

1966

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Recommended Citation

John H. Riggs Jr., *Termination of Treaties by the Executive without Congressional Approval: The Case of the Warsaw Convention*, 32 J. Air L. & Com. 526 (1966)
<https://scholar.smu.edu/jalc/vol32/iss4/3>

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TERMINATION OF TREATIES BY THE EXECUTIVE WITHOUT CONGRESSIONAL APPROVAL: THE CASE OF THE WARSAW CONVENTION

BY JOHN H. RIGGS, JR.†

I. INTRODUCTION

ON 15 NOVEMBER 1965, the United States Department of State delivered a diplomatic note to the Polish Government in Warsaw announcing the withdrawal of the United States from the Warsaw Convention.¹ The note and accompanying press release² indicated that the denunciation resulted solely from the Convention's low limitations on liability for injury or death to passengers, and in no way represented a departure from the long-standing commitment of the United States to international co-operation in matters relating to civil aviation. It further disclosed that the withdrawal, which by the terms of Article 39 of the Convention would not take effect until six months after delivery of the notice of denunciation,³ would be rescinded if

prior to its effective date of May 15, 1966, there is a reasonable prospect of an international agreement on limits of liability in international air transportation in the area of \$100,000 per passenger or on uniform rules but without any limit of liability, and if, pending the effectiveness of such international agreement, there is a provisional arrangement among the principal international airlines waiving the limits of liability up to \$75,000 per passenger.⁴

At the time of the denunciation, neither the Congress nor the Senate by

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¹ Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention), 12 Oct. 1929, 49 Stat. 3000, T.S. No. 876 (1934) [hereinafter Warsaw Convention]. Although not an original signatory to the Warsaw Convention when it was negotiated in 1929, the United States adhered to the treaty on 29 October 1934. The Senate advised adherence, subject to the reservation under the "Additional Protocol," on 15 June 1934, and the President duly proclaimed the adherence on 29 October 1934. The United States signed, but has never ratified The Hague Protocol which modifies the Warsaw Convention, and which took effect for the ratifying countries on 1 August 1963.

² The Department of State's note is reprinted in 31 J. AIR L. & COM. 305 (1965), 53 DEP'T STATE BULL. 924 (1965). The press release, dated 15 November 1965, is set forth in 53 DEP'T STATE BULL. 923 (1965). See generally Kreindler, *The Denunciation of the Warsaw Convention*, 31 J. AIR L. & COM. 291 (1965).

³ Warsaw Convention, art. 39:

- (1) Any one of the High Contracting Parties may denounce this convention by a notification addressed to the Government of the Republic of Poland, which shall at once inform the Government of each of the High Contracting Parties.
- (2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only as regards the party which shall have proceeded to denunciation.

⁴ Dep't of State Press Release No. 268, 15 Nov. 1965; 53 DEP'T STATE BULL. 923, 924 (1965).

itself had taken formal action to concur in or to advise the withdrawal of the United States from the Convention.⁵

Just one day prior to the effective date, the Department of State announced the withdrawal of its denunciation of the Warsaw Convention. Essentially, the withdrawal of the denunciation resulted from an eleventh hour agreement among the world's leading international air carriers to waive the \$8300 personal injury and death damages limitation as well as certain defenses under the Convention, in exchange for a tariff provision setting a new damages limit of \$75,000 under conditions of virtual absolute liability.⁶ But in cancelling its denunciation, the Department of State made it clear that the agreement by the carriers was only a "provisional" measure and that, "the Government of the United States looks forward to continued discussions looking to an up-to-date and permanent international agreement on the important issues dealt with in the Warsaw Convention."⁷ Thus, the State Department may again denounce the Warsaw Convention if it does not feel that steps are being taken with deliberate speed to negotiate a multilateral replacement treaty for the Warsaw-Hague combination.

The possibility of a later denunciation raises the question of presidential power to unilaterally withdraw or terminate United States adherence to a self-executing treaty of the nature of the Warsaw Convention.⁸ The Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur. . . ."⁹ However, the Constitution is silent on the question of where the treaty-terminating power lies. It would seem logical that the same formalities required for making a treaty would prevail in the termination of a bilateral one or in the withdrawal from a multilateral one.¹⁰

⁵ The only action taken by Congress or the Senate alone was a hearing by the Senate Foreign Relations Committee on 26-27 May 1965, on the question of ratification of The Hague Protocol to the Warsaw Convention. In the Committee's report dated 29 June 1965, ratification of The Hague Protocol was recommended; but the Committee added that if legislation containing a complementary insurance program "is not enacted within a reasonable time (*i.e.*, prior to the adjournment of the 89th Congress), the Department of State should take immediate steps to denounce the Warsaw Convention and The Hague Protocol." 32 J. AIR L. & COM. 244 (1966). No formal action has been taken by the Congress or the Senate since then. However, a resolution sponsored by twenty-eight senators directing the President to denounce the Warsaw Convention was introduced on 3 May 1965, and is currently pending before the Senate Foreign Relations Committee (S. Res. 256, 89th Cong.).

⁶ 54 DEP'T STATE BULL. 1033 (1966). The text of the United States note to the Polish Government dated 14 May 1966, and the press releases of the Department of State on the withdrawal of the denunciation are set forth in 32 J. AIR L. & COM. 243-48 (1966). Three domestic airlines, Delta, National, and United, have not accepted the absolute liability provision.

⁷ Department of State Note to Polish Government, 14 May 1966, reprinted in 32 J. AIR L. & COM. 248 (1966).

⁸ See generally CORWIN, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 423-25 (1953); 5 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 319-42 (1943); 2 HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 1516-27 (2d ed. 1945); Nelson, *The Termination of Treaties and Executive Agreements by the United States: Theory and Practice*, 42 MINN. L. REV. 879 (1958); and Riesenfeld, *The Power of Congress and the President in International Relations: Three Recent Supreme Court Decisions*, 25 CALIF. L. REV. 643 (1937).

⁹ U.S. CONST. art. II, § 2.

¹⁰ "[T]he obligations of the treaty could not be changed or varied, but by the same formalities with which they were introduced; or, at least, by some act of as high an import, and of as un-

Yet there is no judicial decision in American jurisprudence which has directly met this question. Perhaps one reason for the absence of case law on the subject is that relatively few treaties are legislative and self-executing in nature, and very few of such treaties have been terminated by the executive branch alone. Most treaties are in the nature of international compacts which relate to governmental relations only. Only a small number are conventions which establish both an international and, in the case of the United States,¹¹ an internal (legislative) body of law governing rights between private individuals or companies. Thus, few instances occur where private persons have the opportunity to litigate the issue of whether private rights, established by a treaty, have been unconstitutionally abrogated by the improper termination of a treaty by the Executive alone. Because of the problem of "standing," it is doubtful that an individual could litigate this issue unless the treaty in question involved private rights and the termination affected him directly. But if the Department of State again denounces the Warsaw Convention and allows the denunciation to become effective six months afterwards, a strong possibility exists that this issue might be litigated because of the Convention's direct effect on both individuals and companies.

The question of the power of the executive branch to terminate a legislative treaty without the concurrence of all or part of the legislative branch is a matter of municipal law, not international law. The internal enforceability of a treaty as "the Supreme Law of the Land" after an attempted unilateral termination by the President depends entirely upon American constitutional law.¹²

II. TERMINATION POWER OF THE EXECUTIVE

The position of the executive branch on this question has been inconsistent. In a memorandum relating to the termination of a bilateral treaty of commerce and navigation with Italy, Green H. Hackworth, then Legal Adviser of the Department of State, wrote to President Roosevelt:

The question as to the authority of the Executive to terminate treaties independently of the Congress or of the Senate is in a somewhat confused state. Although the Constitution contains provision with reference to the making of treaties, it is silent with respect to their abrogation. In some cases treaties have been terminated by the President pursuant to action by Congress. In other cases action has been taken by the President pursuant to resolutions of the Senate alone. In still others the initiative has been taken

equivocal an authority." *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 75 (1821) (Story, J.); *Techt v. Hughes*, 229 N.Y. 222, 243, 128 N.E. 185, 192 (Cardozo, J.), *cert. denied*, 254 U.S. 643 (1920); *cf. Jones v. Walker*, 13 Fed. Cas. 1059, 1062-63 (No. 7507) (C.C. Va., date unknown) (Jay, C.J.).

¹¹ U.S. CONST. art. VI, § 2 provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges of every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.

United States v. Belmont, 301 U.S. 324, 331-32 (1937); *Asakura v. Seattle*, 265 U.S. 332 (1924); *Missouri v. Holland*, 252 U.S. 416 (1920).

¹² *Riesenfeld*, *supra* note 8, at 656-58.

by the President. In some cases his action was afterwards notified to the Senate or to both Houses of Congress and approved, in other cases it was not referred to either House. No settled rule or procedure has been followed.¹³

Since the question has never been directly considered by an American court,¹⁴ the opinions of constitutional law authorities are split. Hackworth apparently considered the answer to lie in presidential precedents, not in constitutional law.¹⁵ It has also been argued that the silence of the Constitution on this point probably means that the President acting alone has the power to terminate a treaty as an international obligation, although perhaps not as binding municipal law.¹⁶ Others argue that "the abrogation of a treaty involves the exercise of the same kind of power as the making of it,"¹⁷ and that therefore some sort of congressional or senatorial concurrence in termination is necessary for it to have *both* international and internal effect.¹⁸

Little judicial authority exists. In *Techt v. Hughes*,¹⁹ Judge Cardozo considered the effect of the first World War upon private rights created by a pre-war treaty between the United States and Austria-Hungary. After repeating the well-established rule that courts alone may not invalidate a treaty provision without some action taken by "the political departments of the government that it has been suspended or annulled,"²⁰ Judge Cardozo stated, in dicta:

President and Senate may denounce the treaty, and thus terminate its life. Congress may enact an inconsistent rule, which will control the action of the courts. . . . The treaty of peace itself may set up new relations, and terminate earlier pacts, either tacitly or expressly. . . . But until one of these things is done, until some one of these events occurs, while war is still flagrant, and the will of the political departments of the government un-

¹³ 5 HACKWORTH, *op. cit. supra* note 8, at 330. Mr. Hackworth nevertheless advised President Roosevelt that he had the power to terminate the Italian Treaty without seeking the advice and consent of the Senate or the approval of Congress because of an 1898 precedent involving unilateral termination of a clause in a similar treaty with Switzerland. President Roosevelt thereafter gave notice to the Italian Government of the termination of the treaty, and no action by the Senate or Congress was sought. A similar treaty termination without legislative participation occurred in 1926 during President Coolidge's administration. But Presidents Wilson and Hayes took the position that the advice and consent of two-thirds of the Senate was required before they could give notice of termination. In President Wilson's case, withdrawal from a unilateral public health treaty was involved. Reeves, *The Jones Act and the Denunciation of Treaties*, 15 AM. J. INT'L L. 33 (1921). President Taft obtained a joint resolution of both houses of Congress in 1911 ratifying prior notice given by him that the United States was terminating a commercial treaty with Russia. Other procedures have also been followed. These and other instances are described and catalogued in 5 HACKWORTH, *op. cit. supra* note 8, at 319-33; Nelson, *supra* note 8, at 879-82.

¹⁴ The question of whether American courts would accept jurisdiction over this issue is discussed *infra*.

¹⁵ Cf. note 17 *infra*; CORWIN, *op. cit. supra* note 8, at 423-24.

¹⁶ 1 WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* 584-85 (2d ed. 1929).

¹⁷ Taft, *The Boundaries Between the Executive, the Legislative and the Judicial Branches of the Government*, 25 YALE L.J. 599, 610 (1916).

¹⁸ Riesenfeld, *supra* note 8, at 660-62.

¹⁹ 229 N.Y. 222, 128 N.E. 185, *cert. denied*, 254 U.S. 643 (1920).

²⁰ In *Jones v. Walker*, 13 Fed. Cas. 1059, 1063 (No. 7507) (C.C. Va., date unknown), Chief Justice Jay stated, "Where the department authorized to annul a voidable treaty shall deem it most conducive to the national interest that it should longer continue to be obeyed and observed, no right can be incident to the judiciary to declare it void in a single instance." See also *Charlton v. Kelly*, 229 U.S. 447 (1913); *Terlinden v. Ames*, 184 U.S. 270 (1902). On the issue of the effect of war upon treaties, see *Clark v. Allen*, 331 U.S. 503 (1947); *Society for the Propagation of the Gospel v. New Haven*, 21 U.S. (8 Wheat.) 464, 494-95 (1823); *Argento v. Horn*, 241 F.2d 258, 262-63 (6th Cir. 1957) (Stewart, C.J.); and 106 U. Pa. L. Rev. 617 (1958).

revealed, the courts, as I view their function, play a humbler and more cautious part.²¹

This language has been quoted with approval by the Supreme Court, albeit again in dicta.²²

In *Van Der Weyde v. Ocean Transp. Co.*,²³ Congress terminated a treaty by means of a statute and "requested and directed" the President to give notice of the termination to Norway. Despite the unusual procedure, the Supreme Court decided that the treaty had been properly terminated since both political departments had concurred in the termination. Thus, where the President and the Congress are in harmony on the termination, the court will consider such action as proper.²⁴ But direct confrontation on the issue of the President's power to terminate a treaty without some form of congressional approbation was avoided:

[W]e think that the question as to the authority of the Executive in the absence of congressional action, or of action by the treaty-making power, to denounce a treaty of the United States, is not here involved.²⁵

In *United States v. Curtiss-Wright Export Corp.*,²⁶ the Supreme Court dealt with the power of the President as the "sole organ of the federal government in the field of international relations." Congress had passed a joint resolution empowering the President to prohibit the sale of arms or munitions into certain Latin American countries. The President thereafter issued proclamations putting the resolution into effect. The constitutionality of this procedure was in issue. With sweeping language, Mr. Justice Sutherland broadly defined the presidential power in foreign relations:

Not only, as we have shown, is the Federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.²⁷

Whether this general language could be used to support the proposition that the President may terminate a treaty alone is doubtful. Not all treaties involve merely political relationships with foreign nations. Chief Justice Marshall has said:

Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the

²¹ 229 N.Y. at 243, 128 N.E. at 192.

²² *Clark v. Allen*, 331 U.S. 503, 509 (1947). See also Mr. Justice Story's language quoted in *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 14 (1821).

²³ 297 U.S. 114 (1936). See the thorough discussion of the case in *Riesenfeld*, *supra* note 8, at 645-65; and Comment, 35 MICH. L. REV. 88 (1936).

²⁴ *Riesenfeld*, *supra* note 8, at 665.

²⁵ 297 U.S. at 117.

²⁶ 299 U.S. 304, 320 (1936).

²⁷ *Id.* at 319.

legislature, whenever it operates of itself, without the aid of any legislative provision.²⁸

If a particular treaty is fundamentally legislation on an international plane, as in the case of the Warsaw Convention, and if it relates principally to private rights and liabilities, the analogy presents itself between repeal of a statute and termination of a treaty legislative in nature. The power to repeal is inherent in the power to legislate, and it would seem that the same formalities would be necessary in both enactment and repeal. Since a treaty cannot become effective either as an international compact or as internal law in the United States until two-thirds of the Senate consent, then can it be terminated internationally or internally without action by the Senate or Congress?

Congress has considerable power to modify or to abrogate treaties.

Congress by legislation, and so far as the people and authorities of the United States are concerned, could abrogate a treaty made between this country and another country which had been negotiated by the President and approved by the Senate.²⁹

In *Taylor v. Morton*,³⁰ Mr. Justice Curtis wrote this illuminating discussion of the power of Congress to abrogate a treaty by inconsistent legislation:

The first and most obvious distinction between a treaty and an act of congress is, that the former is made by the president and ratified by two thirds of the senators present; the latter by majorities of both houses of Congress and the president, or by both houses only, by constitutional majorities, if the president refuses his assent. Ordinarily, it is certainly true, that the powers of enacting and repealing laws reside in the same persons. But there is no reason, in the nature of things, why it may not be otherwise. . . . I think it is impossible to maintain that, under our constitution, the president and senate exclusively, possess the power to modify or repeal a law found in a treaty.³¹

Curtis reasoned that the Constitution could not have been intended to render this country "helpless" by requiring the President and Senate to enter into a new treaty with the other country, requiring the latter's approval, before the present treaty could be terminated. Since both treaty and congressional legislation are on equal footing as the supreme law of the land, subsequent legislation can cause an inconsistent treaty to be abrogated. As in *Van Der Weyde v. Ocean Transp. Co.*,³² the rule in this line of cases accords with Mr. Justice Story's precept that treaty termination should be only "by some act of as high an import, and of as unequivocal an authority" as the formalities by which a treaty was made.³³

But the influence of the executive branch on the courts in treaty matters

²⁸ *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829). See note 11 *supra*; *Geofroy v. Riggs*, 133 U.S. 258 (1890) (extent of the treaty-making power). Marshall's statement has been repeated often. *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 747 (1838); *United States v. Arredondo*, 31 U.S. (6 Pet.) 691, 735 (1832).

²⁹ *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 460 (1899). See also *The Chinese Exclusion Case*, 130 U.S. 581, 600-01 (1889); *Head Money Cases*, 112 U.S. 580, 597 (1884); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1870).

³⁰ 23 Fed. Cas. 784 (No. 13799) (C.C.D. Mass. 1855).

³¹ *Id.* at 785-86.

³² 297 U.S. 114 (1936).

³³ *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 75 (1821).

is considerable. Whether a treaty continues to exist or has been extinguished is principally a matter for executive determination. Thus, the decision as to whether a treaty remains in effect despite a war between the two nations³⁴ and whether a treaty has been terminated by the breach of the other country is for the Executive alone to answer.³⁵ In *Charlton v. Kelly*,³⁶ the Department of State had advised the Court that it considered the United States still bound by an extradition treaty with Italy, although Italy had apparently violated the treaty on several occasions. The Supreme Court stated, "A construction of a treaty by the political department of the Government, while not conclusive upon a court called upon to construe such a treaty in a matter involving personal rights, is nevertheless of much weight."³⁷ It can be argued that the Court's recognition of the views of the executive branch on the effectiveness or interpretation of a treaty is a reflection of the judiciary's deference to the President in matters relating more to the conduct of foreign relations than to the making of treaties. Although, in some instances, the power to interpret a treaty may be the power to terminate it, the two powers remain fundamentally different in most cases.

It has been suggested that there is a controlling analogy between the President's power of removal from office and the power to terminate treaties.³⁸ In the same section which grants the treaty-making power to the President by and with the advice and consent of the Senate, the Constitution gives the President the power to appoint all officers of the United States not otherwise provided for, again "by and with the Advice and Consent of the Senate. . . ."³⁹ At first glance, there would seem to be a clear parallel between the two provisions due to their proximity in the Constitution and their common language.

In *Parsons v. United States*,⁴⁰ the Supreme Court held that the President could remove a federal district attorney from his office before the end of his term without congressional or senatorial approval even though a statute provided for a four-year tenure of office. Later, in *Myers v. United States*,⁴¹ the Court considered the power of the President to unilaterally

³⁴ *Clark v. Allen*, 331 U.S. 503, 514 (1947); *Techt v. Hughes*, 229 N.Y. 222, 128 N.E. 185, cert. denied, 254 U.S. 643 (1920). President has on one occasion invoked the rule of *rebus sic stantibus* (a treaty shall cease to be obligatory as soon as the state of facts and conditions upon which it was founded has substantially changed) in justification for suspending United States obligations under the International Loadline Convention of 5 July 1930, 47 Stat. 2228, T.S. No. 858 (1931). The presidential proclamation was based on an opinion of the Attorney General, 40 OPS. ATT'Y GEN. 119 (1941). See Briggs, *The Attorney General Invokes Rebus Sic Stantibus*, 36 AM. J. INT'L L. 89 (1942). 2 HYDE, *op. cit. supra* note 8, at 1527.

³⁵ *Charlton v. Kelly*, 229 U.S. 447 (1913); cf. *Terlinden v. Ames*, 184 U.S. 270, 285 (1902).
³⁶ 229 U.S. 447 (1913).

³⁷ *Id.* at 468. In nontreaty matters involving the exercise by the Executive of its power to conduct the foreign relations of the United States, the influence of the Department of State's opinion is similarly persuasive on the courts. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); 58 AM. J. INT'L L. 779 (1964). *But see*, *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957 (S.D.N.Y. 1965); Comment, 59 AM. J. INT'L L. 899 (1965). Cf. *Latvian State Cargo & Passenger S.S. Line v. McGrath*, 188 F.2d 1000 (D.C. Cir. 1951); *The Maret*, 145 F.2d 431 (3d Cir. 1944).

³⁸ Nelson, *supra* note 8, at 883-88.

³⁹ U.S. CONST. art. II, § 2.

⁴⁰ 167 U.S. 324 (1897).

⁴¹ 272 U.S. 52 (1926).

remove a postmaster. A statute passed by Congress providing that the postmaster could be removed from office by the President only with the advice and consent of the Senate was held an unconstitutional limitation on the removal power of the President. The pronouncement in *Myers* was narrowed considerably in *Humphrey's Executor v. United States*,⁴² where it was held that the President could not unilaterally remove officers appointed pursuant to an act of Congress to an office of legislative or judicial nature. Thus, the *Myers* decision affirming the power of the President alone to remove was confined to purely executive officers.

It has been argued that the powers of termination and removal are both essentially negative, that the Constitution does not expressly limit either power, and that the President is in both cases best suited to determine whether a treaty should remain in effect or whether a person should remain in office.⁴³ But, as previously pointed out, treaties are often fundamentally legislative; they can, like the Warsaw Convention, provide a set of international rules governing rights and liabilities between private persons. Termination of a legislative treaty is by no means essentially a negative act. Treaties, together with the Constitution and federal legislation, are at the top of the hierarchy of statutes establishing American law. Terminating a treaty of this sort automatically causes the applicable law in most cases to become that of the various states.⁴⁴ In any case, some substitute local law moves in immediately to fill the void. The decision to terminate a legislative treaty, involving as it does the exchange of one body of law for another, is principally for the legislature, although the interests of the Executive in the conduct of foreign relations may be indirectly involved.⁴⁵ The issue remains, however, whether in some cases the President is, after all, best suited to decide on treaty termination in an area traditionally and constitutionally governed by legislation.

A serious practical hurdle to the adjudication of the President's power to terminate a treaty is the "political question" doctrine. It is settled that "the question whether a state is in a position to perform its treaty obligations,"⁴⁶ whether a foreign country had properly ratified a treaty with the United States,⁴⁷ whether the United States is justified in disregarding its treaty engagements with other nations,⁴⁸ and whether a treaty remains effective after a foreign country, which is the other party to the compact,

⁴² 295 U.S. 602 (1935).

⁴³ Nelson, *supra* note 8, at 887-88.

⁴⁴ Cf. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

⁴⁵ It should be noted that in the Warsaw Convention situation, what is involved is mostly the regulation of foreign commerce, which duty devolves upon the Congress (U.S. CONST. art. I, § 8), although foreign relations are peripherally involved. Perhaps, therefore, Congress should necessarily play some part in the question of whether the resolution of the problems with which the Convention deals should revert to local law instead of the present treaty.

⁴⁶ *Clark v. Allen*, 331 U.S. 503, 514 (1947). The Court found that the conduct of the "political departments" was wholly consistent with the continued validity of a treaty, despite an intervening war.

⁴⁷ *Doe v. Braden*, 57 U.S. (16 How.) 635, 656 (1853); *Kelley v. Societe Anonyme Belge d'Exploitation de la Navigation Aerienne*, 242 F. Supp. 129, 137 (E.D.N.Y. 1965).

⁴⁸ *The Chinese Exclusion Case*, 130 U.S. 581, 602 (1889).

is merged into another country⁴⁹ are all non-justiciable political questions.⁵⁰

It seems doubtful, however, that the "political question" doctrine applies to the issue of who can terminate a treaty under American constitutional law.⁵¹ The present activist Supreme Court has recently indicated a greater willingness to accept jurisdiction over cases which formerly involved "political questions."⁵² Moreover, in cases which more closely approach the treaty termination question, the Supreme Court by analogy has indicated that the political question doctrine would not be invoked. The power of the Congress to force the abrogation of a treaty,⁵³ the congressional power to abrogate a treaty by subsequent inconsistent legislation,⁵⁴ the power of the president to enter into a binding "executive agreement" without Congressional assent,⁵⁵ and the Executive's power to unilaterally regulate foreign commerce⁵⁶ have all been judicially dealt with. It would seem logical, therefore, that the Supreme Court would not refuse to review the constitutional question of the power to terminate treaties. The areas where the court has refused review under the "political question" doctrine relate generally to issues governed by international rather than municipal law, and to subjects which come directly within the President's power to conduct foreign relations.

III. CONCLUSION

Although there is no determinative answer yet to the question of the President's power to terminate a treaty without some form of congressional approval, the issue appears to be justiciable. In the case of the Warsaw Convention, the President must deal with a treaty which is legislative in nature and which is principally concerned with the regulation of foreign commerce. For these reasons, the courts should require some congressional approval before that treaty could be validly terminated as part of the supreme law of the land. In this connection, development of a judicial doctrine similar to that announced in the power of removal cases is conceivable, whereby the power to terminate would depend upon the nature and subject matter of the treaty.

⁴⁹ *Terlinden v. Ames*, 184 U.S. 270, 288 (1902).

⁵⁰ In *Taylor v. Morton*, 23 Fed. Cas. 784, 787 (No. 13799) (C.C.D. Mass. 1855), Mr. Justice Curtis asked:

Is it a judicial question, whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty, has been voluntarily withdrawn by one party, so that it is no longer obligatory on the other; whether the views and acts of a foreign sovereign, manifested through his representative have given just occasion to the political departments of our government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise? I apprehend not. These powers have not been confided by the people to the judiciary, which has no suitable means to exercise them; but to the executive and the legislative departments of our government. They belong to diplomacy and legislation, and not to the administration of existing laws.

⁵¹ *Contra*, CORWIN, *op. cit. supra* note 8, at 426.

⁵² See, e.g., *Baker v. Carr*, 369 U.S. 186, 211 (1962). There the Supreme Court stated in dicta, "[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." See generally Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 *YALE L.J.* 517, 542 (1966).

⁵³ *Van Der Weyde v. Ocean Transp. Co.*, 297 U.S. 114 (1936).

⁵⁴ See cases cited note 29 *supra*.

⁵⁵ *United States v. Belmont*, 301 U.S. 324 (1937).

⁵⁶ *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 660 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955).