

Sec. 2—Powers, Duties of the President Cl. 2—Treaties and Appointment of Officers

nate treaties, but the Supreme Court, no majority agreeing on a common ground, vacated that decision and instructed the trial court to dismiss the suit.³⁹⁶ Although no Court opinion bars future litigation, it appears that the political question doctrine or some other rule of judicial restraint will leave such disputes to the contending forces of the political branches.³⁹⁷

Determination Whether a Treaty Has Lapsed.—There is clear judicial recognition that the President may without consulting Congress validly determine the question whether specific treaty provisions have lapsed. The following passage from Justice Lurton's opinion in *Charlton v. Kelly*³⁹⁸ is pertinent: "If the attitude of Italy was, as contended, a violation of the obligation of the treaty, which, in international law, would have justified the United States in denouncing the treaty as no longer obligatory, it did not automatically have that effect. If the United States elected not to declare its abrogation, or come to a rupture, the treaty would remain in force. It was only voidable, not void; and if the United States should prefer, it might waive any breach which in its judgment had occurred and conform to its own obligation as if there had been no such breach. . . . That the political branch of the government recognizes the treaty obligation as still existing is evidenced by its action in this case. . . . The executive department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the appellant as one imposed by the treaty as the supreme law of the land as affording authority for the warrant of extradition."³⁹⁹ So also it is primarily for the political departments to determine whether certain provisions of a treaty have survived a war in which the other contracting state ceased to exist as a member of the international community.⁴⁰⁰

Status of a Treaty a Political Question.—It is clear that many questions which arise concerning a treaty are of a political nature and will not be decided by the courts. In the words of Justice Curtis in *Taylor v. Morton*:⁴⁰¹ It is not "a judicial question, whether a treaty with a foreign sovereign has been violated by him; whether

³⁹⁶ *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979) (en banc), *vacated and remanded*, 444 U.S. 996 (1979). Four Justices found the case nonjusticiable because of the political question doctrine, *id.* at 1002, but one other Justice in the majority and one in dissent rejected this analysis. *Id.* at 998 (Justice Powell), 1006 (Justice Brennan). The remaining three Justices were silent on the doctrine.

³⁹⁷ *Cf. Baker v. Carr*, 369 U.S. 186, 211–13, 217 (1962).

³⁹⁸ 229 U.S. 447 (1913).

³⁹⁹ 229 U.S. at 473–76.

⁴⁰⁰ *Clark v. Allen*, 331 U.S. 503 (1947).

⁴⁰¹ 23 Fed. Cas. 784 (No. 13,799) (C.C.D. Mass. 1855).