2d 178 (9th Cir. 1972). Judge Sweigert pointed to the inconsistency in not deciding the Vietnam cases but deciding the Steel Seizure Case: "It seems to this court that to strike down as unconstitutional a President's wartime seizure of a few private steel mills but to shy away on 'political question' grounds from interfering with presidential war, itself, would be to strain at a gnat and swallow a camel." Id. at 550. For scholarly criticism, see Henkin, supra note 144, at 623; Tigar, supra note 144.


207. Mutual Defense Treaty, Dec. 2, 1954, United States-Republic of China, 6 U.S.T. 433. Article X of the treaty provided that it "shall remain in force indefinitely. Either Party may terminate it one year after notice has been given to the other Party." Id. at 437.

208. 444 U.S. at 1002. Justice Rehnquist believed that the dismissal was necessitated by Coleman v. Miller, 307 U.S. 433 (1939). Goldwater, 444 U.S. at 1003 (Rehnquist, J., concurring). In Coleman, the Court held that Congress had the power to determine whether a proposed constitutional amendment had lost its viability due to the lapse of time, 307 U.S. at 456, thus precluding the Court from independently determining whether the amendment was still viable. Id. at 450.
ests—resources that are unavailable to private litigants.\textsuperscript{209} Justice Rehnquist concluded that the lack of any express constitutional provisions controlling treaty termination and his belief that the termination procedures might vary with different treaties, made the controversy a political dispute.\textsuperscript{210} Justice Rehnquist’s approach is remiss, however, because it defers to the political branches the very power to decide the separation of powers issue, rather than a factual question.\textsuperscript{211} Indeed, Justice Rehnquist failed to even consider to which of

\textsuperscript{209} 444 U.S. at 1004 (Rehnquist, J., concurring). This language might be an indication that Justice Rehnquist would have decided the case differently had the question been raised by individuals asserting their rights under the treaty. In reality, however, this language only reveals a dilemma: The treaty the President repudiates might contain individual rights similar to those contained in the treaty in Asakura v. Seattle, 265 U.S. 332 (1924). \textit{See supra} note 29. If Justice Rehnquist would hear the claim of an individual under the treaty, then the potential for uncertainty and confusion is just as great as in the \textit{Goldwater} situation. This is so because until that individual brings a case, the participants of the political process cannot be certain that the court will refrain from declaring the treaty still binding. This requires the President to conduct foreign policy without knowing whether his treaty termination might be reversed. On the other hand, if Justice Rehnquist refuses to hear the individual's claim, then he has effectively denied the individual's rights without a hearing. This is unacceptable since the treaty could be designed to protect the rights of foreign nationals, who might not otherwise have sufficient protection in the political process.

\textsuperscript{210} 444 U.S. at 1003 (Rehnquist, J., concurring). Justice Rehnquist's theory, although accepted by the plurality, was rejected by a majority of the Court. He was able to muster the votes needed to have the case dismissed only because Justice Powell believed that the case was not ripe for determination since the Senate had not yet chosen to confront the President on the issue. \textit{Id.} at 997 (Powell, J., concurring). \textit{See supra} notes 121-34 and accompanying text. Justice Powell completely rejected the conclusion that the case presented a political question. 444 U.S. at 998. He believed that this use of the political question doctrine was inconsistent with precedent. \textit{Id.} Justice Powell pointed out that Justice Rehnquist would be forced to find a political question in the event the President announced that a treaty “would go into effect despite its rejection by the Senate . . . even though art. II, § 2, clearly would resolve the dispute.” \textit{Id.} at 1000.

Justice Brennan thought that Justice Rehnquist had misunderstood the political question doctrine. \textit{Id.} at 1006 (Brennan, J., dissenting). Justice Brennan, the author of the Court's opinion in \textit{Baker v. Carr}, pointed out that

the doctrine does not pertain when a court is faced with the \textit{antecedent} question whether a particular branch has been constitutionally designated as the repository of political decisionmaking power . . . . The issue of decisionmaking authority must be resolved as a matter of constitutional law, not political discretion; accordingly, it falls within the competence of the courts.

\textit{Id.} at 1007 (emphasis in original) (citation omitted). Justice Brennan would have decided the case on the merits in favor of the President, because the President's authority to terminate the treaty derived from his power to withdraw recognition of foreign governments. \textit{Id.}

Justices Blackmun and White also dissented. They felt that the case should have received plenary consideration. “It is also indefensible, without further study, to pass on the issue of justiciability or on the issues of standing or ripeness.” \textit{Id.} at 1006 (Blackmun, J., dissenting in part). Justice Marshall concurred in the result. \textit{Id.} at 996.

\textsuperscript{211} \textit{Cf.} Powell v. McCormack, 395 U.S. 486, 518 (1969); \textit{Baker v. Carr}, 369 U.S. 186, 211 (1961) (political question determination requires court to interpret Constitution to see
the branches the power had been constitutionally committed.

Justice Rehnquist further departed from the classical political question doctrine by insisting that the plaintiff's complaint had to be dismissed if any of the issues presented were political.\(^2\) He analogized the need for dismissal in the political question situation to the need for dismissal in mootness cases where the controversy is dismissed so as not to spawn any legal consequences.\(^3\) Justice Rehnquist felt that political question cases had to be dismissed because they might create far more disruption than deciding a mooted issue. Mootness and the Goldwater case, however, present two distinct situations. A question becomes moot when it no longer presents a sufficiently live controversy; it is, therefore, dismissed "to avoid advisory opinions on abstract propositions of law."\(^4\) In the Goldwater situation, the controversy remains; dismissal merely shifts the battle to another forum. The disruptive consequences of that battle may be far worse than the results of a judicial decision.

Justice Rehnquist's use of the political question doctrine takes the concern over separation of powers and uses it to shield the Court from the very question presented; namely, who has the power? As expressed in Marbury, and reaffirmed in Baker, judicial abstention is designed to implement the constitutional separation of powers. It is the same separation of powers scheme, however, that suffers when the courts abstain from determining the scope of the constitutional allocation of these powers to the political branches. Rather than protecting the powers of one branch from encroachment by another, Justice Rehnquist encourages the branches to clash, so long as the judiciary is not involved. This new interpretation of the political question doctrine undercuts the very policies that the classical political question doctrine sought to protect.

Furthermore, although Justice Rehnquist declined to reach the merits of the treaty termination question, the practical result of his opinion responded to the merits: The President alone has the power to terminate treaties.\(^5\) The withdrawal of the question from judicial

\(^{212}\) 444 U.S. at 1005.
\(^{213}\) Id.
\(^{215}\) Such a result may have been compelled if the case had been decided on the merits. See 444 U.S. at 1007 (Brennan, J., dissenting); Goldwater v. Carter, 617 F.2d 697 (D.C. Cir.), vacated, 444 U.S. 996 (1979).
review merely left the status quo intact.

This approach greatly adds to the powers of the President since it is the President who is usually the actor. The courts must, at some point, adjudicate separation of powers disputes. Otherwise, the President will become the sole arbiter of his own actions and could avoid the effect of legislation.\footnote{216} For example, consider the litigation under the War Powers Act challenging President Reagan’s actions in El Salvador.\footnote{217} Assume, as plaintiffs contend in their complaint, that the War Powers Act compels the court to order United States troops out of El Salvador. The President could avoid the statutory effect of the Act by claiming that the statute unconstitutionally infringes upon his powers and that this separation of powers question cannot be adjudicated by the court. This would leave Congress powerless to control actions of the President, since any legislative enactment regulating presidential conduct could be challenged in such a manner.

Professor Choper would elevate that approach to principle. His suggestions would greatly weaken the Congress. It is conceivable that Congress may have sufficient determination to defend its prerogatives in some situations, since it is more difficult to get Congress to act than to refrain from acting. The result necessarily would be that the President would have wider latitude to ignore Congress. The courts, on more than one occasion, have found that the President has asserted powers that neither the Constitution nor Congress has granted.\footnote{218} Under Professor Choper’s suggestion, the President would be able to avoid such decisions by contesting the power of Congress to pass the legislation that limits him or by claiming that he alone has the power to make the decision. This would create the separation claim that Professor Choper suggests should be nonjusticiable. The President would become the constitutional arbiter of his own power. With no neutral arbiter of power, such disputes would spark constitutional crises that could ultimately tear apart our gov-

\footnote{216. Professor Choper would require the courts to decide cases where the litigants claim the President has violated a statute. J. Choper, supra note 12, at 320. Nevertheless, Professor Choper would have the courts abstain where both the President and Congress seek judicial resolution of a dispute between these two branches, id. at 333-34, where the President refuses to execute laws claiming a constitutional prerogative, id. at 368, and where the President claims that the statute unconstitutionally restricts his power, id. at 330-34.}


\footnote{218. E.g., Wiener v. United States, 357 U.S. 349 (1958) (President does not have power to remove member of War Commission at will because War Claims Act, 12 Stat. 1240 (1948), precludes President from influencing Commission in processing claims); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).}
ernment. As Professor Berger noted:

[T]he political question doctrine . . . [presents] no obstacle to judicial determination of the rival legislative-executive claims . . . . The power to decide these claims plainly has not been lodged in either the legislative or executive branch; equally plainly, the jurisdiction to demark constitutional boundaries between the rival claimants has been given to the courts. The criteria for judgment whether a claim of “executive privilege” is maintainable can be found in parliamentary practice and, if need be, in the private litigation cases. And the framing of a remedy is attended by no special difficulties but rather falls into familiar patterns. Each of the parties seeks power allegedly conferred by the Constitution and each maintains that interference by the other with the claimed function will seriously impair it, the classic situation for judicial arbitrament. Arbitrament by the courts is the rational substitute for eyeball to eyeball confrontation.\textsuperscript{219}

The kind of conflicts that Justice Rehnquist’s approach would encourage would be detrimental to the smooth functioning of the national government. This problem would be severe in the area of foreign affairs, where the questions are delicate and the need is pressing to present a coherent policy to foreign nations. Excessive infighting over which branch has what power in a given situation would undermine a coherent foreign policy and divert attention from the policy issues that needed to be faced. Such infighting might jeopardize the country’s position as a world leader.

The courts would do well not to use a political question doctrine rooted in concern for expediency to avoid separation of powers adjudication and, particularly, claims founded upon a statute limiting the President, such as the War Powers Resolution.\textsuperscript{220} Rather, once it is determined that the plaintiffs have standing to sue under a statute, the courts should proceed to apply the statute, unless it is found to be unconstitutional. The courts may inquire into congressional power to pass the particular statute\textsuperscript{221} or whether the statute unconstitutionally requires the courts to hear cases that fall outside of their article III power. A political question, however, requires deference to

\textsuperscript{221} Firmage, supra note 136, at 68.
a political branch of government. Once there is a statute, it is evidence that a political branch has made a political determination. The role of the court should then be to consider whether that political branch acted within the scope of its authority. If the statute is constitutional, then the political question doctrine should compel the courts to defer to the legislative expression and apply its commands. As Professor Firmage wrote:

When the executive and legislative branches are in open disagreement over the employment of the war powers, most of the criteria of political question noted in Baker v. Carr point toward independent judicial review. The question of the constitutional delegation is simply which of the political branches should prevail. The national government is not speaking with one voice and may be able to do so only after judicial determination of constitutional competence. The embarrassment of "multifarious pronouncements" has occurred, not by judicial intrusion, but as a result of disputes between the political branches.222

The courts' disregard of acts of Congress, without considering the separation of powers question, effectively constitutes the judicial branch placing itself above the will of Congress, thus usurping congressional power.

CONCLUSION

The role of the judiciary in enforcing separation of powers in the area of foreign affairs stands threatened by decisions such as Atlee and Goldwater. The separation of powers doctrine was a founding principle of American government.223 This doctrine was designed to play a key role in the maintenance of a representative democracy.224 The political question doctrine initially denoted those issues in a case or controversy that were properly answerable by the President or Congress—the political branches. There was nothing discretionary about this doctrine; it required the courts to interpret the Constitution to determine whether a particular function or activity had been committed to another branch of government.225

At the heart of the approach taken by Professor Choper and

222. Id. at 100.
224. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593-94 (1952) (Frankfurter, J., concurring).
Justice Rehnquist is the belief that the courts should not decide questions of separation of powers in the area of foreign affairs. Their motivation is understandable. A separation of powers question can only arise as a challenge to established policies. Where a branch is found to have acted outside of its committed authority, its policy must necessarily fall. When international affairs moved slower and seemed less complex, the pressure from the political branches was less intense. In light of the fast-paced, complex, and often secretive nature of modern international relations, however, principle often gives way to expediency. The safest course, in the short run, would appear to be to allow the courts to sidestep those controversies that they believe they are unable to resolve.

In the long run, however, such an approach can only be dangerous. It would permit the structure of separation to gradually weaken. Not only does this allow the President to usurp the powers of Congress, but it gives the courts additional power. If the courts were permitted to selectively use their judicial power, judges would be free from past precedents. Those precedents, if properly respected, represent a vigorous restraint upon the powers of judicial review and statutory construction, as well as on the President and Congress. If the political question doctrine is extended to cases arising under statutes, then the President may ignore Congress. As Professor Gunther warns, the failure to decide cases where there is an obligation to decide is a "virulent variety of free-wheeling interventionism." Such dangerous power ought not be placed in the hands of an unelected judiciary.

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