THE CONSTITUTIONAL POWER TO TERMINATE TREATIES: WHO, WHEN, AND WHY.

Alan C. Swan*

Introduction

When in December of 1978, President Carter announced his decision to give the one-year notice terminating the 1954 Mutual Defense Treaty with the Republic of China (Taiwan),1 he precipitated a constitutional debate of considerable importance. At issue was whether the President acted properly in terminating the treaty on his own initiative. More sharply than any similar debate in recent years, the discussion brought into focus the entirely different and conflicting approaches that have tended to dominate discourse between the Executive and Congress concerning their respective constitutional responsibilities for foreign policy. The debate pointedly demonstrated the lack of intellectual imagination in both approaches.

Unhappily, the quality of the debate did not improve when the question entered the courts under the aegis of Senator Goldwater's suit against the President.2 The matter reached the Supreme Court. The Court escaped by dismissing the case as non-justiciable.3 While several Justices used the occasion to carve out interesting, even novel positions on peripheral issues of standing and political question,4 the chief virtue of the order was aborting the Court of Appeals' unfortunate opinion dismissing the Senator's suit on the merits. Since it is with the merits of the questions that we are concerned, the Circuit Court opinion and the District Court decision holding that President Carter had violated the Constitution are the focus of this article.

* Professor of Law, University of Miami, School of Law


2. Goldwater v. Carter, 481 F. Supp. 949 (D.D.C. 1979); rev'd. per curiam, 617 F.2d 697 (D.C. Cir. 1979); vacated as non-justiciable 100 S.Ct 533 (1979) (mem.)


4. Id. Statement of Mr. Justice Rehnquist (political question); Statement of Mr. Justice Powell (case not "ripe" for judicial review).
The first approach to the allocation of foreign affairs powers, characteristic of the terms in which Congress tends to conduct its side of the discourse, is exemplified by Judge Gasch's District Court opinion and Judge MacKinnon's appeals court dissent. Both opinions tended to be narrowly literal and too simple. At the core of their argument stood the supremacy clause and the apparent parallel, under the clause, between statutes and treaties. Statutes, they noted, could be repealed only by legislative action. The same, therefore, must be true of treaties. The argument was seen through an all-or-nothing perspective. But treaties differ from statutes. Though both are sources of domestic law, treaties are international compacts as well. If, on occasion, terminating a treaty is very much like repealing a statute, it does not follow that all terminations can be so analogized. Neither does the supremacy clause pretend to define or control all the forms of law-making in which the government might engage. The simplistic all-or-nothing argument conflicts with the historical record and with the possibility that the President may indeed have the right to terminate treaties under a variety of circumstances and without congressional or senatorial concurrence.

This, of course, is not to suggest that the supremacy clause was irrelevant. The defect lay rather in the failure to go deeper, a failure which left both Judges Gasch and McKinnon vulnerable to attack by the Court of Appeals majority and unable to exploit the analytic fallacies upon which the latter's decision was built. Moreover, neither Judge was able adequately to formulate the legal significance of the distinctions that exist between the historical record and President Carter's action. Neither was able to dramatize the unprecedented and unwarranted nature of the power claimed by that action.

7. The supremacy clause states as follows: This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties which shall be made under the Authority of the United States, shall be the Supreme Law of the Land. . . . U.S. Const. art. VI, cl. 2.
8. See Part V infra.
While Judges Gasch and MacKinnon demonstrate that one cannot approach important questions of this sort through a narrow literal reading of the Constitution, the Court of Appeals majority demonstrates the positive dangers of what can be called the "rhetorical approach." This approach has dominated the executive side of the discourse and, in fact, commanded a much wider allegiance until it stumbled badly in the aftermath of Vietnam.

The argument is a familiar one: foreign policy is uniquely presidential business. Politicians say it is so and foreign governments behave as though it were so. Presidents usually act accordingly. We generally expect them to act that way and hold them accountable for the results. Only as the constitutional text renders its intrusion unavoidable do we concede a place to Congress in this otherwise executive sphere. In somewhat more sophisticated terms it is said that the formulation and execution of foreign policy are for the President alone, except as he needs domestic legislation or money or finds it expedient to make a treaty, obtain a formal declaration of war or seek congressional advice. Within such a framework, termination of the Mutual Defense Treaty was solely a presidential matter.

This position is rarely supported by any serious constitutional analysis. Its adherents appear to believe that its repeated assertion, bolstered by a few arguments from expediency and an appeal to follow the practice of other nations, will make its truth self-evident. When pressed for a supporting constitutional reference the "executive power" clause is usually invoked.


10. The executive power clause provides: "The executive power shall be vested in a President of the United States of America." If construed as an affirmative grant of power, the clause contains no definition of the power being disposed of. It is something called the "executive power," but one must look elsewhere, perhaps to history or other models, for what that might include. Hamilton, of course, is the name most closely associated with the idea that the executive power clause was an affirmative grant to the President of all powers, not granted elsewhere, that were "by their nature" executive. This included all powers specifically enumerated in Article II plus those flowing "from the general grant, interpreted in conformity with other parts of the Constitution, and with the principles of government." Hamilton (Pacificus), in E.S. Corwin, The President's Control of Foreign Relations at 11 (1917 & reprint 1970). As to "principles of government," it might be thought that Hamilton was drawing mostly upon the model of the 18th century British monarch. For a more contemporary expression of the Hamiltonian view see Myers v. United States, 272 U.S. 52 (1926) discussed infra at note 79 and accompanying text.
Since that clause does not define the "executive" power which it is supposed to confer upon the President, however, the argument lapses into a rhetorical mode: foreign policy is an "inherently" executive function because it is so.

As with the supremacy clause argument, there is just enough in this last assertion to lend it credibility. The President does indeed play a more dominant role in the formulation of foreign policy than he normally plays in domestic matters.11 But this point should begin, not, as the "inherent" theorists would have it, end the analysis. It is necessary (1) to understand the textual sources of the President's commanding role and the limitations upon that role inherent in those sources; (2) to fashion a theory explaining the relationship of those sources to the other parts of the document; and (3) to explore the several facets of the President's role and determine how the scope of the power implicit in each facet is to be fixed under the dictates of the separation of powers doctrine and other postulates that lie "behind the words of the Constitution" and serve to "limit and control."12

Since none of this is part of the "inherent powers" theory, its application to the Goldwater case yielded a predictable outcome: the President won. More important than the winning -- which was short lived -- was the manner of the victory, which we may hope carries a permanent lesson. Throughout its opinion, the Court of Appeals was uneasy with the "inherent powers" approach. The opinion valiantly searches for a sounder foundation upon which to base a decision in favor of the President. Yet it only succeeds in producing an opinion permeated by analytic confusion, textual contradictions, and a complete repudiation of the separation of powers doctrine as that doctrine has come to be understood in contemporary decisions. The Court of Appeals opinion stands as evidence of how any effort to translate the practical fact of presidential leadership into a constitutional rule of self-sufficient presidential power depends upon rhetoric and rhetoric alone.

In the end, of course, the exponents of this approach, including the Court of Appeals, may actually be working at another level. Out of a deeper concern for efficacy

11. See Part I infra.
in the conduct of foreign policy, they may be con-founding the constitutional question with the merits of the President's policy and using the rhetorical approach to secure that result. Perhaps they worry lest the trends apparent in the aftermath of the Vietnam and Watergate tragedies leave the nation impotent to meet the challenges of a hostile world; that the pendulum has swung too far against the President. Perhaps they also look at Congress and worry lest the chaos, the de-lays, the cultural myopia, and the heavy-handed style of American congressional politics compromise the effect-ive conduct of delicate relations with other governments.

This kind of thinking, however, falls victim to its own premises. It echoes the widespread tendency to decry the intrusion of legal technicalities into the great affairs of state. But in the constitutional sphere at least, great affairs are rarely understood a-part from legal technicalities. In our case the failure to make careful distinctions, to attend to the constitu-tional text, to refine concepts, and probe the cases on the grounds of a broader concern for governmental efficacy only masks the fact that efficacy is not genuine-ly at issue in this debate. Our democratic values are at stake. But that becomes apparent only after the legal analysis is done and both the rhetorical and literal approaches discarded. Only then can it be seen that complete vindication of the President's position would not only have arrested the pendulum but turned it back to whence it started. One can, of course, wish that the Supreme Court had, by an adequate review of the merits, secured against such a result. Nevertheless, with the Court of Appeals decision set aside, one may now hope that the intellectual poverty of that effort, combined with the larger debate, will deter Presidents from attempting any similar action in the future.

Part I of this article examines the President's commanding place in the conduct of American foreign policy. Part II analyzes the Court of Appeals decision. In Part III a broader design of the President's foreign affairs power is formulated. Part IV canvasses a wider spectrum of foreign affairs cases to support the proposed design. Finally, Part V applies that design to the historical record of treaty terminations.
THE PRESIDENTIAL OFFICE: OF POLICY INITIATIVE AND ADMINISTRATION DISCRETION

The President is without doubt the dominant actor in the formulation and execution of American foreign policy. In the "vast external realm," the modern President exercises powers of initiative and administration more extensive and more decisive to the course of the nation than is generally the case in domestic matters, except perhaps in times of great emergency. Yet, the reason for this is not immediately apparent from the constitutional text. The framers, constrained by fears of a too powerful executive, conferred upon the President a limited number of essentially instrumental functions. He was to be commander-in-chief and was to "make treaties" with the "advice" as well as "consent" of the Senate. He was to participate in the legislative process by making recommendations and exercising the veto power. He might nominate ambassadors, public ministers and consuls, but with the "advice and consent" of the Senate. He was to "receive ambassadors and other public ministers" to "take care that the laws be faithfully executed" (Take Care clause). This was the whole of it.

In contrast, not only was the Senate to share in the making of treaties and the appointment of ambassadors, but Congress was given the power to regulate the movement of goods, people, and ideas across our boundaries and the authority to borrow, to tax, and to spend money. Congress was further empowered to declare war to "define
offenses against the Law of Nations," and to "make all laws . . . necessary and proper for carrying into execution" not only its own powers, but those of the President as well. There was scarcely a subject likely to arise in the conduct of our relations with other nations in which the Senate or the Congress was not assigned a principal policy-formulating role.

If the structure of power implicit in the text of the Constitution -- and the expectations that lay behind that text -- bear little resemblance to the contemporary scheme of things, the transformation has occurred largely through an elaboration upon the scanty enumerations of Article II. Louis Henkin has put the point well: "much of what the President has attained may indeed lie in or between the lines of the Constitution and all of it has been shaped by what is there."29

Thus, the once purely ceremonial function of "receiving" foreign ambassadors has been read to give the recognition power to the President. When the constitutional text was read as establishing the executive as the sole "organ," or spokesman, of the nation in its relations with other states, diplomacy became an exclusive presidential province. With that came the power to negotiate, the power to influence foreign expectations and attitudes, the power to control the flow of information and advice to Congress and the power to affect its perception of events abroad, often decisively.

When, as commander-in-chief, Presidents assumed the authority to direct the global disposition of American military forces, they came to possess a vast practical capacity to manipulate the nation's involvement in the tensions that lead to war. In short, any President disposed to exercise it eventually came to have a power of initiative in the formulation of foreign policy that exceeded anything he was likely to possess in the domestic sphere. Significantly, there is no threat to this power in the challenge to President Carter's actions.

In similar vein, his power as commander-in-chief, his powers as sole "organ" of the nation and his responsibilities under the Take Care clause, abetted by even broader delegations of authority from Congress, have

27. U.S. Const. art. I, sec. 8, cl. 10.
combined to give the President a vast discretion in the administration of foreign policy. Again, there is no threat to this power in the case against President Carter.

On the other hand, the constitutional text is not just an historical curiosity. The extensive enumerations of power in Article I still remain. That the President possesses a vast power of policy initiative and a vast power for securing congressional agreement with his initiatives, does not mean that he possesses an exclusive policy-making authority. That he exercises a large discretion in the administration of policy does not relieve him of duty to conform to that policy. History has worked less of a change in the formal allocations of authority under the Constitution than an elaboration upon the President's enumerated powers. This elaboration has permitted him to exploit the political dynamics of the twentieth century to limit the scope and independence of congressional judgment. Nevertheless, that judgment must be exercised. And when Congress determines to assert its independence, the constitutional limits on the presidential office are quite apparent indeed, often dramatically.

It is vital that we not transform the practical control of policy derived from the exercise of initiative and administrative discretion into a constitutionally-mandated exclusive power of policy decision. This point goes to the very heart of our success as a constitutional democracy: the right of each generation, operating within a continuing framework of government, to work out its own balance between the competing values at stake in all governance. It is also essential to securing true effectiveness in foreign policy. If the long course of our history teaches us anything, it is that no institutional arrangement can threaten the long-range effectiveness of policy more than the imperial presidency. Deep within the fundamental political dynamics of the nation lies an antipathy to all that such an arrangement portends. Only in times of maximum danger are we likely to tolerate the arrangement and even then tolerance is likely to be short lived. To ignore these dynamics, to posit the ideal of a self-sufficient Presidency, is the surest road to both the abuse of power and to the popular disenchantment and inconstancy which will ultimately defeat any policy, however wise it may seem to the professional diplomatist, academic expert, or other minion of the foreign affairs establishment.

Yet, this is precisely the danger we face. Spotted throughout our constitutional history, insinuating itself
into an occasional court decision, is a ritual chant. Outside the constitutional text, referenced by the executive power clause, there lies, it is claimed, some broader "inherent" power in the President to formulate and conduct foreign policy. Vague, elastic, the idea is the source of rhetoric that can be used to transform the textually limited character of the presidential office into a self-sufficient policy-formulating institution. At bottom, this is what is at stake in the constitutional debate over the President's handling of the Mutual Defense Treaty with Taiwan. By his decision the President boldly asserted his unilateral right to override policies established jointly by President and Senate, policies that intimately pertain to Congress' war powers. One could scarcely conceive of a more audacious claim for the Presidency as a self-sufficient policy-making institution. It is that claim that the Court of Appeals saw fit to uphold.
II

THE COURT OF APPEALS DECISION:
AN EXERCISE IN THE RHETORICAL TRADITION.

1. The Rhetorical Formulation

In language reminiscent of Alexander Hamilton and of Chief Justice Taft in Myers v. United States, the Court of Appeals majority commences its defense of the President by alluding to the executive power clause. It observes that, when compared with the specificity of the grants to the other departments, the clause is notable for its lack of definition. Then, citing United States v. Curtiss-Wright Export Corp., it observes that the whole of the foreign affairs power of the sovereign United States is vested in the federal government. The stage appears set for a bold thrust. Because it constitutes an open-ended (undefined) grant of power, the court appears prepared to argue that the executive power clause vests in the President all power belonging to the federal government not expressly reserved to the other departments of government, at least if those powers pertain to the conduct of foreign affairs. In the latter sphere, the court seems ready to say, Congress possesses no implied powers whatever.

The argument has an intriguing aspect. It appears as an attempt to escape the vagueness of the "inherency" notion and to discover a content for the executive power clause in the structure of the constitution text. The specificity of the extensive enumerated grants of power to Congress in Article I is used as evidence that the open-ended executive power clause was intended as a repository for powers not given elsewhere. Once this is accomplished, however, the enumerated grants of Article I are conveniently and understandably forgotten. President Carter's action impinged directly on Congress' war-powers.

30. See note 10 supra.
31. 272 U.S. 52 (1926) discussed infra at note 79 and accompanying text.
32. 617 F.2d at 704.
33. 299 U.S. 304 (1936) discussed in Court of Appeals Opinion, note 32 supra, at 18.
34. See Part II infra.
Accordingly, it was no longer the enumerated grants of Article I but the absence of a functional grant (i.e., participation in treaty terminations) to Congress that defined the scope of the residual executive power clause. The device is transparent and contradicted by numerous decisions, a point to which we shall return. For the present we can do no more than read the court as restating the traditional "inherent powers" argument, while evidencing some reticence to embrace that argument.

This reticence becomes even more evident when the court suddenly backs away from the bold approach upon which it seemed bent and turns to arguing that terminations of treaties are a special case with the President's foreign affairs power. The President is the constitutional representative of the United States in all "external affairs." He is, the court notes, quoting Curtiss-Wright the "sole organ and the Federal Government in the field of international relations." That function, it adds, is "not confined to being a channel of communication" but "embraces an active policy determination as to the conduct of the United States...." Moreover, the President alone negotiates treaties and consequently has the initiative in formulating all treaties. He can refuse to ratify a treaty after it has received senatorial approval and the Senate cannot override his "veto." The court also reads significance into the fact that the treaty power is found in Article II rather than in Article I. Finally the President's power of initiative in treatymaking and his control of the notice-giving function combine in the court's mind to create a case in which a decision requiring congressional or senatorial approval of all treaty terminations,

35. See Part II infra.
36. 617 F.2d at 705.
37. Id. at 707.
38. Id.
39. Id. at 705.
40. Id. The only difference between the President's power to "veto" treaties and his power to "veto" statutes is that the latter veto may not be overridden only so long as the President can persuade more than one third of the membership of either House of Congress to his view.
41. Id. This is of dubious significance. Up through the Report of the Committee on Detail of the Constitutional Convention, the Treaty Power appeared in Article I. The transfer to Article II, was done at the last minute by the Committee on Style.
similar to the "specific requirements of initial approval," would constitute "an unprecedented feat of judicial construction."\textsuperscript{42}

At the threshold, it is important to observe the full import of this reasoning. Not surprisingly, in a government of divided powers, the President possesses a vital monopoly of instrumental powers by which the government carries out all aspects of its foreign policy, not just its treaty policies. He is the "sole organ" of the nation in all its international relations. He alone can negotiate, sign and ratify all international agreements. He alone can officially notify foreign governments of intended American actions, irrespective of whether those actions pertain to a treaty. He alone conducts diplomacy, commands the troops in war, and must "take care that the law" pertaining to our foreign affairs be "faithfully executed." By virtue of these powers the President has come, in practical terms, to possess a vast power of initiative over the formulation of all foreign policy, not just treaty policies.

From this, it would seem to follow that if the President's power to initiate treaty policy and his control of the formal instruments of implementation combine to confer upon him a power to decide all treaty questions without reference to Congress or Senate, except as the Constitution expressly requires the latter's concurrence, the same must be true of all foreign policy decisions. Except as the President finds that the successful pursuit of a policy requires the exercise of a function expressly conferred upon the Congress or Senate (e.g., senatorial consent to the making of a treaty; a congressional declaration of war or enactment of a substantive statute or appropriations act) the formulation as well as execution of the nation's foreign policies belong exclusively to the President. Neither Congress nor Senate possesses any implied foreign affairs power whatever.

Thus the court arrived at precisely that bold assertion of an "inherent" presidential power over foreign policy that is characteristic of the rhetorical tradition and which it seemed so intent upon avoiding. Indeed, the court itself is very much alert to this fact. The balance of the opinion is largely devoted to showing why treaty terminations are a unique foreign

\textsuperscript{42. \textit{Id.}}
policy matter and to why the Taiwan situation is unique. The effort, however, is at best unpersuasive; at

43. Further evidencing its concern for the sweeping implications of the core theory, the court acknowledges that the "vital functions" of the President in "deciding upon" a treaty's "viability" might "interact with Congress' legitimate concerns and powers." Then, however, it refuses to decide how that interaction might affect Goldwater. To do so would "prematurely intrude" the judiciary into the picture. 617 F.2d at 707. This is a remarkable statement. On one hand, the conclusion that the President has the "vital function" of determining upon a treaty's "viability" is derived entirely from the core theory (i.e., the absence of decision). On the other hand, the court admits that theoretically, at least, Congress might have "legitimate concerns and power" that could intrude upon such a question. If so, what remains of the core theory? The issue seems to have been radically revised. The question now seems to be whether Congress' "legitimate concerns and powers" did in fact intrude. As if to underscore the point, the court immediately proceeds to consider intrusion into the competing claims of Congress and President that it had already declared "premature."

Thus, it notes that the power to extend recognition to a foreign government belongs exclusively to the President. Id. at 706. It then concludes that the "president makes a responsible claim that he has authority as Chief Executive to determine that there is no meaningful vitality to a mutual defense treaty when there is no recognized state." Id. This is an intriguing statement because of the judicial intrusion implied (i.e., it judges the President's claim of authority as "responsible") and because of what the court does not say. Note first that, unlike Justice Brennan (Goldwater v. Carter, 100 S.Ct. at 539 [1979]) the court does not argue that because the recognition power belongs exclusively to the President, he likewise has the exclusive power to terminate any treaty with a third nation if termination is an element in the recognition decision. The latter argument cannot be reconciled with United States v. Pink, 315 U.S. 204 (1941), would prove much too much (see infra note 191 and accompanying text) and is improbable on its face. The President's exclusive possession of the recognition power is more the legacy of history and the necessities of diplomacy in an age of slow communication than a matter dictated by the values and practical scheme of government underlying our Constitution. Note also, that the court is not arguing that a defense treaty must, as a matter of law, cease to exist upon the withdrawal of de jure recognition from the governing authorities in a foreign state. It would have been sheer folly for the court to have adopted such a position since the Executive had carefully not done so (see Taiwan, Hearings Before the Committee on Foreign Relations, on S. 245, 96th Cong., 1st Sess. 49 (1979) [statement of Warren Christopher, Deputy Secretary of State]) and had carefully refrained from either recognizing Peking as sovereign over Taiwan or even recognizing Peking's claims of sovereignty over the island (i.e., we only "acknowledged" that Peking had advanced the claim. We have in short, not adopted a "one China" policy.)
The decision to sustain the President

43. (continued)

Id. at 19 and 29. (Also, compare the Joint Communiqué of December 15, 1978 with the separate statements by the United States and by the People's Republic of China, 18 Int'l Legal Materials 273 et seq.) This position was necessary to protect the fifty-five other treaties we continue to maintain with the authorities of Taiwan.

On what basis, then, did the court conclude that the President's claim of authority was a "responsible" claim? The answer could appear to be either (1) because of the core theory (i.e., the absence of any implied power in Congress to participate in treaty termination decisions generally) or (2) because Congress has no "legitimate concerns or power" in any case where the President decides to terminate a treaty as an incidence of de-recognizing the governing authorities of a foreign state. Since we have already been told that it cannot be the core theory (Congress' powers can interact with the President's "vital function"), it must be the second. Yet, we are never told why Congress has no such power or concern, a pregnant question in the case of a defense treaty which may impinge upon Congress' war powers (see Part IV infra). The court's argument, in other words, is either a blatant exercise in question begging or the reassertion of the core theory under a smoke screen. The latter would at least have the virtue of explaining the conclusion, although it is a totally unprincipled explanation (see Part II (2) and (3) infra).

44. The other argument advanced by the court as it intruded into the competition between the President's "vital function" and Congress' "legitimate concerns and power" (see note 43 supra) involves the termination clause of the treaty. This clause, the court triumphantly claims, is "of central significance," an "over-arching" factor in the case which "knit[s] together" all the "other considerations." (617 F. 2d at 708). The Chief Executive's authority is, the court announces, "at its zenith when the Senate has consented to a treaty that expressly provides for termination on one year's notice, and the President's action is the giving of the notice of termination." Id. What an utterly remarkable statement! If the only power that the President brought to the case was his instrumental notice giving function and it is the marriage of that function with the Senate's consent that raises his power to its "zenith," what has happened to the core theory -- the utter lack of any power in the Senate or Congress to insist on participating in the decision to give the termination notice? Apparently the Senate does have some power to intrude upon the termination question since its consent to the President making that decision is the "overarching" factor in the case.

More pointedly, however, the argument is made out of whole cloth. What, in fact, did the Senate consent to? It consented to a clause permitting the sovereign United States to absolve itself of a treaty obligation without violating international law. That was the sole purpose of the clause. That is all the Senate consented to and nothing in the transactions involving that clause, whether between the executive
and the Taiwan government or between the Executive and the Senate, had anything whatsoever to do with the constitutional relationship between the President and Senate. Also, the right of termination is reserved to the sovereign United States. If the Senate is not the sole repository of American sovereignty, neither is the President. Furthermore, there is no hint in this, or in any other treaty confirmation proceeding, that either the President or the Senate thought that, by approving such a clause, the latter was delegating a broad termination power to the former. It is nothing but delegation by accident (not even implication) or, more accurately perhaps, by judicial fiat. Indeed, many, if not most, of the treaties to which the United States is now a party, reserve some such unilateral right of termination to the parties. As a consequence these erstwhile and quite accidental delegations of authority taken together would probably represent the single largest transfer of legislative authority to the President since the National Recovery Act, declared unconstitutional in A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935). The Schecter case, in fact, raises an intriguing point. Since the Mutual Defense Treaty constituted both an international compact and a source of domestic law (see text accompanying note 67 infra) and, since the court conceded that the termination of the domestic law effects of a treaty was indistinguishable from the repeal of a statute 617 F.2d at 705, the delegation of authority so blithely ascribed to the Senate would seem to be indistinguishable from a totally open ended, unguided authority to repeal a statute. Surely, any attempt to delegate such authority to the President would raise a bit of a constitutional question. It would find no parallel in the domestic cases and would not be sanctioned by the more expansive possibilities announced in United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (see text accompanying note 94 infra). Nor can the theory be squared with the Supreme Court’s decision in Van der Wayde v. Ocean Co., 297 U.S. 114 (1936), where it was the passage of a later inconsistent statute and not the termination clause in the applicable treaty that supplied the constitutional warrant for the President’s decision to invoke that clause. (see text accompanying note 173 infra).

In practical terms, the court’s theory would virtually guarantee a refusal by the Senate in future cases to sanction a termination clause without either a reservation or some declaration concerning its rights. Such a development would introduce an unnecessary issue not only into the senatorial proceedings but into the international negotiations as well. Constructed out of whole cloth, this theory is also perverse.

This is not to deny, of course, that the President and Senate may fashion a working relationship on the termination question involving the grant of substantial discretion to the President. But the termination clause in the Mutual Defense Treaty represents no effort in that direction. Consult the effort in S. Res. 15 to interpret the clause in this fashion (Report of the Committee on Foreign Relations on S. Res., 15 96th Cong., 1st Sess., at 1 [1979]). The effort was
upon him an independent power to terminate all treaties under any circumstance. The case takes the court's theory to its outer limits.

In *Goldwater* President Carter claimed a power to ignore or override the policies embodied in a treaty where both the treaty regime and its attendant policies were in all respects viable except for the single fact that he alone had decided that the nation should pursue a different course. Implicit in that decision was the President's willingness to take certain strategic risks which impinged directly upon commitments made in treaties with other nations and regarding Congress' exercise of its war powers. Under the Court of Appeals' logic, in other words, the President's initiative in treaty-making and his instrumental power to give notice of a decision to terminate a treaty served first to negate any implied right in Congress or the Senate to participate in the termination decision. Next, it served as the source of an affirmative power in the President to override policies previously agreed upon by a former President and two thirds of the Senate, each acting pursuant to an express constitutional grant of power concerning a most delicate responsibility. Nothing comparable to such a claim is to be found anywhere in the history of unilateral presidential terminations. It is far from clear that either Alexander Hamilton or Chief

44. (continued)

roundly defeated. And finally, nothing in the historical record of treaty terminations evidences a working relationship that would encompass the action taken by President Carter in the Taiwan case (*see Part V infra*).

45. *See Part V infra.*

46. *See Part IV infra.*

47. *See Part V infra.*

48. In his famous debate with Madison, Hamilton contended that while the President could not declare war, the war power was a "concurrent authority," an example of the "...right of the executive ...to determine the condition of the Nation, though it may in its consequences, affect the exercise of the power of the legislature to declare war. The legislature is still free to perform its duties, according to its own sense of them though the executive, in the exercise of its constitutional powers, may establish an antecedent state of things, which ought to weigh in the legislative decision."

7 Hamilton (*Pacificus*), The Works of Alexander Hamilton 76 (T.C. Hamilton ed.). It is by no means clear from this that Hamilton viewed the President as empowered to conduct any hostilities he chose without ever obtaining a congressional authorization. Certainly he cannot
Justice Taft would have contemplated so bold a claim for their "inherent powers" theory, or that Curtiss-Wright can be read to go so far. It is an extraordinary theory: foreign policy making is an exclusive presidential sphere except as it encounters some express functional grant to Congress, but even then the President may override policies established through a textually required process involving both President and one or both houses of Congress.

48. (continued)

be read as asserting that the President could persist in carrying on a war if Congress expressly considered and rejected a grant of authority to do so; that he could simply ignore or override the congressional will.

49. Any analogy between the President's removal power to which Chief Justice Taft was addressing himself in Myers v. United States, 272 U.S. 52 (1926) (discussed infra at note 78 and accompanying text), and the power to terminate treaties is suspect at best. The President must obviously have some control over the subordinates through whom he discharges his constitutional duties, and that surely might include a power to remove those subordinates. It is thus a power that pertains to the President's control over his own department within the government. Treaty terminations, on the other hand, are an exercise by the government of its sovereign power of substantive governance. A presidential claim to "sovereignty" over the executive department is not quite the same as a claim to the sovereign power of the United States. Also the removal of subordinate is a managerial or administrative act, lacking the more generalized and continuing prescriptive quality that we often associate with lawmaking. The termination of a treaty, however, is an affirmative prescriptive act with a generalized and continuing effect.

50. See text accompanying note 94 infra.
2. The Core Theory: Analytic and Textual Contradictions

To negotiate and sign a treaty, to proclaim its ratification, and, as "sole organ," to give the notice terminating a treaty are intrinsically no more than functions necessary to carry into effect some antecedent policy decision. The power to perform those functions does not, by its own terms, imply an independent power to make that decision. Indeed, it is a first principle for any government of divided powers that the department charged with executing the basic choices that determine the ends and manner of governance cannot, on the strength of that charge alone, claim the power to make those choices. Otherwise there could be no government of divided powers. If we were to look to first principles in defining the boundaries of the President's "inherent" powers over foreign affairs, the result would be disastrous to President Carter's cause and the whole notion of presidential self-sufficiency in foreign affairs.

Total reliance on such a principle, however, would conflict with much constitutional history. Long practice makes plain that the Executive is not invariably foreclosed from exercising an independent policy-making power. There are indeed situations in which the President possesses not only the power to act without congressional warrant, but to do so in open disregard of the congressional will. As a practical matter, the President's virtual monopoly of the instrumental powers of government assures that he is far more than the mere executor of some other lawmaker's antecedent will. He is a necessary participant in all foreign policy decisionmaking. It would be strange indeed if the political values and practical necessities that have brought vast powers of policy initiative to the modern Presidency did not, on proper occasions, spill over to transform that power into a power to decide and act independently.51 All of this, however, is a far cry from the Court of Appeals' use of the President's instrumental powers to bootstrap the presidential office into a self-sufficient policy-making institution that can invariably act without reference to, and even in defiance of, the other branches of government, except as the de-

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51. For a more complete discussion, see Part III.
cision engages an express functional grant to one of the latter.

In sum, history, if nothing else, has rendered any theory of "inherent" presidential powers analytically useless. Such meaning as might have been derived from first principles is far too limited to be squared with our constitutional traditions. But the use of the "inherent powers" concept to transform the Presidency into a vast, self-sufficient policy-making institution constrained only by the express functional grants to Congress, is even more offensive to those traditions. We are in need of a new overarching allocative design and a new analytic mode. We need something more rigorous than rhetoric and more sophisticated than textual literalism to reconcile first principles with the political values and practical experience of government that so often combine to render our constitutional law at once intellectually taxing and eminently workable.

Later we will pursue the search for such a design with an inquiry into a separation of powers doctrine.52 First, however, it is necessary to show that the Court of Appeals' use of the "inherent powers" theory not only contradicts first principles but encounters a number of textual embarrassments of which the court was only too aware.

In spite of its cognizance of the enumerated grants to Congress under Article I,53 the court had to ignore the fact that the President's decision impinged directly upon one such power -- the power to declare war. The theory had to treat the enumerated grants of Article I as irrelevant unless there first existed some express grant to Congress of authority to participate in the particular function giving rise to a question concerning those subjects. A wide variety of judicial decisions, however, including decisions by the Court of Appeals itself, have thoroughly repudiated any such principle.

For instance, the President cannot, merely by avoiding a formal declaration of war, exercise an unlimited power to conduct war without a congressional authorization.54

52. For a more complete discussion see Section 3 of this Part.
53. See text accompanying note 34 supra.
54. See discussion on war process cases Part IV infra.
The functional form of the grant to Congress (i.e., the power to issue a declaration) is not controlling. It is the subject matter of the decision -- the choice between peace and war -- that dictates the necessity of congressional participation. Likewise, Congress is given no role in the function of making non-treaty agreements with foreign nations. Yet, the President cannot, by entering into such an agreement, prescribe crimes against the United States.\footnote{55} Neither can he, by such an agreement, regulate foreign commerce\footnote{56} or fix the value of the coinage,\footnote{57} at least insofar as the agreement is contrary to policies expressed in an antecedent statute or treaty.\footnote{58} Surely, there is something anomalous in suggesting that while the President cannot by agreement with a foreign power change an established treaty relationship governing trade, he can do so by unilaterally terminating the treaty.

This last example introduces a more general and far more serious source of embarrassment for the court. If, on the strength of his powers of initiative and administration in treaty affairs and the absence of any express right in Congress or Senate to participate in treaty terminations, the President may override the policies laid down in a treaty by unilaterally terminating it, then he should have the same right to repeal a statute pertaining to foreign affairs. In practical terms, his power to initiate, to veto, and to administer such a statute, differ only in degree from his powers over the making and

\footnote{55. The Over the Top, 5 F. 2d 838 (D. Conn. 1925). But consider the possible exception implicit in the powers ascribed to the President in United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) and discussed at note 95 infra and in the accompanying text.}


\footnote{57. The practice seems firmly established by the extensive legislation used to authorize, ratify and implement our international monetary arrangements, e.g., The Gold Reserve Act of 1934, the Bretton Woods Agreement Act, the Special Drawing Rights Act, the Par Value Modification Act, and the Balance of Payments Authority contained in the Trade Act of 1974.}

\footnote{58. Dicta in the cases cited note 56 supra suggest that the regulation of foreign commerce is a subject upon which the President possesses no independent law-making power whatsoever. But this would seem too broad a rule. Surely occasions might arise where the President could independently regulate commerce on the substantive authority of the Take Care clause or his power as "commander-in-chief," provided, of course, that he does not violate the expressed will of the statute or treaty makers. Also consider L. Henkin, Foreign Affairs and the Constitution 180 (1972).}
administration of treaties. The Constitution is as silent with respect to the repeal of statutes as it is with respect to the termination of treaties.

Stung by this argument, and by related questions concerning the necessary and proper clause, the court responds by stating that treaties are sui generis. They are not just another law but are also international compacts with both international and domestic consequences. The President, according to the court, controls the international consequences; Congress, in its "role as law-maker," controls the domestic. Now, obviously, the court did not mean to imply that after January 1, 1980 the Mutual Defense Treaty, although terminated as an international compact, still remained in full force and effect as domestic law. Instead, the court was operating upon two assumptions: first, that a treaty of this character was only an international compact and not a source of domestic law, and second, that while the power to supercede a treaty as domestic law might constitute an exercise of the legislative power vested in Congress, the termination of a treaty as an international compact did not do so. 59

59. It is true that the Senate is entirely dependent upon the President's willingness to negotiate treaties. It is also theoretically true that Congress can initiate statutes independent of presidential suggestion. Nevertheless, the practical fact is that, in the foreign affairs field, virtually all important legislation originates in the executive branch, so that the distinction is minimal. For a comparison of the veto power see note 40 supra.

60. 617 F.2d at 705.

61. The question is why the "necessary and proper" clause should not constitute precisely the functional grant which the Court of Appeals thought did not exist. Certainly, the termination of a treaty is law-making in the sense encompassed by that clause. It negates obligations that would otherwise be binding upon the sovereign United States under international law. If the terms of a treaty are invoked as rules of decision in a court of law, the act of terminating the treaty definitively bars a decision predicated upon those terms. More affirmatively, the termination of a treaty brings into existence a new normative regime, whether embodied in customary international law, in an antecedent and subsisting statute or in common law. See McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819). Under the necessary and proper clause, Congress is empowered to make all laws necessary to carry out not only its own enumerated powers but those of the President as well. Accord, 617 F.2d at 717-718 (McKinnon, J., dissenting).

62. 617 F.2d at 705.

63. Thus the court poses the issue in the following terms: the issue here...is not Congress' legislative powers to supercede or affect the domestic impact of a treaty; the issue is whether the Senate (or Congress) must in this case give its
With regard to the first assumption, it is notable that many of the obligations imposed on the United States by the Mutual Defense Treaty lie within the province of the Executive to perform, while the performance of all those obligations, including the defense commitment in Article V, requires affirmative executive cooperation. Since the Take Care Clause encompasses treaties as well as statutes, these provisions of the treaty would seem to constitute rules of conduct binding upon the Executive by force of the latter's constitutional obligation "to faithfully execute the Law." Arguably, Article X of the treaty, by means of the supremacy clause, also binds Congress to some affirmative action. By force of the Constitution, in other words, the treaty lays down a rule of domestic law. That is precisely the case with every other self-executing treaty.

63. (continued)

prior consent to discontinue a treaty which the President thinks is desirable to terminate in the national interest and pursuant to a provision in the treaty itself. Id.

64. Mutual Defense Treaty, Article I (settlement of disputes by peaceful means), Article IV (consultation by foreign ministers), and Article VII (right of the United States to dispose of its armed forces in Taiwan).

65. Article V of the Mutual Defense Treaty provides as follows:

Each party recognizes that an armed attack in the West Pacific Area directed against the territories of either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes. Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

For a more complete discussion of the President's constitutional role in carrying out this obligation see text accompanying note 163 infra.

66. It has been asserted that Congress cannot be constitutionally bound to carry out the terms of a treaty, although its failure to do so may give rise to a violation by the United States of its international legal obligations. The theory is that no legislature can constitutionally bind its successors, and that the same rule applies to treaties. However, in the special context of the international legal obligations imposed upon the United States by the Mutual Defense Treaty (see note 67 infra) it can certainly be argued that Congress is under a constitutional obligation at least to consider the use of armed force (vote yes or no) if Taiwan were attacked, even though it might not be considered constitutionally bound by any limitations on its discretion which, as a matter of international law, apply to the sovereign United States.

67. It will be observed that under Article V of the Mutual Defense
It constitutes a rule of domestic law not of its own force, but, by force of the Constitution. Anytime the Constitution

67. (continued) Treaty (see note 65 for text) an attack on Taiwan does not automatically require that the United States come to the defense of the island. If the words "in accordance with its constitutional processes" mean anything, they would seem to mean that each party reserves some right to judge whether, by what means and to what extent it shall respond to an attack on the other party. It is this fact that has led some to suggest that the treaty is not self-executing. Apparently, the idea is that, so long as there remains some decision to be made by American governmental authorities before the United States actually responds to an attack on Taiwan, the treaty cannot be considered self-executing. This position quite erroneously distinguishes between a self-executing and non-self-executing treaty of alliance on the basis of whether the treaty is an automatic or non-automatic commitment to war, assuming that the treaty-makers could actually make an automatic commitment. It also tends to reflect some confusion between the international law effects and certain constitutional effects of a treaty.

A self-executing treaty, by its own force, imposes upon the United States an international legal obligation to act or not act in a fashion which, absent the treaty, would be open to it. By operations of the Constitution, that treaty then becomes a source of domestic law, unless, by reason of the subject matter, legislation is required to render the treaty obligations domestic law. Even in this latter case, however, the treaty may still give rise to a completely binding international obligation of the United States if the negotiators are careless. A non-self-executing treaty is a treaty which, according to the intention of the parties, will not operate as a source of domestic law without implementing legislation. Generally, the negotiation will also make sure that such a treaty does not give rise to an international legal obligation until the legislation is passed, although it might imply an obligation actually to deliberate upon the necessary legislation. In such deliberations, however, any limitation on the exercise of an absolute discretion would have the aspect of a moral obligation only. Based upon this distinction, the Mutual Defense Treaty with Taiwan constitutes a self-executing treaty. By its own force it imposes upon the United States an international legal obligation and it was plainly the contemplation of the parties that no further domestic legal action would be necessary to give that obligation domestic law effect. The point is illustrated rather nicely by the discussion in the Senate Foreign Relations Committee on the NATO Treaty, the provisions of which are essentially the same as the Taiwan treaty. As explained by the late Dean Acheson, if Europe were attacked, the United States would not, by that fact alone, be under an international legal obligation to declare war. Congress and President would still be free to decide what action, if any, was necessary to restore and maintain the security of the North Atlantic sea. Nevertheless, the treaty did, the Secretary made clear, place a limitation upon the factors that Congress and President might otherwise consider in making their decision. They were
imposes upon the public officials of the United States a legal obligation to conform their official behavior to the

bound to consider only what was necessary for maintaining security in the treaty area and to make a good-faith judgment on that question. If, the Secretary added, we confronted an attack comparable to those "that had twice occurred in this century," then in his view, nothing less than "the use of armed forces" would legally be required. The Secretary, in sum, made amply plain that while the Treaty may give the United States some flexibility in judging what its response to an attack on a treaty partner might be, that flexibility is far less than would have been available without the treaty. The United States Government was under an unqualified international legal obligation both with respect to the boundaries of the discretion it might exercise and the necessity of exercising a good-faith judgment within those boundaries, and that obligation did not contemplate implementing legislation or any other further domestic legal action. It is at this point that the tendency to confuse the international law effects of a treaty with another quite distinctive constitutional effect begins to creep in. The internationally binding limitations of the Taiwan treaty on the exercise by the United States of its discretion pertain to a discretion in which Congress must join with the President. Moreover, it may be argued that a treaty can never constitutionally limit Congress' discretion. The theory is that no legislature can constitutionally bind a subsequent legislature, and that this rule is as applicable to treaties as to statutes. Thus, the argument seems to be that if Congress cannot constitutionally have its discretion limited by a treaty, no treaty which requires an exercise of discretion by Congress can have a domestic law effect, can be self-executing. Even if, arguendo, one accepts the premise that Congress is never constitutionally bound by a treaty limitation on its discretion that does not ipso facto establish that the treaty can have no domestic law effect, i.e., that is cannot be non-self-executing. It may still, under the Constitution, bind the executive and, unless legislation is a constitutional predicate to judicial action, the judiciary as well. Whether a treaty is to have such effect remains a matter of the intention of the parties. In the case of the Mutual Defense Treaty, Secretary Acheson's statement makes plain that the legal limitations imposed upon the exercise of discretion by the United States were not intended to be contingent upon any further implementing action insofar as those limitations could constitutionally operate as rules of domestic law. And certainly insofar as those limitations pertained to executive discretion, there was no constitutional barrier to their immediate operation as rules of domestic law (i.e., to be self-executing). One could go further and argue that even with respect to Congress, those limitations had a domestic law effect because, constitutionally, Congress could be compelled by the treaty affirmatively to deliberate on whether to respond to an attack on Taiwan. And certainly, if one rejects the notion that Congress cannot be constitutionally bound to treaty limitations on its discretion, Article V of the Mutual Defense Treaty was fully self-executing. See generally H. Henkin, Foreign Affairs and the Constitution 156 (1972).
terms of a treaty, that treaty operates both as a source of domestic law and as an international compact. To deny this, to suggest that some self-executing treaties, such as treaties of alliance, can have no domestic law effect, rests upon a very limited conception of law.

Compare, for example, an alliance with a self-executing commercial treaty, which is invariably thought to constitute a source of domestic law. The alliance, of course, can have just as great a domestic impact and be as legally binding on national officials as the commercial treaty. The only difference lies in the fact that there is likely to be some individual with standing to formulate a justiciable challenge to any official interpretation of the commercial treaty. Otherwise identical, the commercial and defense treaties differ only in the availability of someone with standing to sue. To reply on this distinction, however, as a basis for denying that the alliance constitutes a source of domestic law, reflects the naive idea that even the most authoritatively prescribed rules of official conduct are not "law" unless they can be vouchsafed judicial enforcement. It is an idea that would horrify the international lawyer. Worse, it would confine the supremacy clause within boundaries dictated by notions of justiciability wholly unrelated to the purposes of that clause. It would mean that numerous appropriations and other statutes were not part of the "law of the land"; an eccentric suggestion at best. If eccentricity is to be avoided and all statutes viewed as sources of domestic law, the same must be true of all self-executing treaties, including the Mutual Defense Treaty.

If the Mutual Defense Treaty was both a source of domestic law and an international compact and if, as the court concedes, only Congress could supercede a treaty as a rule of domestic law, then the President's ostensible power to terminate the Mutual Defense Treaty as an international compact is anomalous at best. The President, acting without congressional concurrence, has the authority to relieve the United States of its international legal obligations under the treaty, but United States officials, including the President, remain bound by the Constitution to conform their conduct to the treaty. To avoid this anomaly one must conclude that since, according to the court, the power to supercede the domestic effect of a treaty was in-

68. 617 F.2d at 705.
distinguishable from the power to repeal a statute, the President either acted unconstitutionally or has the power to repeal foreign affairs statutes. Surely it was the former.

In sum, while one can credit the court with a valiant effort to bring some rigor to the "inherent powers" theory, the analytic confusion, textual anomalies, and contradictions that attended the effort demonstrate the difficulties of reconciling that theory with either the language, structure or traditional interpretations of the Constitution. One can readily admit that by reason of his enumerated powers and the political dynamics of the twentieth century, the modern President possesses vast resources of initiative and administration in foreign policy. But no serious legal analysis can transform that initiative and administrative discretion into a self-sufficient power adequate to support President Carter's actions. In this context one is reminded of the wisdom and warning of Justice Jackson in the Steel Seizure Case. Responding to the claim that the President had a broad "inherent" power to seize the nation's steel mills, the Justice first noted that a "loose and irresponsible use of the adjectives colors all non-legal and much legal discussion of presidential powers," listing first among those adjectives the notion of "inherent" powers. He then added:

The claim of inherent and unrestricted Presidential powers has long been a persuasive dialectical weapon in political controversy. While it is not surprising that counsel should grasp support from such unadjudicated claims of power, a judge cannot accept self-serving press statements of the attorney for one of the interested parties as authority in answering a constitutional question even if the advocate was himself. But prudence has counseled that actual reliance on such nebulous claims stop short of provoking a judicial test.

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69. Only the termination of a treaty as an international compact was, according to the court, a non-legislative act. Id.
70. The court, of course, did not argue that the termination of a statute was a non-legislative act.
71. Once established that the Mutual Defense Treaty is a source of domestic law as well as an international compact, the only way out of this conclusion is through the anomaly already noted; namely that the Mutual Defense Treaty with Taiwan remains binding upon the officers of the United States even though it is no longer a subsisting agreement with the authorities on Taiwan.
73. Id. at 646-47.
74. Id. at 647.
3. The Core Theory and the Separation of Powers Doctrine

The Court of Appeals was obviously fearful lest, by labeling the termination of a treaty a "legislative" act, it prejudice a decision to assign the termination power to the Executive acting alone. The label seemed to embarrass the result. Underlying this fear one can readily discern the workings of a very distinctive view of the separation of powers doctrine. It is a version which evokes the image of a government the sum of whose powers are to be allocated among its several departments according to whether those powers, "by their nature"75 are to be categorized as legislative, executive, or judicial. Moreover, unless the Constitution expressly commands it, no department should be permitted to intrude into the "natural" sphere of decision which appears to constitute such an intrusion. While this version of the doctrine is sometimes explained as a means of preserving departmental independence, it would appear primarily concerned with assuring order and efficiency in governmental affairs and might properly be called the functional-orderliness version of the separation of powers doctrine.

Nothing in the language of the Constitution -- nothing in the supremacy clause or in Article I -- commands this strict disassociation of the President from the law-making powers of the government.76 More importantly, moved by the

75. The phrase is Hamilton's, see note 19 supra. For a more contemporary expression see Chief Justice Taft's opinion in Myers v. United States, 272 U.S. 52 (1926) quoted at note 82 infra.

76. As noted, the supremacy clause does not pretend to define or control all the forms of law-making in which the government might engage. Article I grants to Congress only the legislative powers "herein granted." The President participates in the legislative process through both the power to recommend and the power to veto laws. His participation in the making of treaties, renders him a "law-maker." While the functional-orderliness version of the doctrine treats these examples of the "President-as-legislator" as expressed exceptions to the general scheme of the Constitution, that characterization is derived solely from the political values one chooses to prefer. Under different priorities one could as readily view them as examples of a preferred structure. There is, in short, nothing textually inevitable about the functional-orderliness version of the separation of powers doctrine.
difficulties of squaring the notion of "inherent" departmental spheres with our political values and the practical needs of a working government, the Supreme Court has unequivocally repudiated the functional-orderliness conception. It has revitalized a far more venerable Madisonian version. And it is this latter version which is our starting point in breaking away from both the literal and rhetorical traditions and fashioning a new, more adequate allocative design for the foreign relations powers of the Federal government and for demonstrating how far President Carter strayed beyond the boundaries of that design.

For this purpose we can borrow from the President's apologists and start with one of their favorite cases, *Myers v. United States*. In *Myers* the Supreme Court held that the President had an "inherent" power to remove executive officers, and, therefore, could do so without regard to a statute requiring senatorial consent to the removal. Analytically, the Court's theory could be given a very limited meaning. It could signify only that, because the President, in "faithfully executing the law," or acting as commander-in-chief or as "sole organ" of the nation, must

77. See notes 90 and 91 infra, and accompanying text.
78. 272 U.S. 52 (1926).
79. Conceding that the statute had been violated, the *Myers* decision nevertheless held that the President was constitutionally empowered to act without regard to the statutory limitations. According to Chief Justice Taft, the removal power could be read into the executive power clause of Article II and into the President's power to appoint such executive officials. But if the removal power was to be implied from the appointive power, the requirement for senatorial consent to appointments would seem to imply a right in the Senate to participate in removals as well. The Chief Justice answers that the grant of legislative power under Article I "is limited to powers therein enumerated." On the other hand, the grant of the executive power to the President under Article II is given "in general terms strengthened by specific terms where emphasis is appropriate, and limited by direct expression where limitation is needed." That no express limit was placed on the power of removal by the executive constituted, according to the Chief Justice, a "convincing indication that none was intended." (Id. at 117). As the Chief Justice acknowledged, this answer is straight out of Hamilton. (Id. at 118). The executive power clause constituted an affirmative grant of all authority that was "by its nature" (i.e., inherently) executive.
work through subordinates, he must also possess a power to remove those subordinates. "Inherent" could, in other words, mean nothing more than "necessarily implied."

Such usage, however, would not have supplied a predicate adequate for the holding in the case. It would only have meant that the Constitution itself sanctioned the President's removal of an officer; that he did not need an antecedent statute. It would not have established that Congress was powerless to regulate the President or that the President could ignore the statute. Some additional reason, apart from the fact that the removal power was a natural and practical adjunct of the President's constitutionally enumerated duties, had to be invoked if "inherent" was to connote an "exclusive" or "plenary" power.

It was, of course, possible that the values or the practical objectives served by giving the President autonomy on the subject of executive removals merited taking this additional step. Such a conclusion, however, would also have entailed a judgment that the values or objectives served by the exercise of congressional control were not as urgent or weighty as those undergirding the principle of presidential autonomy. A decision to elevate an incidental power into an "exclusive" or "plenary" power could have rested upon a discriminating inquiry into the values and practical objectives at stake in the competition for power.

In Myers, however, there is very little, if any, inquiry along these lines. Chief Justice Taft resorts instead to the functional-orderliness version of the separation of powers doctrine. He uses the fact that the removal of executive officers is an implied power of the President to evoke a broader sense that, by the natural order of things, the question of removals was executive matter (i.e., he labels it an "inherent" power encompassed within the executive power clause.) Then, once the label was attached, the fact

80. The pragmatic arguments -- even the language employed by the Chief Justice -- demonstrate that the Take Care clause, or any of the President's other enumerated powers, was more than adequate to the purpose.

81. Having read the removal power into the President's appointive power, the Chief Justice had to have some rationale for cutting away the same implication from the Senate's express right to participate in appointments. (See note 79 supra). This is the function performed by placing the label "inherent" on an implied function. So far as executive officers were concerned both their appointment and their removal were "inherently" executive functions. This meant, as the Chief Justice more than once affirms, that when the Senate participated in either an executive appointment or an executive removal it was participating in what was by its nature an executive act. Such participation was an aberration to be tolerated only insofar as the Constitution expressly required that
that the Constitution failed to give Congress or the Senate a role in the decision to remove an executive officer, meant that the President was free to ignore any statute that presumed to confer on the Senate a right to intrude. 81

The parallel to the Court of Appeals reasoning in Goldwater is apparent. The initiative flowing from the instrumental power to negotiate treaties and to give the formal notice terminating a treaty is used to suggest that treaty affairs generally and the decision to terminate a treaty specifically are naturally presidential. 82 The conclusion is more intuitive than analytic. We are only told that it would constitute an "unprecedented feat of judicial construction" to believe otherwise. 83 Nevertheless, once categorized, the result is the same as in Myers. Since the Constitution does not expressly assign to the Congress or Senate any role in treaty terminations, the President's "inherent" power becomes an "exclusive" or "plenary" authority and the President is empowered to ignore or override policies formulated by the treaty-makers.

There is another, wholly different, conception of the separation of powers doctrine that would foreclose it be tolerated. The Chief Justice reveals his viewpoint rather plainly in the words quoted at note 82 infra.

82. The Chief Justice notes:

If there is a principle in our Constitution, indeed in any free Constitution more sacred than any other, it is that which separates the legislative, executive and judicial powers.... Their union under the confederation had not worked well, as the members of the convention knew. Montesquieu's view that the maintenance of independence between the Legislative, Executive and the Judicial branches was a security for the people had their full approval.... Accordingly, the Constitution was so framed as to vest in the Congress all legislative powers therein granted, to vest in the President the executive power, and to vest in one Supreme Court and such inferior courts as Congress might establish, the judicial power. From this division, on principle, the reasonable construction of the Constitution must be that the branches must be kept separate in all cases in which they are not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires.

272 U.S. at 116. The functional-orderliness conception is plain.

83. See text accompanying note 42 supra.

84. 617 F.2d at 703.
resort to any such line of argument. As Madison saw it nearly two hundred years ago, separation of powers was a device intended to constrain the government in its power over the people by requiring, on appropriate questions, the concurrence of two, if not three, independent and potentially jealous departments. The mixing of powers -- the joining of decisional authority -- was the critical element in the dynamics of this version. It found its expression in the classic imagery of checks and balances. Perhaps the most notable recent expression of this version is found in Justice Brandeis' dissent in *Myers*:

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.

If intended to preserve liberty and the basic values of a democratic society, it would be unthinkable if checks and balances operated only on occasions when the Constitution expressly assigned the Congress or Senate the function of participating in a governmental decision. To the contrary, implicit in this version of the doctrine is a recognition that any governmental decision by the concurrent will of President and Congress (or President and two-thirds of the Senate, in the case of treaties) constitutes a more authoritative act of governance than is possible when the President alone decides the course of the nation. That authoritativeness, in turn, reflects the belief that a concurrent decision can be taken as a surer and hence more legi

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85. Madison saw the separation of powers as a basic tenet of a free government. "The accumulation of all powers, legislative, executive, and judicial, in the same hands, may justly be pronounced the very definition of tyranny." J. Madison, A. Hamilton, and J. Jay, *The Federalist Papers* 301 (W. Kendall & G. Carey eds. 1965). The branches, however, could not be wholly unconnected. In order for one branch effectively to limit the exercise of power by another, there must be an overlapping of power. Each branch should wield power over the others so that no one branch would become supreme. *Id.* at 308.

86. 272 U.S. at 293.

87. That the Constitution confers upon Congress the power to override a presidential veto does not detract from this essential point. The requirement to override assures that the decision is based upon an adequate consensus.
timate expression of the general will -- a decision consonant with our democratic postulates -- and also a more considered, and hence legitimate, limitation upon individual liberty. A concern for legitimacy is the hallmark of any version of the separation of powers doctrine designed to preserve individual liberty and basic democratic values. It necessarily implies a willingness to require the sharing of power, even on occasions when the Constitution does not expressly require it.

At the same time, because the Madisonian version of the doctrine is rooted in a concern for governmental legitimacy, it does not invariably require a shared decision. There can be no legitimate government unless it can also, over time, demonstrate some minimum capacity to act effectively. There are times, especially in conducting foreign affairs, when speed, secrecy and unity in national expressions are essential to effective governance. Quite obviously, these conditions cannot always be secured if decisional authority is shared. Nor can one ignore the fact that there are differences in perceptions, in values, and in style between the Executive and Congress. These differences are endemic to the function, structure, and diverse constituencies served by the two branches. As such, these differences render a shared power either inimical to effective governance, or essential to it.

Under the tutelage of the Madisonian conception of the separation of powers doctrine, in cases where the Constitution is silent, any inquiry into the allocation of power to make foreign policy must be cautious and exacting. It is an inquiry to be guided by the importance of the substantive question being decided (i.e., its potential impact on the American people and the course of the nation's affairs) and by the practical constraints under which the decision must be made if it is to be effective. Any allocative decision derived from this matrix will look very different from a decision rooted in a more abstract and intuitive inquiry into the essential "nature" of a governmental function. At the heart of this conception lies a concern for efficacy in the conduct of foreign affairs. It is, however, a concern carefully measured and constrained by the price it would exact in terms of our democratic values. Consequently, it represents a workable concern for efficacy, not, as the visionaries of the rhetorical tradition would have it, an invitation to that ultimate in practical folly, the imperial presidency.

Against this background, we can turn to the cases
following Myers. The hallmark of these cases -- whether they relate to the removal power or to other questions pertaining to the President's control of his own department -- is the rejection by the Supreme Court of the functional-orderliness version of the separation of powers doctrine in favor of the Madisonian interpretation.

88. The Supreme Court's retreat from Chief Justice Taft's theories starts with Humphrey's Executor v. United States, 295 U.S. 602 (1935), in which the Court upheld a salary claim by the estate of a deceased Federal Trade Commissioner who had been dismissed by President Roosevelt before his statutory term expired. Myers was distinguished because the Federal Trade Commission was established by Congress to carry out the latter's policies and could not be characterized "as an arm or an eye of the executive." The Commission's functions were, the Court thought, to be performed "free from executive control," as evidenced by the fact that the commission acted either "quasi-legislatively" or "quasi-judicially." It was, hence, "an agency," not of the executive, "but of the legislative or judicial departments." With respect to officers of this character the President's power was not "illimitable." More generally the removal power was, the Court announced, to "depend upon the character of the office."

After Humphrey's Executor the Court in Wiener v. United States, 357 U.S. 349 (1958), upheld a claim for back salary by a member of the War Claims Settlement Commission appointed by President Truman and dismissed by President Eisenhower before expiration of his statutory term. Noting the "intrinsic judicial character" of the tasks assigned by Congress to the Commission and the similarity between President Eisenhower's reasons for dismissing Wiener and President Roosevelt's reasons for dismissing Humphrey, the Court held that its decision was controlled by Humphrey's Executor and the "nature of the office test" laid down in that decision.

89. Concepts such as "quasi-legislative" and "quasi-judicial" soon fail if taken as a strict litmus of the limits on the President's removal power. Vast powers to promulgate rules and regulations according to quasi-legislative procedures and vast powers to decide particular cases according to quasi-judicial procedures have been given to the President's cabinet. Yet, surely nothing said in Wiener or Humphrey's Executor would suggest that Congress could prevent the President from removing those officers. Particular officers are required to act in a "quasi-legislative" or "quasi-judicial" manner more as a result of procedural values -- principally due process -- than of anything that speaks to the delineation of the relative powers of President and Congress over the subject of removals. The key, therefore, is the "nature of the office test." With that test, the whole subject was drawn into a decisional paradigm quite alien to the theory that pervaded Myers. In contrast to Chief Justice Taft's overarching and highly formalistic scheme which classified all actions as "inherently" belonging to one department or another, Humphrey's Executor and Weiner are somewhat clumsy responses to the realities of modern administrative government. That the
If progress toward this point is slow in the later removal cases, it is fully and expressly accomplished in United States v. Nixon and Nixon v. Administrator of General Services. If there is any doubt that the

89. (continued) rationale chosen was somewhat inept does not gainsay the fact that the Court was responding to the changing realities of modern administrative government. It was searching for a means of drawing a line between the needs of the President as perceived by Myers and the needs of Congress as reflected in those changing realities. Once this occurred, once the Court acknowledged that its problem was one of accommodating the conflicting claims of the executive and the Congress in a new setting, it had embarked upon a doctrinal course totally at odds with the older formalistic tradition of Myers. It had all but expressly abandoned the theoretical teachings of that case.


91. In Nixon v. Administrator of General Services, 433 U.S. 425 (1977), the Court upheld the validity of the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2107 (1976) against a claim by former President Nixon that in providing for archival screening and ultimate public access to presidential papers, the Act violated, inter alia, the separation of powers doctrine. On this point, Justice Brennan stated for the majority:

Appellant's argument is in any event based on an interpretation of the separation of powers doctrine inconsistent with the origins of that doctrine, recent decisions of the Court, and the contemporary realities of our political system. True, it has been said that each of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or indirect, of either of the others. . . .

But the more pragmatic, flexible approach of Madison in the Federalist papers and later of Mr. Justice Story was expressly affirmed by this Court only three years ago in United States v. Nixon, 418 U.S. 683 (1974) . . . . Although acknowledging that each branch of the government has the duty, initially, to interpret the Constitution for itself, and that its interpretation of its powers is due great respect from the other branches, 418 U.S. at 703, the Court squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches. Rather, the unanimous Court essentially embraced Justice Jackson's view expressed in his concurrence in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 635 (1952):

'In designing the structure of our Government and dividing and allocating the sovereign power among
Court's rejection of the Myers theoretical predicates is applicable to the foreign affairs sphere, that doubt can be laid to rest by examining a wider spectrum of foreign affairs decisions.\(^9\) The results reached in those cases evince that larger concern for legitimacy -- for the political values and the practical sense of effective governance -- that is the touchstone of the Madisonian system of checks and balances. Out of these decisions there also emerges a broader allocative pattern of exclusive and shared powers wholly at odds with the Court of Appeals decision.\(^9\) That decision ignores the development of the separation of powers doctrine over the last fifty years, is at odds with most of the major foreign policy opinions of the Supreme Court in that same period, and has no parallel in the nearly two hundred years of practical accommodation between President and Congress on the matter of treaty terminations. It is an unprincipled decision.

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\(^9\) The Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence. 418 U.S. at 707 (emphasis supplied). Like the District Court, we therefore find that appellant's argument rests upon an 'archiac view of the separation of powers as requiring three airtight departments of government.' (See discussion of Youngstown at note 126 infra and accompanying text).

\(^9\) See Part IV infra.

\(^9\) See Part III infra.
4. The Core Theory and the Many Faces of Curtiss-Wright

Nothing underscores the last point more forcefully than an analysis of the Court of Appeals' effort to find support for its decision in Justice Sutherland's famous dictum in United States v. Curtiss-Wright Export Corporation.\footnote{299 U. S. 304 (1936).} The point is a detour, but a necessary one. No utterance by the Supreme Court has been so frequently used by the Executive as a "dialectical weapon" in its discourse with Congress concerning the allocation of the foreign relations powers of the federal government. No utterance has come to haunt the courts as regularly as Justice Sutherland's somewhat exuberant rhetoric.

In Curtiss-Wright the defendant company sought to overturn certain criminal indictments charging it with selling arms to the participants in the Chaco War in violation of an executive proclamation. It argued that the joint resolution of Congress upon which the President's proclamation was predicated constituted an unlawful delegation of legislative authority to the Executive. In rejecting this contention, Justice Sutherland not only concluded that the joint resolution was an entirely valid exercise of the legislative power but that the indictments could also be sustained as an exercise of:

the very delicate, plenary and exclusive power of the President as the sole organ of the Federal Government in the field of international relations -- a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power must be exercised in subordination to the applicable provisions of the Constitution.\footnote{Id. at 320.}

It is notable that in quoting from this dictum, the Court of Appeals omitted the Justice's adjectives -- "delicate, plenary and exclusive."\footnote{617 F.2d at 707.} To the extent this reflected a certain wariness, the court's caution was well taken. It is far from clear what Justice Sutherland

\footnote{94. 299 U. S. 304 (1936).}
\footnote{95. Id. at 320.}
\footnote{96. 617 F.2d at 707.}
had in mind. There are a host of interpretive questions, but the one that most concerns us can be put in the following terms: Assume that the Justice did intend to assign some prescriptive power to the President (i.e., that he was not speaking only of the President's prosecutorial powers) and suppose that instead of passing a resolution authorizing the prosecutions in question, Congress had considered and expressly rejected the idea. Did the Justice mean to imply that under these circumstances the President could have proceeded without

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97. Did the Justice, for example, intend to attribute to the President an authority to define as criminal under domestic law any theretofore noncriminal act merely because that act affected the nation's foreign relations? Alternatively, was the prescriptive power which the Justice ascribed to the President limited solely to acts which theretofore constituted violations of international law? If he is to be read in this fashion, then perhaps he had no prescriptive power whatsoever in mind. This is especially possible since the Constitution expressly confers upon Congress the power to "define and punish... offenses against the Law of Nations." U.S. Const. art. I, sec. 8 cl. 10. Perhaps, in other words, he is to be saying only that the President had a "plenary" prosecutorial power, which he could exercise in that case without benefit of statute or joint resolution because arms sales to the participants in the Chaco war constituted violations of international law and, as such, were in the nature of common law crimes under domestic law.

98. If the Justice, for example, meant only that the President, in his prosecutorial capacity, (see note 97 supra) possessed a "plenary" or "exclusive" power, the dictum is useless to the President. The power to prosecute for established crimes is a power to carry forward, or "execute," norms of conduct already laid down by some legislative authority. It is not a prescriptive power in the sense of a power to define new norms of conduct. Treaty termination, on the other hand, invariably involves adoption of new norms — of either international law or domestic law, or both. If the act of terminating a treaty, however, is not more than simple obedience to an antecedent decision by the statute or even treaty-makers (e.g., termination precipitated by the enactment of a later and inconsistent statute), then termination only serves propria vigore to adopt new norms of international law. In this case, the authority to terminate can readily be likened to the prosecutorial power. It is a means of giving international effect to an antecedent domestic legislative decision. In President Carter's case, however, this action in terminating the Mutual Defense Treaty rested upon no such antecedent legislative decision. It rested solely upon his own conclusion that termination was in the national interest. It was prescriptive in the broadest sense of creating a new normative regime governing United States' relations with Taiwan. Plainly, such an act can draw no support from Justice Sutherland, if interpreted as referring solely to the President's prosecutorial function.
regard to the congressional will? Or did he only intend to ascribe to the President power to act so long as the statute- or treaty-makers had remained silent? Was he speaking only of an interstitial prescriptive power?

First, note should be taken of the context in which the statement appears. It was offered as support for a decision validating a congressional resolution upon which the President had relied. It would seem a bit strained to suggest that the Justice expressly had in mind a situation in which the President sought to ignore or override a congressional decision. Context suggests that he was speaking only of an interstitial prescriptive power. Read in this fashion, the dictum constitutes a very modest and readily defensible extension of the law found in a long and respectable line of authority. But if this is the proper interpretation of the Justice's statement, it is of no assistance to the Court of Appeals. As the historical record shows, circumstances can arise in which treaty termination may be analogized to an act of interstitial law-making. In sharp contrast to those historical examples, however, President Carter in the Taiwan situation was claiming a power to override an otherwise completely viable treaty policy relying upon nothing more than his personal vision of the national interest.

Even more telling, the Court of Appeals itself admitted that, if read to endow the President with power to override the expressed will of the statute or treaty-makers, the dictum would be incredible. Justice Sutherland, it must be remembered, was not speaking of the President's power in relationship to treaties. He was concerned with the power to make domestic criminal law. To conclude, therefore, that the Justice was asserting a presidential power to override the congressional will on such a matter, is tantamount to saying that the President could repeal any foreign affairs statute he chose anytime he chose to do so. As this was precisely the idea the Court of Appeals was at great pains to deny, one ought not to attribute the thought to Justice Sutherland unless compelled by his language to do so. Such a

99. See cases discussed infra Part IV.
100. See Part III infra.
101. See notes 182 and 186 infra and accompanying text.
102. 617 F.2d at 707.
reading would constitute a total repudiation of the separation of powers doctrine and of the political values that underlie that precept. Indeed, if read in this broad fashion, a strong case can be made for the conclusion that the dictum has been overruled by Youngstown Sheet & Tube Company v. Sawyer. Finally, if Justice Sutherland's dictum is supportive of President Carter only when read in this improbable, if not incredible fashion, that fact tends to underscore how very far the Court of Appeals strayed from established principles in upholding the President.

III

THE PRESIDENT'S FOREIGN POLICY POWERS:
A GENERAL DESIGN

It is not enough to state the case against the President and the Court of Appeals negatively. The case must be affirmatively placed within that larger design that has developed through the decided cases in keeping with the basic political values and practical scheme of government embodied in the separation of powers doctrine. Apart from his vast powers of initiative and administration, two basic principles establish the larger pattern of the President's power over foreign relations whenever he purports to act with "legal effect." This includes situations in which he issues commands binding upon the civil and military officers of the government in the performance of their duties.\footnote{\(104\)}

The first, and most fundamental precept is that the President must act in obedience to and in furtherance of the policies which reflect the expressed will of the statute- or treaty-makers. If he takes the initiative to change the statute- or treaty-maker's policy, the

\footnote{104. We are not unmindful of possible and subtle distinctions, illustrated by Consumer Union of United States v. Kissinger, 506 F. 2d 136 (D.C. Cir. 1975), between presidential acts that have legal effect and acts of a different order. In that case, the executive branch undertook to limit imports by sponsoring a series of "self imposed limitation" by foreign producers. While statutes existed empowering the President to limit imports for the general purposes he was otherwise attempting to achieve, the Executive eschewed reliance upon those statutes because their procedures were too cumbersome. In spite of the fact that the undertakings were rather clearly induced by various Executive representatives, the court refused to declare the Executive's actions unconstitutional because it deemed the unilateral private undertakings legally "unenforceable." This problem, however, certainly does not arise in our situation. The act of terminating a treaty has legal effect in every sense. It negates obligations that would otherwise be binding upon the sovereign United States under international law. If the terms of a treaty are invoked as rules of decision in a court of law, the act of terminating the treaty definitively bars a decision predicated upon those terms. More affirmatively, the termination of a treaty brings into existence a new normative regime, whether embodied in customary international law, in an antecedent and subsisting statute or in common law.}
Congress or Senate must, at some appropriate point, concur in the change. Far from depending upon the supremacy clause, this basic principle is based squarely upon the higher order of legitimacy that generally attaches to the concurrent will of President and Congress (the statute-makers) or President and Senate (the treaty-makers). For purposes of this precept it is totally irrelevant that the question of policy pertains to the performance by the President of a function in which Congress is not expressly given the authority to participate.105

There are, however, exceptions to this basic principle. Our constitutional scheme is not blind to the practical needs of the President in discharging his office effectively. Nor is it blind to the fact that exigencies can arise under which too rigorous an adherence to our democratic postulates and too zealous a regard for our liberties could leave the nation impotent to defend either. For example, the Congress cannot, by statute, encroach upon the President's right to remove those high officers of the executive branch through whom he must conduct diplomacy, or deny him the right to appoint special agents for that purpose.106 Doubtless he possesses a broad privilege immune from legislative restraint to control the disclosure, even to Congress, of executive documents and other communications pertaining to foreign affairs.107 History seems to have established a comparable rule with regard to the recognition power.108

While debatable, it is also possible to argue that the value calculus of checks and balances may merit the imposition of limits upon the power of Congress to restrict

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105. The very fact of a government with separate departments means that the Executive is called upon to perform many functions in which Congress is not required to participate or cannot do so (e.g., the prosecution of law suits, the negotiation of agreements, the giving of notice terminating a treaty, commanding the nation's forces in battle). If a policy embodied in a statute or treaty were dependent for execution upon an express grant to Congress of the right to participate in each of the particular Executive functions to which that policy might be relevant, statutes and treaties would scarcely ever by obeyed. The confusion between instrumental function and policy-making to which the Court of Appeals succumbed simply has no place in our constitutional thought.

106. This much is left from the teachings of Myers v. United States, 272 U.S. 52 (1926), and Humphrey's Executor v. United States, 295 U.S. 602 (1935) and Wiener v. United States, 357 U.S. 349 (1957). See note 89 supra.


the President's emergency war powers or his authority to withdraw American forces from active hostilities.109

The cases from which these examples are drawn illustrate the broader analytic mode which, under the separation of powers doctrine, must guide the resolution of all basic questions concerning the allocation of constitutional powers. These authorities also underscore how far Goldwater, when tested by that mode, stands removed from this important, but limited, sphere of exclusive presidential authority.110

The second major postulate of the broader design is that, outside the limited area of his exclusive powers, the President possesses a potentially expansive independent power to act with "legal effect" so long as the statute and treaty-makers have remained silent. While the boundaries of this interstitial power have never been fully explored by the decided cases, the specific enumerations of Article II have thus far proved wholly adequate to the purpose. The President has needed no assistance from some vague notion of "inherent" power derived from the executive power clause.

Principal among the sources of this interstitial power is the Take Care clause, often cited as a source of presidential law-making authority, notwithstanding the absence of an antecedent statute or treaty.111 Likewise, the President, as commander-in-chief, possesses substantial power to expose and even commit the nation to armed conflict without benefit of a congressional declaration or authorization.112 The "organ" function is somewhat different. As a source of the President's powers of initiative, its scope is extensive. By expressing the attitudes, the inclinations, and expectations of the United States, often with portents of future action, the President can decisively shape the course of relationships with a foreign power and narrow the effective scope of congressional discretion when the decision comes under its scrutiny. But as a source of authority to act with binding "legal effect" it is probably of minimal significance. If Justice Sutherland's Curtiss-Wright dictum is to be assigned any analytically defensible

109. See discussion Part IV.
110. See discussion Part IV.
111. See discussion beginning at note 123 infra and accompanying text.
112. See discussion beginning at note 144 infra and accompanying text.
significance, it is as authority for this last point.\footnote{113}{See discussion Part II (4).}

Still, there are exceptions to this precept; subjects upon which the President possesses no power whatever to act with legal effect except with congressional or senatorial concurrence. Long tradition, and some authority,\footnote{114}{See cases cited at note 55 supra.} hold that neither treaties nor, a fortiori, executive agreements, may serve in lieu of a statute as the basis for a criminal prosecution or for the withdrawal from the Treasury of funds needed to carry out the agreement. It is quite clear that, as commander-in-chief, there are limits beyond which the President cannot commit the nation to war without an express congressional authorization.\footnote{115}{See note 147 infra and accompanying text.} Even though subject to serious question, recurrent dicta suggest that the President cannot, by executive agreement or unilateral act, effectively regulate commerce with a foreign nation without statutory authorization or ratification.\footnote{116}{See cases discussed at notes 56 and 58 supra.} Finally, it would be a mistake to assume that the President acts without practical constraint in that vast diplomatic realm where, as "organ" of the nation, he can often shape our relations with foreign governments and create that "antecedent state of things" which circumscribes Congress in the exercise of its judgment.

Once again, in both the grant of and limitations upon this interstitial power, one can observe the workings of the Madisonian conception of the separation of powers doctrine. There is a search for a workable balance between effective governance on the one hand and the preservation of liberty and democratic values on the other. There is also a recognition that the President has a national constituency and that each of the substantive enumerations of Article II, unlike the executive power clause, possesses its basis of legitimacy, albeit more attenuated than that which congressional concurrence might supply. Nor is the system unmindful of the fact that, in a large, heterogenous democracy which at times exhibits a certain penchant for chaos in its deliberative processes, there is a need for leadership. Persuasion, not naked power, is the weapon we expect our leaders to use. But we will not deny power when the more open deliberative processes
of Congress have proved indifferent or too chaotic or fractionalized to reach a decision.

So it is that under the Take Care clause, the President, in acting without benefit of statute or treaty, must invoke broader policies and objectives reflected in related statutes or treaties, conform to the postulates of customary international law, or act to preserve the structure of the nation's established international relationships. Indeed, there is something eminently measured and sensible in allowing the President to act without invariably referring to Congress matters where speed and confidentiality may be essential. It must be remembered, however, that he is always subordinate to Congress should it choose to act, either with his concurrence or over his veto.

As commander-in-chief the President may draw on necessity as the great legitimator of his independent power. But those powers are not unlimited. Without attempting any refinement of the subject, the limits implicit in the definition of the theater of war and of the circumstances under which he may commit troops to active hostilities reflect a point at which necessity must give way to the demand for a broader consensus before calling upon the nation to make the extraordinary sacrifices which war may require.

The fact that the President may not expend money from the Treasury without benefit of an appropriations statute is not only a response to an explicit constitutional command\(^\text{117}\) but a linchpin of our system. It is probably the single most important factor assuring that the general scheme of the Constitution is, in fact, adhered to in the day-to-day conduct of diplomacy. The requirement of a statutory predicate for criminal prosecutions, reflects the fact, in light of our commitment to personal liberty and the rule of law, that any decision that may lead to the imprisonment of an individual must proceed from a concurrent will of President and Congress, including the latter's more popular branch.

How, then, does the problem of treaty termination fit within this larger design? In the improbable event of a treaty, rather than executive agreement, on a subject within his exclusive sphere, the President could,

\(^{117}\) U.S. Const. art. 1, sec. 9, cl. 7.
of course, terminate that treaty.

Apart from this eccentric possibility, however, one must begin fitting the treaty termination problem into the larger design of the President's powers by recognizing again that all self-executing treaties perform a dual role. They are sources of domestic law addressed to judges, to the Executive, occasionally to private individuals, and possibly even to the Congress. They also prescribe rules of conduct binding upon the sovereign United States under international law. Because of this dual role, situations may arise where the two facets of a treaty diverge. The classic example, of course, is the case where the treaty as a rule of domestic law has been superceded by a subsequently enacted statute. In responding to the resulting divergence, the courts have placed themselves under a constitutional obligation to follow the latest expression of the legislative will and, as a corollary, have required the President to use his powers as the "organ" of the nation to end the divergence by terminating or abrogating the treaty. This constitutes one example of a situation where the President may indeed terminate a treaty without reference to either Congress or Senate precisely because he is powerless either to ignore or override a statute or later treaty.

On the other hand, cases will also arise where the treaty text, in both its domestic and international effects, is the final and authoritative statement of the law. Because the President cannot ignore or override the treaty-makers, he is constitutionally prohibited from terminating the treaty without congressional or senatorial concurrence.

Between these extremes, a number of situations can arise. There may be situations in which the basic direction and objectives of American foreign policy, as embodied in subsequently enacted statute or treaty, are substantially at odds with the policy of an earlier treaty, even though, technically, adherence to one need not give rise to a violation of the other. It can be said that both the international and domestic law effects of the

118. See note 66 supra.
119. See cases cited at note 172 infra.
120. See note 172 infra and accompanying text.
earlier treaty are out of line with the latest expression of policy by the statute- or treaty-makers. Here the President can be viewed as empowered to bring the earlier treaty regime into conformity with that policy by terminating the treaty. That the President may act without reference to Congress would seem a modest extension of his power to terminate treaties that have been superseded by subsequently enacted statutes.

Also, a foreign government may breach a treaty under circumstances which, according to international law, results in the United States having the choice of either terminating the treaty or "waiving" the breach and treating the agreement as a continuing obligation of both parties. Here, the President's authority can be analyzed in either of two ways. He can be said to possess an independent authority to make that choice, so long as his choice can be justified by reference to the policies and objectives that underlay the original decision to make the treaty. Tested by this standard, the President's authority would seem indistinguishable from the power, noted above, to conform an earlier treaty regime to the broader policies and objectives of a later enacted statute or treaty.

Alternatively, breach of the treaty by the other party and possibly the occurrence of other events outside the control of either President or Congress may be analyzed as creating a situation so distinct from that which obtained when the treaty was made as to constitute a new problem which can be characterized in either of two ways. One can say that, had they contemplated these new circumstances the original treaty-makers would not have entered into the treaty. More modestly, one might conclude that a new situation has arisen with regard to which the treaty-makers have expressed no policy. Termination under the first characterization can be thought of as designed to bring the international legal obligations of the United States into conformity with the latest, albeit presumed, intention of the treaty-makers' will. If characterized as a situation with regard to which the treaty-makers have expressed no policy, granting the President independent power to terminate the treaty could be justified as an exercise of his interstitial power to act with "legal effect," provided the subject matter involved is not one upon which congressional concurrence is otherwise required.
The greatest difficulty with both of these characterizations lies in identifying the events that warrant their use. And this difficulty can be especially problematic since it is cases in which these characterizations must be used that reach to the farthest boundaries of an independent presidential power.

When, aided by a few judicial decisions, this analytic structure is superimposed upon the historical record of independent executive treaty terminations, several conclusions emerge. The vast bulk of these cases reside comfortably within our several modest extensions of the President's power to terminate those treaties that are inconsistent with a subsequently enacted statute. In only a few instances is it necessary to push to the very boundaries of the President's power under this line of analysis. Admittedly, some of these cases stand at the outer limits of that boundary. In the contrast between these latter cases and President Carter's action, however, one can see quite vividly how far the President strayed beyond the limits of his constitutional authority.

\footnote{121. See, e.g., note 178 infra and text accompanying note 179 infra.}
IV

A WIDER SURVEY OF CASES: THE TAKE CARE CLAUSE AND THE WAR POWERS

In addition to the decisions already noted and others reviewed in the context of the historical record, two further lines of authority are particularly helpful in completing our brief sketch of the presidential powers because they are based on the Take Care clause and the war powers. The first line consists of the decisions that culminated in Youngstown Sheet & Tube Company v. Sawyer, the celebrated Steel Seizure Case.

The line begins with Little v. Barreme, in which Chief Justice Marshall struck a note that echoes throughout our constitutional history. In the absence of a statute or treaty, the Take Care clause is an independent source of presidential power. In the presence of a statute or treaty, however, the clause constitutes a limitation upon presidential power.

Little was followed in In re Nagel, which not only affirmed the dual function of the Take Care clause, but underscored the potentially expansive character of that clause as a source of presidential power where Congress has remained silent. The Court held that

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122. 343 U.S. 579 (1952).
123. 6 U.S. (2 Cranch) 170 (1804).
124. The Court concluded that the captain of a U.S. naval vessel which had seized a Danish merchantman while the latter was outbound from a French port, was liable to the Danish owners because the seizure violated a statute under which only vessels "bound or sailing to" such a port could be seized. This conclusion was reached, however, only after Chief Justice Marshall conceded that the President, whose "high duty it is to 'take care that the laws be faithfully executed' and is Commander-in-Chief... might without Congressional authority in the then existing state of things have authorized the action taken." Id. But Congress had made its will plain and the captain of the naval vessel could not escape liability for violating that will merely because he had followed the President's orders.
125. 135 U.S. 1 (1889).
126. Nagel had been jailed and charged by the State of California for a murder allegedly committed while guarding Mr. Justice Field while the latter was on circuit. The issue was whether Nagel might have habeas corpus under a statute requiring that he be "in custody for an act done or omitted in pursuance of the law of the United States." There was,
the President's "duty" under the clause was not:

limited to the enforcement of acts of Congress or of treaties of the United States according to their expressed terms. [It] includes the rights, duties and obligations growing out of the Constitution itself, our international relations, and all of the protection implied by the nature of the government under the Constitution.127

The notion of a power to enforce the "rights, duties and obligations growing out . . . of [the nation's] international relations and [out of] the protection implied by the nature of the government" certainly attributes to the Take Care clause a flexible and potentially expansive capability. Equally important, the structure of the opinion is transparent. When considering the case as though Congress had been silent, the Court adopts an expansive view of the President's powers. Once a statute is introduced, however, the opinion shifts completely into the interpretive mode.128 A similar pattern has, from the beginning, dominated the work of the courts on foreign policy as well as domestic cases, the most notable modern example being the Steel Seizure129 decision. There the Secretary of Commerce had taken over the management of the nation's steel mills because, according to the President, a threatened strike would have shut those mills down and threatened the flow of war material to our forces in Korea. In upholding an injunction against the Secretary, Justice Black, writing for the Court, characterized the President's action as a clear and unequivocal act of "lawmaking."130 Whether this implied that the

126. (continued)
the State argued, no federal statute in existence empowering U.S. Marshals to protect the justices of the Supreme Court. Accepting the State's contention, arguendo, the Court, without reference to any "inherent" power in the Executive, responded by relying upon the Take Care clause. Id.
127. 135 U.S. at 64.
128. This is apparent from the care with which the Court documented its conclusion that Nagel's actions did indeed fall within the powers granted to U.S. Marshals by statute. Id. at 69.
129. 343 U.S. 579 (1952).
130. Id. at 588.
President invariably required a statutory warrant for actions not within his powers as commander-in-chief is unclear.\textsuperscript{131} Congress had, in fact, legislated on the subject. The President had not complied with the authority given to him because it was too cumbersome and Congress had expressly refused to grant a broader authority.

It is precisely this last point which led Justice Clark,\textsuperscript{132} in his concurring opinion, to conclude that the case was controlled by \textit{Little v. Barreme}.\textsuperscript{133} Implicit in all the opinions of the Court, including Chief Justice Vinson's dissent, is a clear-cut rejection of the government's argument that the President possessed an "inherent" power to do what had to be done to meet the emergency at hand.

If there was no such "inherent" power to meet the exigencies of war, one could scarcely argue a broader "inherent" power over all foreign relations. This logic applies to \textit{Goldwater} because \textit{Steel Seizure} involved foreign affairs.\textsuperscript{134} Indeed, if, as in \textit{Curtiss-Wright},\textsuperscript{135} the prosecution of an American company in an American court for a violation of domestic law constituted a foreign relations matter because the crime charged involved the shipment of unwanted goods abroad, then plainly the seizure in America of American property in order to assure the supply of needed goods abroad was equally a foreign relations question. If one compares the foreign policy stakes at issue in the two cases, \textit{Curtiss-Wright} pales to insignificance. This point was

\begin{itemize}
\item \textsuperscript{131} The Justice expressly considered and rejected the contention that the President's action fell within his powers as Commander-in-Chief. \textit{Id}. at 587.
\item \textsuperscript{132} \textit{Id}. at 660.
\item \textsuperscript{133} 6 U.S. (2 Cranch) 170 (1804).
\item \textsuperscript{134} The Government sought to show that the President had acted in furtherance of our obligations under the United Nations Charter. 343 U.S. at 668. And there were sworn statements from the cabinet purporting to prove the disastrous effects a continued steel strike would have had on the strategic interests of the United States in both the Far East and Europe. \textit{Id}. at 678.
\item \textsuperscript{135} 299 U.S. 304 (1936).
\end{itemize}
POWER TO TERMINATE TREATIES

inadvertantly but rather dramatically illustrated by Attlee v. Laird. Moreover, in light of the record, it would have been a dereliction of duty for the Supreme Court to have treated the case as a wholly domestic matter if the President had an "inherent" power over foreign affairs that was adequate to sustain his action. The Steel Seizure decision stands, in short, as an authoritative denial of any broad "inherent" power over foreign policy that would permit the President to ignore or override the statute or treaty-maker's will.

This last point emerges most clearly in a comparison of Justice Jackson's concurring opinion and Chief Justice Vinson's dissent. Justice Jackson commences with words that deserve repeating, words that speak with a peculiar relevance to our present problem:

That comprehensive and undefined Presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal advisor to a President in time of transition and public anxiety. While an interval of detached reflection may temper teachings of that experience they probably are a more realistic influence on my views than the conventional materials of judicial decision. . . But as we approach

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136. 347 F. Supp. 689 (E.D. Pa. 1972), aff'd mem., 411 U.S. 911 (1973). In Attlee the court recognized that the Steel Seizure decision was something of an embarrassment to its conclusion that all the issues involved in the challenge to the Vietnam war were non-justiciable. It, therefore, sought to distinguish the Steel Seizure decision as essentially a domestic case in which the "effect on the foreign relations of this country . . if any . . would have been clearly minimal compared to the drastic change which nationalization by the President would otherwise have brought about in the free enterprise system." 347 F. Supp. at 701, 702. This, the Attlee court asserted, was in sharp contrast to the situation in Curtiss-Wright, which dealt with a critical foreign policy matter: the efforts of the President "to ease the tensions in the Chaco."

The comparison is surely eccentric. Somehow Attlee seems to have demonstrated rather nicely the futility of trying to insulate the rhetorical tradition from the embarrassments of the Steel Seizure decision.

137. 343 U.S. at 634.
138. Id. at 634.
the question of Presidential power, we may overcome mental hazards by recognizing them. The opinions of judges, no less than executives and publicists, often suffer the infirmity of confusing the issue of a power's validity with the cause it is invoked to promote, of confounding the permanent executive office with its temporary occupant. The tendency is strong to emphasize transient results upon policy... and lose sight of enduring consequences upon the balanced power structure of our republic.\footnote{139}

Justice Jackson then relegated the "inherent" powers notion to the realm of rhetoric;\footnote{140}-- a "dialectical weapon" which prudence might advise withholding from any serious judicial test.

The lesson is clear. The President's power to seize the steel mills, if it existed at all, was to be found solely within the textual enumerations of Article II. The Justice searches and finds each wanting although he is quite prepared, as part of his famous threefold division of the presidential powers,\footnote{141} to admit that there may be a "zone of twilight" in which congressional "inertia, indifference or quiescence" may sometimes "enable, if not invite, measures on independent Presidential responsibility."\footnote{142}

It is precisely upon this last point that Chief Justice Vinson builds his long dissent.\footnote{143} Congress had not foreclosed seizure in the case of labor disputes handled under the Defense Production Act. The Taft-Hartley history was not controlling. Moreover, according to

\footnote{139} Id. at 634.
\footnote{140} See note 75 supra and accompanying text.
\footnote{141} (i) When the President acts pursuant to a congressional authorization, or (ii) when, relying upon his "own independent powers," he acts in the "absence of either a Congressional grant or denial of authority"; or (iii) when he "takes measures incompatible with the ... will of Congress." The third type of action could, the Justice asserted, be sustained by the courts only "by disabling Congress from acting upon the subject." 343 U.S. at 635-38.
\footnote{142} Id. at 637.
\footnote{143} Id. at 701.
the Chief Justice, a broad foundation for action under the Take Care clause had been laid in our treaty obligations, the several United Nations resolutions relating to the Korean War, and the "mass" of legislation passed by Congress in furtherance of the war effort. Justice Douglas's contention that, on the subject of property seizures, the Take Care clause was not enough is met by citations to Little v. Barreme and In re Nagel. Throughout it all, the Chief Justice utters not one word of support for the government's "inherent" powers argument. To the contrary, he repeatedly emphasizes that his case for the President rests squarely upon the specific enumerations of Article II.

Equally important, it seems plain that the Chief Justice would have prevailed had Congress remained silent on the point rather than considering and rejecting the use of seizures as a device for settling labor disputes. The dissenters (the Chief Justice, and Justices Reed and Minton) would certainly have been joined by Justices Burton and Clark. The same is almost certainly true of Justices Jackson and Frankfurter. Only Justice Douglas would clearly have remained unpersuaded, though the same is probably true of Justice Black. The decision is a primary illustration of a larger constitutional design integrating presidential subordination to the statute- and treaty-makers with a potentially expansive interstitial power to act independently where the latter have remained silent.

The Steel Seizure decision leads directly into a second line of important cases, those dealing with the President's war powers. We need go no further than the spate of circuit court decisions dealing with various challenges to the war in Southeast Asia. In all these cases the issues raised were whether the President could constitutionally involve the nation in one or more phases of the Vietnam conflict without some congressional authorization and whether he had actually received the authority that was constitutionally required.

In the earliest decisions, these questions were summarily declared nonjusticiable. Later, however, all of the circuits that had an opportunity to review the problem (First, Second, and District of Columbia)
were prepared to treat the challenges as justiciable to the point where they could conclude that some congressional authorization was in fact given. Having come this far, they, with one exception, steadfastly refused to intrude further. They held that questions concerning the proper form of the authorization (a formal declaration versus various statutes and resolutions) or the precise scope of the hostilities authorized were nonjusticiable.

While, in these decisions, the discussion of the President's powers invariably occurs in the context of the political question doctrine, the courts, in passing upon their own competence to decide whether congressional assent was constitutionally necessary, consistently made plain their disposition on the merits of that question. The Vietnam hostilities had reached a point where, without some form of congressional sanction, the President would have exceeded his constitutional authority. If in some cases this was, strictly speaking, dictum, it was as close to a holding as dictum can get.

In upholding the trial court's denial of a temporary injunction, the Second Circuit in Burke v. Laird was confronted at the threshold with the government's contention, based upon Curtiss-Wright, that the President's power as commander-in-chief was "co-extensive" with his powers over foreign policy and that the latter was a "unitary" power which encompassed the whole of the nation's foreign relations. Therefore, the government argued, any judicial inquiry into the President's actions in Vietnam would be "second guessing" a political decision. The appeals court quickly disposed of this argument. The argument would mean that the enumerated powers of Congress—in this instance the power to "declare war"—were an

145. Having come this far, the question they faced was immediately transformed. By their own admission, the courts no longer confronted a policy decision upon which Congress and the President were at odds or upon which Congress had remained silent. They confronted a policy upon which Congress and the President were largely in accord. Recognition of this fact was an important consideration in their refusal to probe further.
147. 429 F. 2d 302 (2d Cir. 1970).
"antique formality." The idea is contrary to both the intent of the framers and the history of the subject. "Orders to fight," the court concluded, at least in some circumstances, could be issued only under the "proper authorization of both branches." This being so, there was, at least at the threshold, a "judicially identifiable duty" which could be judicially enforced, i.e., a justiciable question.

In Massachusetts v. Laird, the First Circuit turned to the constitutional text to determine whether, in alleging that a formal congressional declaration was necessary, petitioner had raised a question "textually committed" to the political departments. From its exegesis upon that text the court concluded that:

[In giving some essential powers to Congress and others to the executive [the Constitution textually] committed the matter [of conducting undeclared wars beyond emergency defense] to both branches whose joint concord precludes the judiciary from measuring a specific executive action against any specific clause in isolation.

Immediately, however, the court recognized that it had all but decided the question on the merits. Forthrightly, it pushed on to restate the conclusion:

All we hold here is that in a situation of prolonged but undeclared hostilities, where the Executive continues to act not

149. 429 F.2d at 305.
150. This aspect of the first Burke decision was reaffirmed when later the Second Circuit upheld the denial of a permanent injunction because the trial court correctly found that Congress' duty "of mutual participation in the prosecution of war" had been satisfied. (Orlando v. Laird, 443 F.2d 1039, 1040 (2d Cir. 1971)). At no time did the Second Circuit deviate from this basic principle even when, in later cases, it dismissed a number of attacks on the war based upon repeal of the Tonkin Gulf Resolution (Da Costa v. Laird, 448 F. 2d 1368 (2d Cir. 1971)), the mining of the harbors in North Vietnam (Da Costa v. Laird, 471 F.2d 1146 (2d Cir. 1973)) and the Cambodian incursion (Holtzman v. Schlesinger, 484 F. 2d 1307 (3d Cir. 1973)).
151. 451 F. 2d 26 (1st Cir. 1971).
152. Id at 33.
only in the absence of any conflicting Congressional claim of authority, but with steady Congressional support, the Constitution has not been breached. Should either branch be opposed to the continuance of hostilities, however, and present the issue in clear terms, a court might well take a different view. 153

If the absence of congressional support could yield a "different view" on the constitutionality of an undeclared war, surely the necessity of such support becomes something more than a vaguely implied requirement.

Finally, there is the District of Columbia Court of Appeals' own decision in *Mitchell v. Laird*. 154 After deciding that it was competent to consider whether the President was constitutionally bound to obtain Congress' approval of the hostilities in Vietnam, the court declined to answer directly the question on its merits. It turned instead to consider whether Congress had in fact given its approval. One judge concluded that it had. The majority thought that the relevant congressional enactments could not serve "as a valid assent to the Vietnam war." 155 Then rather than going back to decide on the merits whether a valid assent was even necessary, the court noted that President Nixon, having inherited the Vietnam war, had declared his intention to bring it to an end. Absent a showing of presidential bad faith, the court concluded that it could not judge the means or timing selected by the President in bringing about this result. 156 Surely, the use of such a rationale all but explicitly confirms that, but for the special context, the President could no longer have prosecuted the war because he lacked the requisite congressional assent.

In sum, the law today would seem to be as clear as circuit unanimity without express Supreme Court affirmation can make it. Whatever actions a President

153. *Id.* at 34.
155. *Id.* at 615.
156. *Id.* at 616.
might independently take as commander-in-chief, there
is a point, measured by the nature and duration of the
hostilities, beyond which he cannot commit the nation
to active fighting without an affirmative congressional
warrant unless those hostilities have their origin in
emergency circumstances. Emergencies aside, war is
a question upon which the President cannot act in the
interstices of the congressional will whether as
commander-in-chief or under the Take Care clause.

Moreover, if we read the Steel Seizure majority
correctly,157 this lack of power to conduct actual
hostilities contrasts with the power to seize private
property in support of an authorized war. That such a
line can be drawn illustrates how thoroughly our
constitutional scheme is rooted in the search for a
workable balance between governmental efficacy and
our democratic postulates, between a protection of the
collective welfare and the preservation of individual
liberty. It is scarcely credible that such a system
could vest in its executive arm, which controls virtually
all the levers of governmental power, an unlimited
"inherent" power to act merely because the subject
of the action touches upon foreign relations.

To these cases we need append only a brief note
regarding such decisions as Reid v. Covert158 and
United States ex rel. Toth v. Quarles159 in which
the Court struck down a number of congressionally
authorized executive agreements insofar as those agree-
ments called for civilian dependants of servicemen (Reid)
or discharged servicemen (Toth) to be subject to trial by
court-martial for crimes committed while stationed
abroad. Neither the Nation's defense nor its foreign
policy interests sufficed, the Court held, to warrant
denying the defendants their rights to a jury trial in
a civilian court upon the indictment of a grand jury.
It may be true that these cases dealt with the guarantees
of the Bill of Rights. But it would be anomalous to
suggest that if, after so thoughtfully seeking a work-
able balance between the collective will in foreign
affairs and the liberties of the individual as guaranteed

157. See discussion at note 146 supra and accompanying text.
158. 354 U.S. 1 (1957).
by the Bill of Rights, the courts\textsuperscript{160} in dealing with treaty terminations, could properly abdicate all concern for checks and balances; that they might suddenly and justifiably lose sight of the fact that checks and balances are as much concerned with the protection of individual rights as the Bill of Rights, and could throw all of our basic democratic postulates upon the mercy of a total preoccupation with governmental efficacy.

Against the background of these cases we can be far more precise in relating the power to terminate treaties of alliance to Congress' war powers. Two points set the stage. First, setting emergency circumstances aside, if a decision "for war" must command the support of both President and Congress, it follows that should Congress declare war by concurrent resolution, the President, who has no constitutionally mandated role in that decision, may refuse to commit American forces to battle. His right of refusal is checks and balances at work. Further, it may be that this power of refusal persists even if Congress acts by statute or joint resolution, including a statute or resolution passed over the President's veto. \textit{Arguendo}, we concede the point. For analytic purposes, we assume that war, with its portent of great sacrifice by the citizenry and its dangers to liberty, requires the continuous concurrence of both President and Congress and that the President can withdraw his concurrence at any time by

\textsuperscript{160} For a wider perspective on this process see Stotzky & Swan, \textit{Due Process Methodology and Prisoner Exchange Treaties: Confronting an Uncertain Calculus}, 62 Minn. L. Rev. 733 (1978); see also \textit{Ex Parte Quirin} 317 U.S. 1 (1942) and \textit{In re Yamashita}, 327 U.S. 1 (1946) upholding a Presidential order establishing military commissions for the trial of certain persons accused of violating the laws of war, insofar as Congress had authorized the President's actions. The Court also held, however, that as applied to commissions sitting in United States territory, the President's order barring civilian court review of the commission decisions could not foreclose review upon \textit{habeas corpus}. Only in Johnson v. Eisentrager, 339 U.S. 763 (1950), did the Court say that, since the \textit{habeas} statutes did not expressly cover the case, the writ would not lie to review commissions established to try enemy aliens outside the territorial jurisdiction of the United States. Yet, paradoxically the Court did in fact review the merits of the commission's decision much as it would had its jurisdiction in \textit{habeas} been established. See also Duncan v. Kahanamoku, 327 U.S. 304 (1946).
terminating hostilities.

The second preliminary point concerns the terms of our Mutual Defense treaties. The Mutual Defense Treaty between the United States and Taiwan is typical. As noted, that agreement imposes upon the sovereign United States an unqualified (i.e., self-executing) international legal obligation to judge in good faith whether an attack on Taiwan impairs the security of the treaty area. Any impairment of the latter is, under the language of the treaty, deemed to impair the security of the United States as well. But the treaty also makes plain that the good faith judgment called for is to be made by constitutional procedures.

Accordingly, under the hypothesis that the power to decide "for war" is a shared power, the language of the treaty would seem to signify the following results. So long as both Congress and the President adhere to the good-faith standard of the treaty, Congress could not command the President to respond to an attack on Taiwan if the President judged the response unwarranted under the treaty criteria. Conversely, the President could not unilaterally respond if Congress refused to concur. In neither event could the United States be held to have violated its international legal obligations. But, if this is so, parallel reasoning suggests that if either department may, by withholding its concurrence, foreclose the other department from pursuing a decision "for war," either department may terminate any treaty that might precipitate the need to confront such a decision.

The logic may be sound, but to qualify as the basis for a general right in the President to terminate any treaty of alliance, it must posit that the existence of an alliance invariably increases the prospects for war and that a decision to terminate an alliance invariably distangles the nation from that prospect. The premise, of course, contradicts the fact that the treaty-makers uniformly thought of our alliances as a deterrent to war. Also, all of our mutual security agreements, including the Mutual Defense Treaty, constitute parts in a larger network of undertakings, each limiting the freedom that the President

161. See note 67 supra.
162. See Article V of the Mutual Defense Treaty quoted at note 65 supra.
163. See note 67 supra.
and Congress would otherwise have had in deciding how to respond to an attack on our ally. This network was constructed in the firm belief that a series of such self-denying ordinances offered the best prospect for never having to face the necessity of the decision which we undertook to make. Lastly, it is deceptive to think that because termination will free the United States from its legal obligation to defend a former ally, termination will change the necessity for that defense. By their own terms, our alliances are rooted in the perception that the security of a treaty partner is related to our own security. While a change in that perception might warrant terminating a treaty, termination \textit{per se} does not change either the perception or the underlying reality.

More generally then, so long as one works, as the law must, within the framework of the assumptions and objectives laid down by the treaty-makers, one is compelled to conclude that if the termination of any one treaty removes an important deterrent to an attack on the treaty partner or on any other nation with whom we remain allied, the termination can be characterized as a step away from war only if accompanied by a change in the perceived probabilities of such an attack or in the attack's perceived threat to our own security. If unaccompanied by such change, the decision must be characterized as potentially entangling\textsuperscript{164} the United States in our former allies' affairs in all the more immediate ways that the treaty was designed to avoid -- the need to fight a war.

Within this framework, it would seem quite impossible to demonstrate that a decision to terminate a treaty of alliance would, in every case, constitute a step away from war. For example, it would be sheer folly to suggest that the dismantling of NATO or the Korean defense pact would enhance the prospects for a stable peace in today's world. This, in turn, is quite sufficient to put at rest any simplistic notion that the termination of an alliance is different in its portent of war from the making of an alliance.

But reality requires that we go a step further. One can readily posit a series of changes in the politico-military

\textsuperscript{164}. For the notion that treaty terminations "disentangle" the United States from other nations' affairs, see L. Henkin, \textit{Foreign Affairs and the Constitution} 169 (1972).
structure of the world in the light of which a dis-
mantling of NATO would be a positive step towards peace. One can also concede that Presidents are unlikely to propose the termination of any alliance except in the context of such changes. Indeed, cases could occur in which there could be no national dissent from the conclusion that termination constituted a step away from war. More likely, however, the tendencies and the wisdom of terminating an alliance will be a matter for rational debate involving a host of difficult questions.

The Taiwan situation is illustrative. One can readily accept the fact that the normalization of relations with Peking is in the interests of the United States and that, by agreeing to normalization, Peking has signaled a new, less belligerent posture toward Taiwan. But there are other factors in the equation. Peking continues to claim that Taiwan is part of China, that the unification of China is a matter for the Chinese alone to settle and it has pointedly refused to renounce the use of force. Nor can one ignore recent Chinese history with its manifest propensities for sharp and precipitous changes in policies toward the West. Surely one must also consider the possibility of an enhanced Chinese military capability resulting from expanded trade and technological acquisitions from the United States. In addition, the United States' interest in the security of Taiwan has not materially diminished. Standing astride the sea routes between Japan, Korea, the Philippines, and Southeast Asia, the continued exclusion of any hostile force from Taiwan remains critical to the preservation of American power in the western Pacific. We may also consider whether termination of the treaty with Taiwan was essential to normalization or whether a less precipitous move might have yielded a better bargain. We may question whether the timing was tied to the President's own domestic political needs in a way that suggests the importance of Congress as a counterweight for the benefit of the nation.

In short, it matters not how one ultimately judges the wisdom of the President's decision. What matters is that it was a grave and far-reaching decision on which rational debate was not only possible but of potentially immense value to the nation. It is beyond

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dispute that if the President has miscalculated, the United States will face some agonizing decisions which will not fall to the President alone to make. Certainly Congress was sensitive to this point when it substantially rewrote the President's proposed Taiwan Relations Act to reaffirm America's commitment to the security of Taiwan, an opportunity not likely to attend the termination of other alliances.

What is true of the Taiwan case is more than likely to be true of our other alliances: a proposed change in direction born of hope but tempered with grave uncertainties, an opportunity fraught with danger and with mixed signals from an erstwhile adversary undoubtedly suffering its own ambivalence. In such a setting, the wisdom of the Madisonian conception of the separation of powers doctrine becomes apparent. These are matters of such grave import that if the idea of checks and balances is to operate at all, it must operate on such occasions.

More rigorously, the same conclusion follows from our general design of the President's foreign relations powers. Later, in the context of the historical record, we deal, arguendo, with the case where the President's interstitial authority might be brought to bear. But that is a very special and distinguishable case. More generally, the higher order of legitimacy that attaches to the concurrent will of the President and two-thirds of the Senate, and renders the President powerless to ignore or override that will, necessarily renders him powerless to reassess either the strategic assumptions upon which that will was predicated or the wisdom of risking the strategic dangers assumed, should he then attempt to act on the basis of his reassessment. He cannot be excused from his duty of obedience to the treaty-makers merely because he thinks that circumstances have out-run their assumptions. Otherwise the rule of obedience would be pointless.

The termination of a treaty of alliance, including a Mutual Defense Treaty, is, in sum, a special case. It impinges directly upon Congress' war powers. Consequently, the separation of powers doctrine, reinforced by political

166. Compare S. 245, 96th Cong., 1st Sess. (1979) (the Executive Branch's proposed bill) with the Taiwan Relations Act.
167. See note 189 infra and accompanying text.
reality, commands that the President be barred from terminating any such treaty without obtaining the concurrence of either two-thirds of the Senate or a majority of both houses of Congress, the latter because, on this subject, the statute-makers can always override the treaty-makers. 168

168. While it may be that, theoretically, there are subjects upon which Congress may not legislate but to which the treaty power extends (cf. Missouri v. Holland, 252 U.S. 416 (1920)), that is certainly not so with regard to treaties of alliance. See generally L. Henkin, Foreign Affairs and the Constitution 145 (1972).
V

THE HISTORICAL RECORD:

A JUDICIAL & HISTORICAL ANALYSIS OF PAST PRECEDENT

In the debates over our subject, much has been made of the fact that Presidents have, in the past, terminated treaties on their own initiative without objection from either Senate or Congress. The State Department argues that there have been twelve cases in our history in which a President has "acted alone." Whether this accurately describes the historical record or not, the Department's effort to use these cases as support for President Carter's decision cannot withstand close scrutiny.

In examining these cases, we are not without judicial assistance. Although few in number, there are some notable decisions which take on increased significance when read in conjunction with our broader design of the presidential powers. Indeed, they fit that design very nicely. With this guidance we conclude that in nine of the cases reviewed the President's actions were firmly predicated upon his duty to "take care that the laws be faithfully executed." In one of the remaining cases, the President failed to act on his decision. This instance we can ignore. In the last two cases, the President acted in a foreign relations context utterly unlike anything attending the Taiwan matter. In sum, our examination will serve both to suggest that President Carter has stepped far beyond the boundaries of his power and to identify some of the implications of his decision.


171. This was President Johnson's 1965 abortive notice of United States withdrawal from the Warsaw Convention. In that instance the President withdrew his notice before it had become effective.
A long line of authority, beginning with *Ware v. Hylton*, 172 has established that, as a source of domestic law, a statute takes precedence over a prior inconsistent treaty and vice versa. This holds even in situations where statutory obligation subsequently imposed upon the executive and the judiciary results in a breach by the United States of its international obligations. But this need not occur. If, by the text of the treaty or under customary international law, the United States has the right to terminate a treaty and avoid its breach, the opportunity obviously exists for bringing the nation's international obligations into conformity with domestic law. In principle, at least, one might argue that the President, being endowed with the instrumental powers for bringing this reconciliation to pass, is under a duty to so. On this point *Van der Weyde v. Ocean Co.* 173 is instructive. In 1915, Congress passed the Seamen's Act, expressing its "judgment" that treaty provisions in conflict with the act "ought to be terminated," adding that the President was "requested and directed" to give foreign governments notice to that effect. The President, invoking rights reserved in the treaty text, initially gave notice terminating the entire 1827 Treaty of Commerce and Navigation with Norway, later agreeing with Norway to terminate only the two clauses most affected by the act. In response to the contention that this decision exceeded the President's constitutional authority, the Court concluded that, under the Take Care clause and as "organ" of our relations with foreign governments, it was "incumbent upon the President" to judge whether any inconsistency existed between the law and the treaty and to act accordingly. It then reviewed the exercise of his discretion declaring it neither "arbitrary" nor "inadmissible." 174

It should be observed that *Van der Weyde* might be thought to impose a "duty" on the President only in the event of a prior express congressional directive. This would mean, however, that, absent a directive, the President could, at his discretion, place the United States in the position of violating international law. The interpretation is perverse. If Congress can put the President under a constitutional obligation to terminate

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172. 3 U.S. 199 (1796).
173. 297 U.S. 114 (1936).
174. *Id.* at 118.
a prior inconsistent treaty, enactment of the statute per se should suffice for that purpose.

The next instructive decision is *Charlton v. Kelly* 175. There the court rejected the argument that Charlton, a United States citizen, could not be extradited to stand trial in Italy because Italy, having refused to yield up its own citizens to the United States, had breached the extradition treaty relied on by the government. Contrary to the United States' interpretation of the word "persons" in the treaty, Italy had contended that, while it was not required to hand over Italians to the United States, the latter was required to give up American citizens to Italy. This apparent lack of reciprocity was justified by the fact that, under Italian law, Italian courts could try Italians found in Italy for crimes committed anywhere in the world, while generally the United States courts could only try persons for crimes committed in the United States. The seeming lack of reciprocity was, the Italians said, wholly in keeping with the essential purposes of the treaty: bringing fugitives to justice. In response, the Secretary of State adhered to his Department's earlier interpretation and asserted that Italy was in violation of the treaty. The decision to surrender Charlton, however, was consistent with the United States' conclusion that the treaty had never been abrogated and that, until abrogation, the United States was obligated to perform.

The Court did not accept this at face value. It took pains to confirm that, under international law, breach by one party only rendered a treaty "voidable" at the instance of the other. It also observed that the treaty was still of considerable value to the country. Yet the American government could not have kept the treaty alive by conceding Italy's interpretation. To have done so would have had the "most serious consequences" for five other treaties in which the same words appeared. 176 The Secretary's solution, therefore, an eminently sensible one, well within Executive discretion. The government would continue to declare Italy in violation, but would then "waive" its right to be free of the treaty.

This grant of discretion to the President to act as best fits the policies and objectives of a treaty suggests a certain broadening of the President's powers under *Van der Weyde*. That case put the President under a duty to

175. 229 U.S. 447 (1913).
176. *Id.* at 468.
terminate all treaties that are inconsistent with a later enacted statute or treaty. Under *Charlton*, the President possesses a discretion to "waive" a right of termination if to do so was consonant with the broader policies and objectives of a treaty. As a corollary, it would seem that the President could terminate any treaty, even one which was not facially inimical to a later statute or treaty, if he found the earlier pact to be inconsistent with the broader policies and objectives of the later enactment. This, of course, is nothing but the teachings of the *Stein Seizure* decision applied to treaty terminations. If, in furtherance of the objectives expressed in the United Nations Resolutions on the Korean War, the President could have seized private property but for the fact that Congress had deliberately denied him that power, then he could terminate a treaty if termination was supported by the policies and objectives of a later enacted statute. The President might not have termination authority if the record showed that Congress had deliberately considered and rejected termination as unnecessary to the policy objectives of the subsequent statute. Looking at the historical record, it seems fair to view six of the twelve instances cited by the State Department as coming within this rule: an aspect of the President's

177. 343 U.S. 579 (1952).

178. President McKinley's termination in 1899 of the 1850 Convention of Friendship, Commerce and Navigation with Switzerland was tied to Swiss insistence upon an interpretation that was contrary to the general policies expressed by Congress in a subsequent statute or was expressly invalidated by that statute. President Wilson's termination in 1920 of the 1891 Treaty of Amity, Commerce and Navigation with the Belgian Congo was one of the terminations under the 1915 Seaman's Act, which was interpreted by Van der Weyde v. Ocean Transport Co., 297 U.S. 114 (1936) as placing the President under a duty to act. President Roosevelt's decision in 1933 to withdraw from the 1927 Convention for the Abolition of Import and Export Prohibitions and Restrictions was directly precipitated by passage of the National Recovery Act in 1933. The State Department feared that, in exercising his powers under that act, the President would be acting in direct violation of, or at least contrary to the policies of, the convention. President Roosevelt's 1933 notice of termination (later withdrawn) of the 1931 Treaty of Extradition with Greece was a direct response to the latter's alleged breach when it refused to extradite Samuel Insull. This termination falls squarely within the boundaries set in *Charlton v. Kelly*. President Roosevelt's agreement with Italy in 1936 to terminate the 1871 Treaty of Commerce and Navigation was for the purpose of gaining the freedom to take action under the 1934 Reciprocal Trade Agreements Act without violating the treaty. Finally, President Kennedy's decision in 1962 to terminate the 1902 Convention on Commercial Relations with
duty to "take Care" that the laws be faithfully executed.

When we move to cases in which there is no later expression of the statute- or treaty-makers' will, the President's power to act on his own initiative is, under our basic design, dependent upon the absence of any expression of policy by the statute- or treaty-makers on the subject of the President's decision. Since the treaty stands as a formal expression of that will, the requirement of legislative "silence" can be met only if new circumstances have arisen which lie beyond the control of either President or Congress and are so incompatible with the treaty regime that one can presume that the treaty-makers would not have proceeded with the treaty had those circumstances been anticipated. The new circumstances must create a situation which can be likened to one in which no treaty or statute exists and, hence, in which the President can act independently (i.e., terminate or continue the treaty) under his interstitial powers. The resulting rule would be somewhat comparable to the international law rule of rebus sic stantibus. As with that rule, the difficulty lies in defining the case. Fortunately, however, we can obtain guidance from the courts.

In Ter Linden v. Ames, petitioner upon habeas corpus challenged his proposed extradition to Germany under a 1852 Treaty with the Kingdom of Prussia. He contended that because Prussia had been absorbed into the German Empire and no longer existed, the treaty had been automatically abrogated and could not serve as a predicate for his extradition.

The Court rejected the argument although it admitted that, under proper circumstances, the absorption of one state by another could result in the abrogation of all treaties made by the absorbed state. Such was the case with Hanover and Nassau which had become incorporated into the Kingdom of Prussia after their conquest in 1866. In such a case neither the courts nor the Executive would have any discretion to consider the treaty obligatory

178. (continued)

Cuba and establish a trade embargo relied on several statutes, including the Tariff Classification Act of 1962. By this latter Act, Congress authorized the suspension of tariff preferences for Cuba and expressly suspended two statutes that had been passed partly to implement the 1902 Treaty.

179. 184 U.S. 270 (1902).
that, however, was not the case with Prussia. The Court examined the German constitution, noted the representations of the German Government itself, and reviewed the practices of other states and of the United States in dealing with Germany. It concluded from this that the case was such that "whether power remain[ed] in a foreign state to carry out its treaty obligations" was an issue for the Executive to decide in the exercise of an informed discretion. 180

In terms of our basic analytic design, it would seem that if the foreign party to a treaty had ceased to exist as an independent sovereign state, the viability of the treaty regime would present, by definition, a new question not within the original contemplation of the treaty-makers. If international law would consider the treaty automatically abrogated, then presumably the President as "organ" of the Nation, and obligated by the Take Care clause, would be bound to take whatever steps were necessary to conform the technical legal situation of the United States to this reality. 181

But, as Terlinden illustrates, given the varieties of changes that can occur in the status of governments, there must necessarily be an area of executive discretion to preserve or terminate a treaty. The standard is whether power remains in a foreign state to carry out its treaty obligations; whether, in other words, the treaty regime continues to be a viable instrument for carrying out the objectives that the treaty-makers originally had in mind. 182 This being the standard, any executive judgment envincing a rational evaluation of the facts would constitute a judgment resting squarely upon the Take Care clause. Moreover, if this is the standard, it is not difficult to conceive of cases, other than a treaty partner's loss of independence, which could raise a comparable issue. Three of the State Department's cases illustrate the point.

In 1954, President Eisenhower withdrew the United States.

180. Id. at 288.
States from the 1923 Convention on the Uniformity of Nomenclature for the Classification of Merchandise (the so-called Brussels' nomenclature). The outdated treaty regime was collapsing, if it had not already done so. Four years earlier the United Nations Economic and Social Council had urged nations to adopt an alternative system. The Organization of American States had taken a similar position and the United States action coincided with similar actions by a number of other countries. The same is true of President Roosevelt's denunciation in 1944 of the 1929 Protocol to the Inter-American Convention for Trademark and Commercial Protection. Apparently the Protocol had never been, and was unlikely to become, a viable regime. Finally, while there is some evidence of an earlier effort at termination by President Madison which was subsequently repudiated by President Monroe, the State Department in 1872 informed the Dutch Minister that the 1782 Treaty of Amity and Commerce with the Netherlands was no longer binding on the parties. In 1889 it listed the treaty among those "with Powers that had been absorbed into other nationalities."

Before turning to the State Department's last two examples of presidential treaty termination, it is instructive to note a test, very comparable to that being developed here, that the courts have used in deciding whether to declare treaties abrogated or suspended by supervening war. In Clark v. Allen, the Court adopted Justice Cardozo's classic statement of the rule. It was for the courts, Justice Cardozo said:

...to determine whether, alone, or by force of connection with an inseparable scheme, the [treaty] provision is inconsistent with the policy or safety of the nation in the emergency of war, and hence presumably intended to be

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183. For general discussion on these three terminations, see the relevant sections in Thomas, note 173 supra and:
2. 11 Dep't State Bull. 442 (1944) (Roosevelt).
184. 331 U.S. 403 (1947).
185. See Techt v. Hughes, 229 N.Y. 222, 128 N.E. 185, cert. denied.
The standard appears as apt for the executive as for the courts: Has an event occurred which is sufficiently incompatible with the treaty-makers' purposes that one can reasonably presume that they would not have intended the treaty to continue once the event occurred? There is, however, a difference, between the test when applied to the Executive and when applied to the courts. If it is concluded that the treaty-makers would not have proceeded under the new circumstance, the judiciary has no alternative but to terminate the treaty (i.e., the courts must then advert to a statute or to the common law for their rule of decision). In the case of the Executive, however, it is certainly arguable that such a conclusion merely triggers the President's independent policy-making powers. It may be likened to a situation in which there is no treaty or statute. The President is free to act with legal effect, either to terminate or continue the treaty regime, provided that his decision is based upon one of his enumerated powers, including the protective function of the Take Care clause.

With this test in mind, we turn to the first of the State Department's remaining cases. In 1927, President Coolidge terminated the 1925 Convention on the Prevention of Smuggling with Mexico. The action was taken in the context of rapidly deteriorating relationship between Mexico and the United States. There had been expropriations of American property and alleged mistreatment of American citizens. Moreover, according to the President, the Mexicans were supplying arms to Nicaraguan insurgents in spite of the repeated American requests that such sales be stopped. Three months before his decision to terminate the treaty, the President had proclaimed an embargo on all arms shipments to Mexico.

One might treat this instance as an extension of the rule in Terlinden v. Ames. The manifest inability or unwillingness of the treaty-partner to control elsewhere the kind of behavior (smuggling) that the treaty was designed to control might be considered to sustain a conclusion that the partner was incapable of fulfilling its obligations and that the treaty regime was not viable. We prefer to analyze the case differently, treating this reasoning as relevant but not decisive.

185. (Continued)
254 U.S. 643 (1920).
186. 331 U.S. at 509-10.
The second case was President Roosevelt's decision in 1939 to terminate the 1911 Treaty of Commerce and Navigation with Japan. Japan had violated the 1920 Nine Power Agreement to respect the territorial integrity of China, had sunk the United States gunboat, *Panay*, had repudiated the Kellogg-Briand Pact and had withdrawn from the 1921 Washington Naval Limitations Agreement. Pressure was building in the United States for an embargo and other economic sanctions against Japan. To that point, however, the President had requested only that private firms take voluntary measures. There was pending in both Houses a joint resolution calling for termination of the 1911 treaty, with some members arguing that the United States was bound to take that step under the 1922 Nine Power Agreement. Nevertheless, no action had been taken on the resolution.

It is instructive to compare this last case with President Kennedy's action in 1962 terminating the 1902 Convention on Commercial Relations with Cuba. In both instances the treaty-partner, Japan and Cuba respectively, had violated its international obligations toward the United States. Each was engaged in activities in third countries which the United States considered aggressive and contrary to its interests. Each constituted a hostile and disruptive force, in an area of the world deemed vital to the United States' own security. As Judge Friendly said, in upholding the Cuban-Assets Control Regulations against a Fifth Amendment attack: "We are not formally at war with Cuba but only in a technical sense are we at peace." If our relations with Japan had not deteriorated as far as had those with Cuba, they were quickly doing so. Certainly, in both cases the climate of relations and the resulting expectations regarding the course of those relations was wholly different from what had prevailed when the treaties were made.

Yet, there is an important difference. President Kennedy acted strictly in keeping with policies embodied in newly enacted statutes and in keeping with other statutorily authorized actions. Those measures had already rendered the treaty virtually inoperable and its termination a mere technicality. President Roosevelt acted without any statutory warrant whatsoever and, in a

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188. Sardino v. Federal Reserve Bank, 361 F. 2d 106, 111 (2d Cir. 1966).
technical sense, the 1911 Treaty with Japan was completely viable. The latter case, in other words, stood at the very borderline of presidential power. Yet, it would seem to have met Justice Cardozo's test as set forth in Clark v. Allen. In the face of the circumstances that attended the termination, would the treaty-makers have contemplated its continuance or not? The answer seems clear. Under the circumstances of 1939, neither the treaty-makers of 1911 nor those of 1939 would have seriously contemplated extending or continuing commercial privileges, especially most-favored-nation treatment, to Japan. In view of Mexico's manifestly unreliable enforcement, the same basic conclusion can be reached with regard to the smuggling treaty.

In contrast, no such answer can be given with regard to the Mutual Defense Treaty with Taiwan. The Taiwan government had not violated any of its treaty obligations toward the United States. It had not acted in anything but the friendliest manner toward this country and its vital interests. It had remained a staunch ally. As already noted, the threat to Taiwan's security had not disappeared with our recognition of the Peking government. The mutual defense agreement was both viable and supportive of a broad range of American interests in the area. What then had changed? An important new opportunity had opened up for improving relations between the United States and a government hostile to the Taiwan regime. This improvement promised substantial advantages to the United States. The climate of opinion in this country was disposed, even strongly disposed, to put past hostilities aside and exploit those advantages. At the same time, this opportunity was not without its dangers for the United States. Peking's continued claim to Taiwan, its refusal to renounce the use of force, and its history of precipitous political change could not be ignored.

Could one then presume, using Justice Cardozo's test, that under these circumstances the treaty-makers would have refused to continue the defense treaty? A negative answer seems clear. What they might have intended is sufficiently in doubt that no presumption could be ascribed to them. Reformulated according to our test, can this situation be likened to one in which no treaty or statute existed? Again the level of uncertainty necessitates a negative answer. The United States faced a situation calling for the exercise of a delicate judgment, a judgment pertaining to a matter of grave importance upon which there was ample time to deliberate.
Also, it must be remembered that, unlike Presidents Coolidge and Roosevelt, President Carter was dealing with a treaty of alliance. His decision impinged directly upon Congress' war powers, a subject -- emergencies aside -- upon which he generally possesses no independent power whatsoever. Nevertheless, even if one concedes, arguendo, as an exception to this rule, that the President may possess a power to terminate an alliance where new circumstances warrant ascribing to the treaty-makers a presumptive intent to abandon the treaty altogether, the fact of its being an exception requires that the test be rigorously applied. If rigorously applied, the conclusion is plain. That President Carter's action could not even qualify under the test as applied in the far less rigorous context of a commercial or smuggling treaty only underscores how far he actually strayed beyond anything sanctioned by the practice of the last two hundred years. His action was unprecedented and unwarranted.

Lastly, there remains the question of whether the close relationship between the termination of the Mutual Defense Treaty and the decision to recognize the Peking regime restores the President's action to the ambit of his powers because the recognition power is exclusively his. United States v. Pink would seem to supply a definitive answer. In that case, it was contended that the United States' receipt of certain funds assigned to it by the Soviet Government (the Litvinov assignments) would violate petitioner's Fifth Amendment rights. In responding, the Court acknowledged that the President's recognition power encompassed a "power to determine the policy which is to govern the question of recognition" and that the Litvinov assignment, as a way of removing the obstacles to the recognition of the Soviets, was a modest implied power of the President. Hence, the Executive's declaration that the assignments

189. See text following note 163 supra.
190. Technically, the Mutual Defense Treaty with Taiwan constituted no barrier whatsoever to the exercise of the President's recognition power. The President could have unilaterally recognized the Peking regime. It was his policy of seeking mutual recognition that made it possible for the Peking regime to demand termination of the Taiwan treaty.
191. 315 U.S. 204 (1942).
192. Id. at 229.
were necessary to the recognition decision was "final and conclusive" on the Court. This did not, however, leave the Court powerless to judge the constitutionality of the assignments. To the contrary, it judged and upheld their validity.

The parallel is suggestive. It is within the function of the courts to judge whether the Executive has conformed to the Constitution. Their competence, however, does not extend to judging the President's decision to recognize a foreign government. On the other hand, it does extend to judging executive agreements, such as the Litvinov assignments, if not tied to an exercise of the recognition power. The question, therefore, is whether tying the two together precludes the courts from exercising their function with respect to agreements. The answer from *Pink* was clearly no.

In a similar vein, Congress is not competent to judge the President's decision to recognize a foreign regime. Yet, if, apart from such a decision, Congress has the power to decide upon the termination of a particular treaty, then the question is the same as that in *Pink*. Does the linkage established by the President foreclose Congress from exercising its function? Surely the answer must be the same: No. Checks and balances govern the relationship between the President and Congress as much as between the President and the courts.

Moreover, the fact that *Pink* involved a challenge under the Bill of Rights does not distinguish it from the treaty termination case. That difference is largely attributable to the functional difference between Congress and courts.

More importantly, unless the results reached in *Pink* are extended to the relationship between Congress and President, the consequences would be wholly at odds with the basic scheme of the Constitution. Consider any situation in which the President possesses an independent power to make policy such as stationing troops abroad, settling international claims or, more generally, protecting American rights under international law. It would be unthinkable if every time he was called upon to enter into negotiations with a foreign government on such matters, he could accede to the latter's demand for the termination of a treaty with a third country and,

193. *Id.* at 230.
in so doing, preclude Congress from exercising any judgment on the question whatsoever. If he could do this, might he not agree to repeal statutes as well? The notion is fundamentally at odds with the system of checks and balances. It is the "inherent" powers theory coming in through the back door.
CONCLUSION

In the end, having performed the legal analysis, what is the case for the President all about? Manifestly, it is not about efficacy in the conduct of foreign relations. Woven into the fabric of constitutional judgment -- in the concepts, the balancing, the lawyers' subtle logic -- is a concern for efficacy. And judged by lawyers' logic, the President's case utterly fails. To insist nonetheless that efficacy is still at issue, is to say something very different. It is to say that the Constitution is unworkable, that it is not fit for the modern world. But that is also to say that we cannot remain a free people.

One cannot be unmindful of the towering figures of Lincoln, Wilson and Franklin Roosevelt who, moved by their own vision of things, boldly took all the power that necessity seemed to dictate and earned the plaudits of history and a grateful people for doing so. Presidents will act; perhaps even in spite of themselves. They will do whatever necessity warrants, trusting to history and the people for their vindication. And it must always be that way. They must always be denied the legitimating influence of the Constitution. In assaying necessity, they must always know that if history and the people turn on them, there is nothing for them but the awesome prospect of impeachment; no protecting cloak of constitutional legitimacy. Were it not so -- were they able to find warrant in some broad "inherent" constitutional power to act upon their own vision -- then every policy preference would become a national necessity, every instrument of governmental action a weapon of necessity and every opponent an enemy of the state. And there would be no liberty left to us.