

Foreign Affairs Cases: The Need for a Mandatory Certification Procedure

[*The district court's erroneous decision in Goldwater v. Carter*] poses a "serious problem" for newly opened U.S.-Chinese diplomatic relations.

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The American judiciary has long recognized that it should leave foreign affairs matters to the political branches of government.² The courts have expressed this understanding through the use of the political question doctrine, extreme judicial deference to executive and legislative decisions concerning war and related military matters, sovereign immunity, the Act of State doctrine, and a narrow standard of review for decisions concerning immigration and naturalization. These doctrines, which might be termed judicial nonintervention doctrines, call for less judicial inquiry into actions of the executive and legislative branches in foreign than in domestic affairs.

The results of this judicial deference are evident. For example, the Supreme Court has never declared a treaty provision to be unconstitutional.³ Also, courts have read expansively the President's constitutional role as Commander in Chief of the Armed Forces,⁴ permitting

1. *China May Cut Ties Over Pact, State Dept. Says*, Wash. Post, Oct. 20, 1979, at A14, col. 6. See also Wash. Star, Oct. 21, 1979, at A3, col. 3: "'I'm sorry to see such an important foreign policy matter thrown in the air and doubts thrown on it by the courts.' [Senate Majority Leader] Byrd said: 'I hope the [PRC] knows that this does not reflect the mood of the Senate.'" But see *Chinese Seem Unruffled by U.S. Court Decision on Accord with Taiwan*, Wash. Post, Oct. 20, 1979, at A14, col. 5.

2. See, e.g., *Techt v. Hughes*, 229 N.Y. 222, 247, 128 N.E. 185, 193 (Cardozo, J.) (few precepts for judges in many kinds of foreign affairs cases), *cert. denied*, 254 U.S. 643 (1920).

3. L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 137 (1972). The courts have invalidated one executive agreement, however. *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953). The court voided an executive agreement with Canada that potatoes imported from Canada not be used for "table stock" because Congress had not authorized the executive agreement and it contravened provisions of a statute directly on point. *Id.* at 658. The insignificant foreign policy implications of the executive agreement in *Capps* probably limit its precedential force.

4. U.S. CONST. art. II, § 2, cl. 1. See, e.g., *United States v. Levy*, 39 C.M.R. 672 (1968); *United States v. Johnson*, 38 C.M.R. 44 (1967); *United States v. Samas*, 37 C.M.R. 708 (1967). These cases before the United States Court of Military Appeals involved challenges to the conflict in Vietnam, and illustrate that a court faced with similar foreign affairs cases may adopt different approaches in denying relief. In *Samas*, the court-martial rejected a defense based on the illegality of the conflict, holding that it was legal. *Id.* at 709. This judgment "on the merits" was reached, however, by way of a perfunctory foreign affairs/great deference to the political branches/no independent judicial inquiry analysis. In *Levy* and *Johnson*, the courts invoked the

the President free rein in war and in foreign "police actions."⁵

In the last decade, some foreign affairs nonintervention doctrines have been weakened. For example, Congress has enacted a significant statutory exception to the doctrine of sovereign immunity.⁶ Two recent cases, however, suggest a strengthening of these doctrines. In *Goldwater v. Carter*⁷ twenty-four Members of Congress challenged the President's exercise of the United States right to terminate the Taiwan Mutual Defense Treaty. In *Narenji v. Civiletti*⁸ Iranians holding student visas challenged an Executive regulation that singled them out for immigration checks. In both cases, the district courts incorrectly reached the merits of the allegations, only to be reversed on appeal, with the appellate courts dismissing the actions on judicial nonintervention grounds.

The ultimate decisions in *Narenji* and *Goldwater* make plain that the federal courts should not have inquired into the foreign affairs mat-

political question doctrine to hold that the legality of the conflict was nonjusticiable. 39 C.M.R. at 677; 38 C.M.R. at 45. The effect in all three cases was the same: The defendants had no grounds for challenging their orders to serve in Vietnam.

5. In the aftermath of the lengthy "police action" in Vietnam, throughout which Congress appropriated funds and conscripted young men to serve in Southeast Asia but never formally declared war, Congress in 1973 asserted its authority to participate in decisions to engage in hostilities abroad by passing the War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1976). This legislation requires the President "in every possible instance . . . [to] consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." *Id.* § 1542.

Whether, in the face of a need for swift military reaction, that Act alters the interaction of Congress and the President in any meaningful way is unclear. It apparently did not in the case of the Mayagüez incident. See Wicker, *Raising Some Mayagüez Questions*, N.Y. Times, May 16, 1975, at 37, col. 2 (uselessness of requirement that President consult Congress). But cf. *Ford Scores Limit on War Powers*, N.Y. Times, Apr. 12, 1977, at 14, col. 4 (ex-President Ford argued that the Act is a nuisance for the President and should be "reconsidered"). Nor did the Act restrict President Carter in the attempt to rescue hostages in Iran by military helicopter. After the rescue attempt failed, Senator Frank Church, chairman of the Senate Foreign Relations Committee, "criticiz[ed] the President for lack of consultation with Congress." Wash. Post, Apr. 26, 1980, at A8, col. 4.

6. While the Foreign Sovereign Immunities Act (FSIA) of 1976, 28 U.S.C. §§ 1602-1611 (1976), generally provides foreign states sovereign immunity from jurisdiction of United States courts, the Act provides several exceptions from immunity, including *id.* § 1605(a)(2), which provides that a foreign state shall not be immune in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state" One purpose in enacting the FSIA was to reduce the foreign policy implications of immunity determinations by transferring them from the executive branch to the judicial. *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270 (3d Cir. 1980). Since the FSIA's transfer of immunity determinations to the judiciary represents the political branches' determination that the judiciary's decisions of this type of case will not conflict with any prior determinations of a political branch, see note 62 *infra*, the nonintervention doctrines do not apply.

7. 481 F. Supp. 949 (D.D.C. Oct. 17, 1979) [hereinafter cited as *Goldwater I*], *rev'd per curiam*, 617 F.2d 697 (D.C. Cir. Nov. 30, 1979) (en banc) [hereinafter cited as *Goldwater II*], *vacated and remanded*, 444 U.S. 996 (Dec. 13, 1979) [hereinafter cited as *Goldwater III*].

8. 481 F. Supp. 1132 (D.D.C. Dec. 11, 1979), *rev'd*, 617 F.2d 745 (D.C. Cir. Dec. 27, 1979), *cert. denied*, 100 S. Ct. 2928 (May 19, 1980).

ters at the core of those cases.⁹ Yet none of the opinions in those cases suggested any means by which district courts could consistently avoid an initial erroneous decision to hear a foreign affairs case or to inquire into a foreign affairs issue. In order to avoid such erroneous decisions, this Comment proposes that Congress enact a statute requiring that where the government nonfrivolously asserts that a case or issue in a district court involves foreign affairs, the court certify that case or issue to the court of appeals for consideration of whether a judicial nonintervention doctrine should be applied, and the case dismissed or the issue not inquired into.

This Comment argues that the current handling of foreign affairs issues and cases at the district court level is inadequate, and that the suggested procedure would substantially reduce the dangers presented by this problem. The focus of this Comment is more procedural than substantive; it accepts the foreign affairs nonintervention doctrines and their contours as a given. Since their goal of avoiding certain harms to the national interest is undermined by the current lack of safeguards against initial erroneous district court decisions, the Comment proposes an effective means of avoiding those harms. In a sense, however, the Comment goes further. Agreeing that the nonintervention doctrines represent the appropriate judicial role in foreign affairs matters, it argues that the consistency in the law achieved by the proposal advanced here for mandatory certification of foreign affairs matters also represents sound policy.¹⁰ Accordingly, the proposal is not intended to alter current substantive law, but only to modify current procedures so that the substantive law can be faithfully applied.

Part I of this Comment briefly sets out the various judicial nonintervention doctrines and discusses several recent cases involving foreign affairs matters. Part II examines the cases and the doctrines and proposes a policy-oriented conceptualization of the three types of harms to the national interest that are likely to result from judicial intervention in foreign affairs. Part II then argues that those three types of harms are likely to result from *any* courtroom inquiry into foreign affairs matters or judicial second-guessing of the merits of the challenged actions. Part III describes the doctrinal and institutional impediments to consistently correct district court determinations of whether to refuse to hear a foreign affairs case or to decline to inquire into a foreign affairs issue, thus demonstrating the ongoing nature of the

9. See *Goldwater III*, *supra* note 7, at 1006 (plurality opinion) ("the political nature of the questions presented should have precluded the lower courts from considering or deciding the merits of the controversy . . .").

10. Cf. Gurfein, *Federal Appellate Procedure*, 31 REC. N.Y.C. B. 652, 653 (1976) (appellate procedure presents profound questions of policy).

problem. Part IV sets forth the proposed statute and defends its adoption as the most reasonable response to the dangers presented by improper judicial inquiry into foreign affairs matters.

I

FOREIGN AFFAIRS CASES

A. *Judicial Nonintervention Doctrines*

Historically, the American judiciary has been sensitive to the principle that executive and legislative actions in the field of foreign affairs require substantially greater deference than is proper in domestic affairs. A number of doctrines for judicial nonintervention in that area reflect that sensitivity. These doctrines are generally consistent with the Restatement view that "courts should abstain from any action that might hinder the executive branch . . . in the conduct of foreign relations."¹¹ A brief description of five nonintervention doctrines follows and provides the context for the discussion of *Goldwater v. Carter* and *Narenji v. Civiletti*.

1. *Sovereign Immunity*

Under the doctrine of sovereign immunity, presently codified in the Foreign Sovereign Immunities Act of 1976,¹² foreign states with "sovereign" status are granted immunity from certain types of suits in the federal courts.¹³ Determination of whether a foreign state should be given sovereign status is in the sole discretion of the political branches, whose decision is conclusive.¹⁴

2. *Act of State Doctrine*

The Act of State doctrine is a rule of substantive law that United States courts will not inquire into the legitimacy of an act of a foreign government done within its national borders. Thus, American courts will not attempt to interfere in the internal affairs of a foreign state. A claimant seeking redress in the United States for such an act of a foreign government therefore can rely only on those diplomatic measures that the United States might attempt on his behalf.¹⁵

Thus, in cases involving the Act of State doctrine, if the Executive

11. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 41, Comment c (1965).

12. See note 6 *supra*.

13. See generally Note, *The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff his Day in Court*, 46 FORDHAM L. REV. 543, 544-57 (1977).

14. *Jones v. United States*, 137 U.S. 202, 212 (1890); *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 180 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

15. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

recognizes a foreign state, a party aggrieved by a governmental-type act¹⁶ of that state cannot turn to the American courts for justice. And if the party turns to the Executive in search of a diplomatic solution, the decision whether to intercede for him is as unreviewable as was the determination of recognition. Such judicial nonintervention serves the national interest by furthering effective foreign relations, but only at the expense of shielding private wrongs from a remedy.¹⁷

Unlike the United States, most civil law countries do not apply the Act of State doctrine to acts contrary to their sense of public order.¹⁸ The expansive American Act of State doctrine is thus not as much a rule of international law as it is an expression of two convictions held by the American judiciary: first, that it should defer to the executive branch's superior ability to determine which governments should be recognized as states, and second, that its nonexamination of the conduct of recognized governments promotes "the highest considerations of international comity and expediency."¹⁹

3. *Extreme Deference to Military Decisions*

A third doctrine is that of according extreme judicial deference to war and similar military decisions.²⁰ The Constitution explicitly grants to Congress²¹ and to the President²² responsibility over military matters. Moreover, the courts lack the expertise needed to make military

16. There is a "commercial act" exception to judicial application of the Act of State doctrine. See, e.g., *International Ass'n of Machinists & Aerospace Workers v. OPEC*, 477 F. Supp. 553, 565 (1979) (discussing 28 U.S.C. § 1605(a)(2) (1976)).

17. *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 769 (1972) (explaining that the doctrine is designed to avoid having courts frustrate the country's foreign policy); see *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918) (Pancho Villa's seizure of property while a Carranza-appointed general not subject to American judicial process after the United States had recognized the Carranza government, since recognition retroactively made the seizure an Act of State). See also *Underhill v. Hernandez*, 168 U.S. 250 (1897) (subsequent recognition of a revolutionary government brought its prior acts against an American citizen under the Act of State doctrine).

18. See, e.g., *Anglo-Iranian Oil Co. v. S.U.P.O.R. Co.*, 22 I.L.R. 19 (Court of Venice 1955); *Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabushiki Kaisha*, 20 I.L.R. 305 (High Court of Tokyo 1953); *Indonesian Nationalization Measures Before Foreign Courts*, 54 AM. J. INT'L L. 305 (1960) (discussion of and excerpts from opinions of the District Court in Bremen and the Hanseatic Court of Appeals, and the Amsterdam District Court and Appellate Court).

19. *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-04 (1918).

20. See, e.g., *L.P. Steuart & Bro. v. Bowles*, 322 U.S. 398, 405 (1944) (per Douglas, J.) ("in times of war the national interest cannot wait on individual claims to preference"); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1310 (2d Cir. 1973) (invasion of Cambodia precisely the type of question involving military and diplomatic expertise that makes the issue political and beyond the competence of the courts), *cert. denied*, 416 U.S. 936 (1974). See also *Owens v. Brown*, 455 F. Supp. 291, 300 (D.D.C. 1978) (dictum) (military judgments deserve great deference because civilians are unfamiliar with necessities of military discipline and duty).

21. U.S. CONST. art. I, § 8, cl.16.

22. *Id.* art. II, § 2, cl.1.

decisions,²³ leading to a high level of judicial deference to executive and legislative decisions in that area.

4. *Deference to Immigration and Naturalization Decisions*

The federal courts review with great deference decisions made by the legislative and executive branches regarding immigration and naturalization.²⁴ The justification for this narrow standard of review is that these decisions often hinge on relations with foreign powers, and therefore are decisions appropriately left to the political branches.²⁵

5. *The Political Question Doctrine*

The political question doctrine²⁶ posits that there are certain "issues to be resolved and decisions to be made by the political branches of government and not by the courts."²⁷ The courts have often invoked this doctrine in foreign affairs cases,²⁸ using it to justify judicial nonin-

23. *Gilligan v. Morgan*, 413 U.S. 1, 11 (1973).

24. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

25. *Mathews v. Diaz*, 426 U.S. 67, 81-82 (1976) ("reasons that preclude judicial review of political questions also dictate a narrow standard of review of [political branches'] decisions . . . in the area of immigration and naturalization") (footnote omitted).

26. Under some interpretations, the political question doctrine subsumes each of the other nonintervention doctrines. For example, when in *Oetjen v. Central Leather Co.*, the Court spoke of judicial acceptance of executive recognition of foreign governments, it did so in terms of both the political question and the Act of State doctrines. 246 U.S. 297, 302-03 (1918). See Tigar, *Judicial Power, The "Political Question Doctrine," and Foreign Relations*, 17 U.C.L.A. L. REV. 1135, 1156 (1970). Justice Brennan has apparently concluded that the Act of State doctrine is based on political question concerns. *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 787-89 (1972) (Brennan, J., dissenting). See also note 25 *supra*.

Some standard references on the political question doctrine are: Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485 (1924); Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338 (1924); Finkelstein, *Further Notes on Judicial Self-Limitation*, 39 HARV. L. REV. 221 (1925); Frank, *Political Questions*, in SUPREME COURT AND SUPREME LAW 36 (E. Cahn ed. 1954); Henkin, *Is There a "Political Question" Doctrine?* 85 YALE L.J. 597 (1976); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966); Tigar, *supra*; Tollett, *Political Questions and the Law*, 42 U. DET. L.J. 439 (1965); Weston, *Political Questions*, 38 HARV. L. REV. 296 (1925). The articles that appeared after the seminal case of *Baker v. Carr*, 369 U.S. 186 (1962), are generally more useful than those published previously.

For a critical look at political question doctrine analysis in foreign affairs cases, see Note, *The Supreme Court as Arbitrator in the Conflict Between Presidential and Congressional War-Making Powers*, 50 B.U. L. REV. 78, 85-94 (Special Issue, Spring 1970); Comment, *Public Interest Litigation and United States Foreign Policy*, 18 HARV. INT'L L.J. 375, 417 (1977). See also Schwartz & McCormack, *The Justiciability of Legal Objections to the American Military Effort in Vietnam*, 46 TEX. L. REV. 1033 (1968).

27. Henkin, *supra* note 26, at 597.

28. A classic expression of the applicability of the political question doctrine to foreign affairs is in *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948):

The President . . . has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. . . . But even if courts could require full disclosure, the

tervention in deportation cases²⁹ and separation of powers cases such as the challenges to the Vietnam conflict³⁰ and now the two Chinas problem.

Madison and the other founders of the Republic recognized the compelling importance of a single voice or united front on foreign as opposed to domestic policy.³¹ Although the Court has established that the "checking function"³² of the judiciary is paramount in domestic matters, the "united front" has consistently prevailed in foreign affairs matters.³³ Congress has shown a corresponding deference to the Exec-

very nature of executive decisions as to foreign policy is political, not judicial. . . . They are delicate, complex, and involve large elements of prophecy. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility

Id. at 111. See also *Hirota v. MacArthur*, 338 U.S. 197, 208 (1948) (Douglas, J., concurring).

Of the various types of cases to which the political question doctrine has been applied, foreign affairs cases most require strict judicial nonintervention. Professor Wright has noted that the doctrine's "principal application is to questions of international and domestic law that immediately concern the political or military interactions of the United States with foreign governments" C. WRIGHT, *FEDERAL COURTS* 52 (3d ed. 1976).

29. See, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580, 591 (1952) (political branches had already determined the way to secure better treatment for aliens; the courts should not work at cross-purposes with that determination).

30. *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); *Orlando v. Laird*, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971).

31. THE FEDERALIST No. 42 (J. Madison).

32. Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RESEARCH J. 521.

33. See, e.g., cases cited note 28 *supra*. The need for a "united front" does not mean that there are no checks on the political branches. The "checking function" on the foreign affairs powers of the political branches should be and is largely political. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 233 (2d ed. 1973) (among the salient considerations which contribute to the conclusion that a question is nonjusticiable is "the superiority of political checks as guides to decisions"). There are at least three effective checks on Executive power: the Congress, the electorate, and other nations.

Congress has numerous devices to check executive action in foreign affairs. Most importantly, it has the spending power. For example, the Congress could have checked the President's actions in Vietnam by cutting off the billions of dollars per year needed to finance those actions. For a brief history of the appropriations, see *Orlando v. Laird*, 443 F.2d 1039, 1042 n.2 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971). Congress could also have ended the war by using its power over conscription.

Although Congress for many years did not use its powers to check the Vietnam war, it has been more aggressive in reviewing presidential action in the area of treaties. The Senate must concur by two-thirds vote in all treaties, and has been by no means a rubber stamp. It may attach amendments or reservations, or it may simply reject a treaty, as it has already done some 60 times. J. PLANO & M. GREENBERG, *AMERICAN POLITICAL DICTIONARY* 410-11 (5th ed. 1979). About 70% of the nearly 1600 treaties submitted to the Senate have been approved. Many of those have never been put into force because Senate amendments or reservations were unacceptable to the President or to the other treaty parties. *Id.* at 411. Any congressional exclusion from foreign policy decisions has been mostly by congressional choice. See *Treaties, politics, and the court*, Chicago Tribune, Dec. 17, 1979, § 3, at 2, col. 2: "The Congress, in the treaty case, could use its appropriations power to resist President Carter's action. The Senate could have refused to give its consent to the appointment of an ambassador to China. Other legislation the President holds dear could have been threatened by legislators."

The Executive must also answer to the people. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137,

utive in foreign affairs in the interest of "one voice."³⁴ In areas such as immigration, in which Congress normally makes the foreign affairs determinations, the courts have proved similarly deferential when judicial review of those determinations has been sought.³⁵

B. Goldwater *and* Narenji

In two recent cases, federal appellate courts applied judicial nonintervention doctrines to foreign affairs cases. Both cases were decided incorrectly by the district courts, but were reversed on appeal.

1. Goldwater v. Carter

On December 15, 1978, the United States and the People's Republic of China (PRC) announced that they would establish full diplomatic relations on January 1, 1979.³⁶ The two nations issued a joint communique that said, in part, that the PRC is "the sole legal Government of China."³⁷ Agreement with that statement required the United States to exercise its right under the Taiwan Mutual Defense Treaty³⁸ to terminate that treaty on one year's notice.³⁹ The President gave that notice

165-66 (1803) (President's use of important political powers accountable politically only); *Pauling v. McNamara*, 331 F.2d 796, 799 (D.C. Cir.), *cert. denied*, 377 U.S. 933 (1964) (people may remove their elected representatives, but not the federal judiciary). This is more than a mere homily of democratic theory without a practical basis. Foreign affairs and security matters are very high visibility issues with the electorate. Presidents have risen and fallen with popular support both for their foreign policy and for their record of collaboration with Congress on that foreign policy. See, e.g., T. BAILEY, A DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE 824-25 (8th ed. 1969):

The Republican platform assailed the Democrats for having lost China to the Communists, for having "plunged us into war in Korea without the consent of our citizens through their authorized representatives in the Congress," and for fighting "without will to victory."

. . . .
Foreign affairs . . . probably proved decisive

. . . .
For the most conspicuous time in American history, the party in power was evicted in the midst of piping prosperity.

The two most important issues, according to postelection Gallup polls, that helped elect Eisenhower were corruption and Korea. *Id.* at 825 n.11.

Finally, there is the constraint, often absent in domestic affairs, of the give-and-take with other countries. The counterforce—diplomatic, military, and commercial—of individual nations and of the community of nations also circumscribes the foreign affairs acts of the political branches.

34. For example, although Congress has refused to adopt the view that it must as a matter of constitutional law enact legislation implementing the international obligations of the United States, it has repeatedly done so. L. HENKIN, *supra* note 3, at 162.

35. See cases cited notes 24-25 *supra*.

36. Nash, *Contemporary Practice of the United States Relating to International Law*, 73 AM. J. INT'L L. 277, 277 (1979).

37. *Id.*

38. 6 U.S.T. 433, T.I.A.S. No. 3178.

39. Nash, *supra* note 36, at 278.

as of January 1, 1979.⁴⁰

On December 22, 1978, Senator Goldwater and twenty-three other legislators filed suit in federal district court seeking declaratory and injunctive relief to prevent termination of the treaty without either senatorial or congressional consent. After preliminary proceedings,⁴¹ the court permitted the plaintiffs to air their allegation that President Carter had mismanaged diplomatic negotiations and had usurped the Congressional role in treaty matters. The court determined that the case did not present a political question,⁴² and held that the President could not terminate the treaty without the approval of either two-thirds of the Senate or a majority of both Houses of Congress, in effect enjoining rapprochement with the PRC.

The Court of Appeals for the District of Columbia Circuit, sitting en banc, reversed on the merits.⁴³ The Supreme Court vacated that judgment and remanded the case to the district court with directions to dismiss the complaint.⁴⁴ Four Justices⁴⁵ stated that the case presented a political question, and that the district court should not have heard the case, since it "involve[d] the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President."⁴⁶ Two Justices thought the case presented no political question,⁴⁷ and three Justices did not address the issue.⁴⁸ Thus, although the opinions do not

40. *Id.*

41. On January 18, 1979, Senator Goldwater and 16 other Senators submitted a concurrent resolution stating that the President should not abrogate mutual defense and other security treaties "without the advice and consent of the Senate . . . or the approval of both Houses of Congress." S. Con. Res. 22, 96th Cong., 1st Sess., 125 CONG. REC. 219 (1979). Neither House of Congress took any action on that resolution. On June 6 the district court dismissed the suit, without prejudice, for lack of standing, observing that three resolutions pending in the Senate might resolve the controversy. Goldwater II, 617 F.2d at 701.

The Senate then passed a resolution drafted by Senator Harry Byrd, Jr. stating that "the sense of the Senate [is] that approval of the United States Senate is required to terminate any mutual defense treaty between the United States and another nation." *Id.* Whether that resolution was to have retroactive effect was unclear. After the resolution passed, Senator Goldwater filed a motion in the district court for alteration or amendment of the June 6 order of dismissal. It was granted, and the case proceeded. *Id.*

42. Goldwater I, *supra* note 7, at 956-58.

43. Goldwater II, *supra* note 7, at 699.

44. Goldwater III, *supra* note 7, at 996.

45. *Id.* at 1002. Justice Rehnquist was joined by Chief Justice Burger and Justices Stewart and Stevens.

46. *Id.*

47. *Id.* at 997-1002 (Powell, J., concurring) (no political question, but case not ripe for review); *id.* at 1006-07 (Breunan, J., dissenting) (no political question; the Constitution commits the power to recognize foreign governments to the President alone).

48. Justice Marshall concurred in the result. *Id.* at 996. Justices Blackmun and White would have set the case for oral argument "on the issue of [its] justiciability" as well as other issues. *Id.* at 1006.

delineate clearly the Court's conception of the political question doctrine, they do indicate its continuing vitality.

Although the Supreme Court decision ended the judicial intervention into U.S.-PRC relations, the judiciary had already interfered irrevocably with a major foreign affairs initiative and had initially invalidated it. This high-visibility setback executed by an organ of the American government imperiled the United States fragile rapprochement with the PRC.⁴⁹

2. *Narenji v. Civiletti*

In response to the Iranian seizure of more than fifty American hostages in November 1979, the President took a number of nonmilitary actions in order to pressure the Iranian government to release the hostages.⁵⁰ One of these actions was to issue an Executive regulation⁵¹ requiring all Iranians holding American student visas to report to immigration or university officials for a determination of whether their immigration papers were in compliance with American law.

In *Narenji v. Civiletti*⁵² several Iranians holding student visas brought suit in the district court, alleging that the regulation was unconstitutional. The district court failed to apply a nonintervention doctrine and, looking into the policy reasons for the regulation, found it to be unconstitutional.

The Court of Appeals for the District of Columbia Circuit unanimously reversed.⁵³ Although the regulation was implemented entirely within the United States, the court held that its effect and thrust were clearly foreign and intergovernmental. The court accepted the Attor-

49. See *Administration Seeks to Avoid Taiwan Fallout*, Wash. Star, Oct. 19, 1979, at 1, col. 1 (capitol special ed.):

[The administration hopes to avoid] a possible serious setback for Chinese-American relations that could unbalance the triangular relationship between Peking, Moscow and Washington. . . .

Some officials expressed apprehension . . . that a legal defeat for Carter would be taken abroad as a sign of U.S. weakness and inability to conduct a stable foreign policy.

Deputy Secretary of State Christopher had filed an affidavit stating that judicial interference with the President's action "would disrupt the process of normalization of relations with the People's Republic of China to the detriment of the national interest of the United States. . . . It would at a minimum be a serious setback in U.S. relations with China that could have far-reaching and long-lasting consequences." *Id.*

50. For example, President Carter indefinitely halted purchases of Iranian oil. See, e.g., Wash. Post, Nov. 13, 1979, at A1, col. 1. He also "order[ed] blocked all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States . . ." Exec. Order No. 12,170, 3 C.F.R. 457 (1980).

51. 8 C.F.R. 214.5 (1980).

52. 481 F. Supp. 1132 (D.D.C. 1979).

53. 617 F.2d 745 (D.C. Cir. 1979), cert. denied, 100 S. Ct. 2928 (1980).

ney General's view that the regulation was "an element of the language of diplomacy . . . fundamental [to] the President's efforts to resolve the Iranian crisis and to maintain the safety of the American hostages in Tehran."⁵⁴

Although the appellate decision halted judicial interference with that aspect of the President's handling of the Iranian hostage crisis, some damage had already been done. The district court had openly questioned and had initially invalidated a major foreign policy move. Its error, although quickly reversed, had irrevocably added, at the worst possible moment, a contribution from the federal judiciary to Iran's deliberate attempt to humiliate the United States.

3. Other cases

Goldwater and *Narenji* are not unique. District courts have been increasingly willing to consider and decide sensitive foreign affairs cases in recent years. Many of their decisions have been incorrect.⁵⁵

Considering the gravity of the possible harms from initial erroneous decision in the foreign affairs realm, this frequency of error is cause for concern. Even in the months since the final decisions in *Goldwater* and *Narenji*, there has been little evidence of district court restraint in foreign affairs matters.

Foreign affairs cases decided or pending after the ultimate decision of *Goldwater* and *Narenji* demonstrate the continuing possibility of district court decisions presenting grave consequences for the effective conduct of foreign affairs.⁵⁶ For example, the decision in *Haitian Refu-*

54. *Id.* at 747.

55. *Rosado v. Civiletti*, 621 F.2d 1179 (2d Cir.) (exchange of prisoners pursuant to treaty with Mexico) (reversing the district court), *cert. denied*, 49 U.S.L.W. 3248 (Oct. 6, 1980); *Jackalone v. Andrus*, No. 79-2359 (D.C. Cir. Nov. 19, 1979) (Iranian demonstrations in front of the White House) (reversing the district court's refusal to grant an injunction); *Adams v. Vance*, 570 F.2d 950 (D.C. Cir. 1977) (mandatory injunction against the Secretary of State, ordering him to vote a certain way in an international commission) (incorrectly decided by the district court); *cf. Edwards v. Carter*, 580 F.2d 1055 (D.C. Cir.) (Panama Canal Treaty) (district court dismissed plaintiffs for lack of standing) (affirmed on the merits), *cert. denied*, 436 U.S. 907 (1978); *American Jewish Cong. v. Vance*, 575 F.2d 939 (D.C. Cir. 1978) (district court dismissed as political question) (affirmed on other grounds); *International Ass'n of Machinists & Aerospace Workers v. OPEC*, 477 F. Supp. 553 (C.D. Cal. 1979) (antitrust suit) (decided against plaintiffs on the merits, but only after four days of hearings airing grievances against OPEC). *But see Pfeiffer v. United States Bureau of Prisons*, 615 F.2d 873 (9th Cir. 1980) (exchange of prisoners pursuant to treaty with Mexico).

56. Presently, there are many pending claims against frozen Iranian assets in this country. The following cases were pending on appeal as of August 1980: *American Int'l Group, Inc. v. Islamic Republic of Iran*, No. 80-1779 (D.C. Cir.) (action for just compensation for nationalized minority interests in Iranian insurance companies) (appeal from preliminary injunction enjoining Iran from removing assets from the United States and from order granting plaintiff American insurance companies partial summary judgment on issue of liability); *Charles T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, No. 80-1027 (1st Cir.) (action for fees for professional services

gee Center v. Civiletti,⁵⁷ decided after *Goldwater* and *Narenji*, shows no judicial deference to the political branches. In that case, the district court permitted a lengthy airing, over the objections of the State Department, of grievances about political conditions in Haiti, a nation friendly to the United States. The only way that the complainants, Haitian refugees, could remain in this country was for them to convince the court that they had left Haiti due to political persecution, a course that required them to use the official forum of the courtroom to paint political conditions in Haiti in as reprehensible a tone as possible. The court reached the merits of the case and invalidated the Government's foreign affairs decision that most Haitian refugees are fleeing abject poverty, not political persecution. The court brushed aside an Immigration and Naturalization Service memorandum stating that the Haitians generally are economic rather than political refugees, and that a decision to receive them would encourage a deluge of the world's poor to come to the United States.⁵⁸

II

THE TYPES OF HARMS THREATENED BY JUDICIAL INTERVENTION IN FOREIGN AFFAIRS CASES

Deference to the foreign affairs determinations of the legislative and executive branches, often exercised under the name of the political question doctrine, was already judicial practice when the Supreme

rendered to Iranian electrification projects) (appeal from preliminary injunction enjoining Iran from disposing of, encumbering, or removing assets); *New Eng. Merchants Nat'l Bank v. Iran Power Generation and Transmission Co.*, No. 80-1071 (1st Cir.) (action for declaratory judgment and damages for failure to pay promissory notes) (appeal from preliminary injunction enjoining Iran from disposing of, encumbering, or removing assets); *Imperial Iranian Air Force v. Behring Int'l, Inc.*, Nos. 79-1784 & 79-2529 (3d Cir.) (action for payment for commercial freight forwarding services rendered to Iranian Air Force) (appeal from orders authorizing prejudgment attachment of defendant's property); *Electronic Data Syss. Corp. v. Social Sec. Org. of the Gov't of Iran*, Nos. 79-2641 & 80-1641 (5th Cir.) (action for damages for breach of contract and for failure to ensure safety of plaintiff's employees in Iran) (appeal from same type of injunction as in *Main*, *supra*, and from final judgment awarding damages, interest, attorney's fees and costs to plaintiff). *See also* *E-Systems, Inc. v. Islamic Republic of Iran*, 491 F. Supp. 1294 (N.D. Tex. 1980) (prejudgment attachment of blocked account denied).

In many of the Frozen Assets cases, the State Department has written to the court to express its view that "any action taken at this time in these cases could have serious repercussions for the conduct of foreign policy . . ." For instance, in a suit in the Southern District of New York involving 75 claims on the fund by American banks on the basis of alleged unpaid debts and loans, the Department urged a 60-day stay of all proceedings for foreign policy reasons, and the district court complied. UPI Dispatch, Jan. 8, 1980, 12:51 AES (emphasis added) (on file with the *California Law Review*).

57. 49 U.S.L.W. 2065 (S.D. Fla. July 2, 1980).

58. *Id.* "Unless overturned on appeal, the ruling means the Haitians must be granted new, unrushed hearings on their claims to political asylum. That process, says one lawyer for the Haitians, could take '10 to 15 years.'" *U.S. Anxious to Weave New Threads into Immigration Net*, *Christian Science Monitor*, July 8, 1980, at 4, col. 3.

Court decided *Baker v. Carr*⁵⁹ in 1962. Although it involved the political question doctrine as applied to domestic matters, *Baker v. Carr* is the seminal case for the doctrine generally. In that case, the Supreme Court delineated six analytical strands underlying the doctrine,⁶⁰ two

59. 369 U.S. 186 (1962). This Comment does not enter the debate whether the political question doctrine is constitutionally based, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7-9 (1959); Tigar, *supra* note 26, at 1135, prudentially based, Finkelstein, *Judicial Self-Limitation*, *supra* note 26, at 344-45, or both, A. BICKEL, *THE LEAST DANGEROUS BRANCH* 184 (1962); Scharpf, *supra* note 26, at 566. See also L. HENKIN, *supra* note 3, at 213. Instead, it analyzes the strands advanced in *Baker v. Carr* in order to construct a policy-oriented framework for identifying when the political question or other judicial nonintervention doctrine should be applied to foreign affairs cases.

60. The six factors explicitly mentioned in *Baker v. Carr* are:

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

369 U.S. at 217.

1. *Embarrassment*. The analysis in the text treats this harm. See text accompanying notes 61-70 *infra*.

2. *Inappropriateness of a Policy Determination by the Judiciary*. This characterization represents, but is less inclusive than, the cluster of harms from the judiciary's operating at cross-purposes with the political branches' initiatives or actions in the foreign affairs area. See text accompanying notes 71-74 *infra*.

3. *Need for Unquestioning Adherence*. The need for judicial adherence is equivalent to the need to avoid the three types of harms discussed at text accompanying notes 61-88 *infra*. The "unquestioning" language is troubling, since the courts have recognized that some foreign affairs matters present difficult trade-offs between civil liberties and effective foreign policy. Thus the judicial nonintervention doctrines have not been, and should not be, regarded as invitations to *ultimate unquestioning* adherence. Were concentration camps with gas chambers, *cf.* *Korematsu v. United States*, 323 U.S. 214 (1944) (Japanese wartime relocation case), to be set up in this country in the name of effective foreign policy, it is unthinkable that the Supreme Court would not intervene because "political questions" were involved.

4. *Textual Commitment*. Judicial decision of matters textually committed in the Constitution to another branch would usurp the legislative and executive roles. It would therefore be a violation of the constitutionally mandated separation of powers. To the extent that the textual commitment problem affects the United States position abroad or its foreign relations, it falls into one of the three harms considered in this Comment.

5. *Lack of Due Respect*. This characterization is irrelevant to foreign affairs, except to the extent that it produces embarrassment abroad or is simultaneously an instance of judicial working at cross-purposes.

6. *Lack of Judicial Standards*. This characterization subsumes two problems. There must be discoverable standards (means to obtain and evaluate evidence) so that the case can be decided. There must also be manageable standards (means to formulate and enforce an order) so that the matter can be put to rest.

While in general it may be more difficult to obtain evidence from abroad than from within the country, this without more is no reason to invoke a foreign affairs nonintervention doctrine. If the success of *A's* suit against *B* relies on the deposition of *C*, a foreigner who lives abroad, *A's* failure to obtain the deposition should cause him to lose on the merits. Like thousands of other plaintiffs, he simply would have failed to prove his case. See Tigar, *supra* note 26, at 1165. Invocation of the political question doctrine for an evidentiary reason means that even if the party

of which apply to foreign affairs cases. The Court stated that political question determinations in the foreign affairs area

seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.⁶¹

Thus, judicial action in foreign affairs cases may have serious adverse consequences. This Comment presents the three types of harmful consequences that may result from judicial intervention in foreign

could obtain evidence from abroad to prove his claim (or establish his defense), the court would not consider that evidence. See generally Comment, *supra* note 26, at 418-19 n.163. To the extent that evidentiary problems hinder the conduct of foreign affairs, it is because they cause one of the three types of harms. The concern is not that a party before an American court may fail to prove a claim based on foreign evidence; it is that he may succeed. The political branches have already determined, however, that certain types of evidence from abroad should not be pursued, subjected to discovery, or heard in the American courts. To allow trafficking in such evidence, then, for the purpose of prevailing in an American court would be a judicial contradiction of the other branches' policy determination (a cross-purpose harm), would embarrass the nation, or would force disclosure of state secrets. See, e.g., *United States v. Sisson*, 294 F. Supp. 511, 515 (D. Mass. 1968).

As to lack of evaluative standards for such foreign evidence as *is* received, that argument is largely a makeweight. For instance, in 1966, Judge Friendly had no difficulty in determining that the Cold War, exacerbated by United States involvement in Vietnam, established the existence of a national emergency sufficient to trigger § 5(b)(1) of the Trading with the Enemy Act, 50 App. U.S.C. § 5 (1976). *Sardino v. Federal Reserve Bank*, 361 F.2d 106, 109 (2d Cir.), *cert. denied*, 385 U.S. 898 (1966). And in litigation concerning insurance policies, courts have not had difficulty determining the existence of a state of war. See, e.g., *Stanbery v. Aetna Life Ins. Co.*, 26 N.J. Super. 498, 503, 98 A.2d 134, 137 (1953) (Korean War); *Hamilton v. McClaughry*, 136 F. 445, 451 (C.C.D. Kan. 1905) (Boxer Rebellion); Note, *supra* note 26, at 81 n.11.

The second possible gloss on "discoverable and manageable standards for resolving the controversy" is that the phrase refers to remedy. This gloss "is not the mark of a political question," but merely "restate[s] the principle of ripeness and the equity principle that the chancellor cannot intervene where the dispute will not permit the entry of a judicially-manageable mandatory decree." Tigar, *supra* note 26, at 1164.

It could, however, be argued that the real problem is not in formulating the injunction, but rather in enforcing it, and that the high probability of defiance of an order enjoining foreign-affairs-related activities urges invocation of the political question or other nonintervention doctrine. However, this argument does not bear scrutiny as an independent ground for judicial nonintervention in a foreign affairs matter. First, it has been in the domestic rather than the foreign affairs area that there have been serious risks of defiance of court orders. See Note, *supra* note 26, at 98. By contrast, in the Steel Seizure case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), President Truman made clear that he would abide by whatever determination the Supreme Court made on the validity of seizure, which was arguably related to the Korean War.

Second, the possibility that a party would resist or defy a judicial decision does not justify a foreign affairs exception to judicial review. Cf. *Nixon v. Sirica*, 487 F.2d 700, 708 (D.C. Cir. 1973) (en banc) (Presidential compliance with a subpoena, if otherwise justiciable, will be decided even if the judiciary cannot enforce it).

In sum, there is no harm to the national interest from judicial resolution of foreign affairs cases independent of the embarrassment or cross-purposes harms, and the separate problem of state secrets disclosure.

61. 369 U.S. at 211-12.

affairs cases: embarrassment, cross-purposes, and the disclosure of state secrets.

A. *The Three Harms*

1. *Embarrassment Harms*

If an American court decides a foreign affairs matter in a way fundamentally inconsistent with the political branches' prior⁶² determination of the appropriate response, the United States might be embarrassed in the eyes both of the nations receiving the conflicting signals and the world generally.⁶³ The nation or nations involved might perceive those signals as signs of confusion, suggesting American weakness and unreliability, or as "double-crossing," suggesting bad faith. The principal danger of this harm is the likelihood that such a perception would weaken the United States overall bargaining position in intergovernmental relations.

As Judge Leventhal noted in *Adams v. Vance*:⁶⁴ "This country's interests in regard to foreign affairs and international agreements may depend on the symbolic significance to other countries of various stances Courts are not in a position to exercise a judgment that is fully sensitive to these matters."⁶⁵ The Supreme Court has stated explicitly that courts should avoid probing into foreign expropriations largely to prevent embarrassment harms. In *Banco Nacional de Cuba v. Sabbatino*,⁶⁶ for example, the Court stated that "however impartial" the American tribunal may be, its decision "might increase any affront," and that "[r]elations with third countries which have engaged in similar expropriations would not be immune from effect."⁶⁷ Many cases have emphasized avoidance of embarrassment as a principal reason for judicial abstention in foreign affairs cases.⁶⁸

62. If the actions and pronouncements of a political branch have not yet determined (or suggested) an American response contrary to the relief sought from the courts, then court action could not be seen as intervention and the courts should not invoke a foreign affairs nonintervention doctrine. See, e.g., *Baker v. Carr*, 369 U.S. at 211-13 (judicial intervention not barred when executive action not conclusive) (citing examples).

63. Cf. L. HENKIN, *supra* note 3, at 162 (Congress implements the international obligations made by the President partly because of an "unwillingness to make the American system appear undependable and ludicrous").

64. 570 F.2d 950 (D.C. Cir. 1977).

65. *Id.* at 955. See also *Baker v. Carr*, 369 U.S. at 217; L. HENKIN, *supra* note 3, at 162; Scharpf, *supra* note 26, at 582.

66. 376 U.S. 398 (1964).

67. *Id.* at 432.

68. See, e.g., *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (Presidential revision of Civil Aeronautics Board order awarding a foreign air route not reviewable because of foreign affairs considerations); *Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) (notion underlying sovereign immunity cases is desire not to embarrass the executive branch); *Braniff Airways, Inc. v. CAB [Chicago-Montreal]*, 581 F.2d 846 (D.C. Cir. 1978) (same as *Chicago & S.*,

Beside *Narenji*, perhaps the best recent example of the potential for embarrassment harm is presented by the Vietnam Conflict cases. Judicial invalidation of an aspect of America's military efforts in Southeast Asia would have produced a substantial embarrassment harm abroad, furnishing a rich propaganda harvest to the United States enemies and its less direct Cold War adversaries. Another danger would have been that nations unfamiliar with our system of judicial review⁶⁹ might have read the decision as a signal of a lack of resolve or of an imminent change in policy.⁷⁰

2. Cross-Purposes Harms

The cross-purposes harm has a more direct impact on a particular foreign affairs policy than the embarrassment harm. If the judiciary's ultimate decision of a foreign affairs matter were to contradict, undo, or block the acts of the political branches, great tangible harms would ensue from the branches' working at cross-purposes.⁷¹

supra); *Wulfsohn v. Russian Socialist Federated Soviet Republic*, 234 N.Y. 372, 138 N.E. 24 (1923) (Cardozo, J.) (review of foreign affairs decision would embarrass the political branches).

69. *Cf. Closing Lafayette Square*, Wash. Post, Nov. 21, 1979, at A16, col. 1 (emphasis added):

The possibility is clear that *the Iranians holding Americans hostage in the embassy there, not understanding what demonstrations in a democracy are all about*, would interpret any demonstration so close to the White House as one sponsored by the government—and base their actions toward their prisoners on totally erroneous assumptions.

70. There are two additional points on the embarrassment harm. First, although admitting that there is an embarrassment harm, some argue that the best way to avoid it is not by judicial deference to foreign affairs acts of the political branches, but by scrupulous scrutiny of those acts. *See, e.g., R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* (1964). In *Goldwater II*, Judge MacKinnon argued that the PRC reaction was irrelevant and that the court "should not offend [the] lasting value of our constitutional scheme in the pursuit of momentary political ascendancy." 617 F.2d at 737 (MacKinnon, J., dissenting).

Even assuming that this position is correct, it would still not argue against this Comment's proposed statute. The proposed statute is not concerned with what the *judicial branch* does. It does not advocate removing from the judiciary, or altering the judiciary's ultimate view of, foreign affairs matters. It is concerned only with reducing *erroneous initial* decisions. It is hard to see how removal of a forum for erroneous official action can in any formulation embarrass the nation in its intergovernmental relations.

Second, this proposal is limited to *foreign affairs* matters. Domestic affairs, even if of immense foreign interest, are not subject to the proposed statute. *Cf. Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976) (public controversy different from controversies of interest to the public). Although acquittal or nonprosecution of the "Wilmington 10" might have improved world public opinion of the United States, *see* Wash. Post, Dec. 15, 1979, at A10, col. 1, their trial on allegedly trumped-up charges in a North Carolina town was *not* a foreign affairs case. Nor was the trial of Ethel and Julius Rosenberg. *See Rosenberg v. United States*, 346 U.S. 273 (1953).

71. For example, the government has to be able to make decisions that affect other countries. Perhaps the most candid statement of this irreducible principle of international relations was made by ex-Secretary of State Henry Kissinger:

Somewhere, somehow, the United States must show that it is capable of rewarding a friend or penalizing an opponent. It must be made clear . . . that our allies benefit from association with us and our enemies suffer.

It is a simpleminded proposition perhaps, but for a great power it is the prerequisite, indeed the definition of an effective foreign policy.

The OPEC suit⁷² is a good example of a case presenting the possibility of such a harm. The political branches had determined, or suggested the determination, that the United States government should not take on the OPEC nations' price-fixing practices. Had the district court permitted the plaintiff unions to subject the OPEC nations to an anti-trust and conspiracy suit in an American federal court, it would have been working at cross-purposes with the political branches' determination.⁷³ Assuming that one of the purposes of the political branches' decision was that better relations with the OPEC nations might result in an increase in energy supplies or lower oil prices, a court ruling that OPEC was violating the American antitrust laws would have accomplished nothing worthwhile, and might have caused a decrease in energy supplies or increase in oil prices.

Leaving the foreign policy decisionmaking process open to such shifts in position would cause both embarrassment and cross-purposes harms to the United States. Embarrassment harms are typically harms to the country's reputation, while cross-purposes harms are generally characterized by a governmental inability to react to world events in a swift, effective, and unified manner.⁷⁴

3. *Disclosure of State Secrets Harms*

A third type of harm of special concern in foreign affairs cases is disclosure of sensitive information about United States activities abroad or United States relations with other governments. For exam-

S.F. Chronicle, Apr. 11, 1980, at 21, col. 6.

72. International Ass'n of Machinists & Aerospace Workers v. OPEC, 477 F. Supp. 553 (C.D. Cal. 1979). Nevertheless, the court permitted four days of hearings, providing a government forum for the plaintiffs' attempt to show that OPEC "price-fixing" "contributed to . . . a recession in the United States." S.F. Chronicle, Aug. 24, 1979, at 16, col. 1.

73. See also *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973) (court expressly recognized that to order that Cambodia not be harmed, after the political determination to conduct bombing in that nation, could cause serious harm, since the court could not evaluate and competently decide the military and diplomatic issues involved), *cert. denied*, 416 U.S. 936 (1974).

74. Judicial inquiry into the procedures of the political branches' foreign affairs determinations "would, indeed, destroy the flexibility of action which the executive and legislative branches have in dealing with other sovereigns." *Orlando v. Laird*, 443 F.2d 1039, 1043 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971). Cf., *Goldwater III*, *supra* note 7, at 997-1002 (Powell, J., concurring). Justice Powell suggested that he would readily apply the political question doctrine were the Court "asked to decide . . . whether a treaty required the President to order troops into a foreign country." *Id.* at 999. He would not, however, apply the political question doctrine to a case involving conflicting interpretations of the forms and procedures that the political branches must use in their interactions in response to foreign affairs problems, as was the case in *Goldwater*.

This distinction, however, seems to give little weight to the harms enumerated here, which can as readily occur from judicial intervention into the nature of the political branches' accommodations in fashioning their response, as into the response itself. See, e.g., *Orlando v. Laird*, 443 F.2d 1039, 1043 (2d Cir.) (method of congressional collaboration is a political question), *cert. denied*, 404 U.S. 869 (1971).

ple, in *United States v. Reynolds*,⁷⁵ an Air Force B-29 had crashed while testing secret electronic equipment. The widows of three civilian observers who had died in the crash sued the Government and moved to discover evidence that the Air Force had concerning the accident. The Supreme Court upheld the Air Force's claim that the evidence, although concededly relevant to the action, was privileged and therefore could be withheld from production, even for in camera inspection. Although the Court drew an analogy to the attorney-client and self-incrimination privileges in upholding the Air Force's claim, the Court's decision seems actually to have hinged on its view that it could not, in 1953, "escape judicial notice that this is a time of vigorous preparation for national defense."⁷⁶

Thus, *Reynolds* appears to be another in the line of judicial decisions deferring to the political branches in foreign affairs. Its deference to the Executive's determination that this information should remain secret hinged to a substantial degree on the foreign affairs uses to which the airborne military hardware being tested would be put,⁷⁷ and on the Court's tacit recognition of the role that military competition with the Soviet Union and the Communist bloc played in the United States intergovernmental relations at the time.

The *Feres* doctrine⁷⁸ attempts to avoid the same type of harms as was presented in *Reynolds*. Under that doctrine, a secret agent's superiors are immune from suit under the Federal Tort Claims Act⁷⁹ if the agent's injuries are incurred "incident to service."⁸⁰ A recent case invoking the *Feres* doctrine is *Sigler v. LeVan*.⁸¹ Sigler had worked for about ten years as a "double agent," identifying Russian agents by selling them often-fabricated American military secrets. After he failed a lie detector test at a debriefing, he was sent to Fort Meade, where he committed suicide. His widow and daughter sued for damages. The court dismissed the action and rejected the plaintiffs' contention that the *Feres* doctrine is inapplicable in cases involving "intentional constitutional violations in a noncombat setting,"⁸² even though it recognized that this conclusion would sometimes lead to "unconscionable results."⁸³

75. 345 U.S. 1 (1953).

76. *Id.* at 10.

77. "[A]ir power is one of the most potent weapons in our scheme of defense . . ." *Id.*

78. *Feres v. United States*, 340 U.S. 135 (1950).

79. 28 U.S.C. §§ 2671-2680 (1976).

80. 340 U.S. at 146.

81. 485 F. Supp. 185 (D. Md. 1980).

82. *Id.* at 191 (citing *Thornwell v. United States*, 471 F. Supp. 344, 348 (D.D.C. 1979)).

83. 485 F. Supp. at 191 (quoting *Thornwell v. United States*, 471 F. Supp. at 348 n.1).

The Freedom of Information Act,⁸⁴ which generally requires government agencies to disclose documents requested by members of the public, also recognizes that the executive branch must be permitted to keep secret sensitive military and diplomatic information.⁸⁵ The Act expressly exempts from disclosure matters that are "specifically authorized . . . by an Executive order to be kept secret in the interest of national defense or foreign policy."⁸⁶ Thus, the state secrets evidentiary privilege seeks to avoid some or all of the harms to the national interest that the political question and other foreign affairs nonintervention doctrines seek to avoid.⁸⁷

B. Similar Harms Result from Any Erroneous Airing or Court Decision

The three types of harms discussed above do not occur only from an *ultimate* erroneous decision of a foreign affairs case or issue. Although the harms are generally not as great, they occur from *any* erroneous decision in a foreign affairs case, even one that is subsequently reversed. This section examines the problem of an *initial* erroneous decision—later "corrected" on appeal—to hear a case, grant injunctive relief, or decide the merits.

1. Embarrassment Harms

A courtroom hearing on the merits of a foreign affairs matter can cause embarrassment harms no matter how the case ultimately is decided. Embarrassment harms are caused as soon as an organ of the American government—a federal court—permits the wisdom and manner of the negotiations, horse-trading, arm-twisting, cajolery, threats, and accommodations between the political branches and other nations to be questioned in an official public forum. That an organ of the United States Government is conducting such an inquiry at all may persuade foreign governments that the United States Government is disorganized or confused. Thus, there is often "the imperative need of unity at home for dealing abroad."⁸⁸ Although application of the polit-

84. 5 U.S.C. § 552 (1976 & Supp. III 1979).

85. *Developments in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1218 (1972).

86. 5 U.S.C. § 552(b)(1)(A) (1976).

87. *See Developments in the Law—The National Security Interest and Civil Liberties*, *supra* note 85, at 1226: "[T]he balancing of substantial competing interests in security and disclosure involves an essentially political judgment as to what course would be best for the nation."

In England, the decision whether the privilege for official information exists is for a political minister. *See* 8 J. WIGMORE, EVIDENCE § 2379(g), at 808 (McNaughton rev. ed. 1961).

88. Weston, *supra* note 26, at 319. "[A]ny intrusion into [foreign affairs] matters such as the recognition of foreign governments might 'imperil the amicable relations between governments

ical question doctrine should "prevent a party from airing an issue"⁸⁹ involving foreign affairs, a district court's failure to apply a nonintervention doctrine quickly and correctly will often result in judicial inquiry into the merits of the case. Such an inquiry will often have, for many of the foreign governments and peoples involved, all the charm that an inquiry conducted by an inferior Iranian tribunal into prior Iranian-American relations would have for the American government and people.⁹⁰

A district court's dismissal of a foreign affairs case after trial would reduce these harms only slightly.⁹¹ Or, in potentially the most damaging situation, the court might decide against the action taken by the political branches, thus tacitly or explicitly criticizing the government's handling of a foreign affairs matter. Ultimate reversal may negate the *legal* effect of the trial court's error, but much of the negative propaganda or other embarrassment effect caused by the decision would remain.

The creation of embarrassment harms by initial erroneous decision is exemplified in the handling of Senator Goldwater's Taiwan challenge. The initial erroneous decision seems very likely to have left the PRC—and America's current and potential allies—with the impression of confusion, indecisiveness, or unreliability on the part of the government.⁹² This impression might outlive the ultimate disposition of the *Goldwater* case.

The embarrassment harms caused by the *Narenji* decision are perhaps clearer. One of the principal causes of the current Iranian-American tension is Iran's deliberate attempt to humiliate the United States.⁹³ The initial erroneous decision in *Narenji* aided this attempt by allowing

and vex the peace of nations.'" Note, *supra* note 26, at 92 (quoting *Oetjen v. Central Leather Co.*, 246 U.S. 297, 304 (1918)).

89. Tigar, *supra* note 26, at 1135.

90. See *U.S. Warns Tehran on "Parading" of Hostages Before Any Tribunal*, N.Y. Times, Dec. 11, 1979, at A1, col. 4: "The White House warned Iran today that the United States would regard the 'parading' of American hostages before an Iranian-appointed international tribunal of inquiry with the same gravity as it would view any trial of the Americans."

In December 1979, when judicial proceedings against the hostages seemed an imminent possibility, the Administration warned Iran repeatedly of the "grave risks" of the hostages "being put on trial or brought before a tribunal" regardless of what the ultimate outcome might be. NBC Nightly News broadcast, Dec. 18, 1979, reprinted in White House Press Summary, Dec. 19, 1979 (on file with the *California Law Review*).

91. It could increase such harms in some cases. For example, a political question determination after a trial full of revelations about the conduct of foreign affairs could cause still further embarrassment harms by appearing to other nations to be a "cover-up."

92. Thus, the damage done to the national image by the initial decision in *Goldwater* could also be seen as a cross-purposes harm. For the "true" cross-purposes harm of the decision, see text accompanying note 104 *infra*.

93. Interview with Henry Kissinger, NBC News (aired Apr. 25, 1980) (transcript on file with the *California Law Review*).

the United States Government to be portrayed as an oppressor of Iranian students.

In sum, the need to avoid the aggravated embarrassment harms to intergovernmental relations that may occur from any judicial airing of or initial erroneous decision concerning foreign affairs matters justifies strict judicial respect for the finality of the political branches' decision-making⁹⁴ in the foreign affairs area, a respect that would be unjustified in the domestic realm.

2. Cross-Purposes Harms

In the case of reviewable district court decisions airing, second-guessing, or contradicting foreign policy acts, cross-purposes harms might seem to cause less difficulty than embarrassment harms. For example, the appellate court can stay the lower court decision pending appeal.⁹⁵ An attempt to distinguish cases involving predominantly cross-purposes harms from those involving predominantly embarrassment harms, however, would be misguided for three reasons. First, the cross-purposes harms in foreign affairs cases will often be difficult to separate from the embarrassment harms,⁹⁶ and there is nothing to be gained by forcing the district court to try to do so. Second, the current system of stays and related procedures to delay the implementation of a district court's decree, pending appeal, can be cumbersome and inefficient.⁹⁷ Third, in many foreign affairs cases, any hearing, court process, or initial erroneous decision itself causes cross-purposes harm. This happens when the political branches do not want any normal judicial consideration of a sensitive foreign affairs issue. The classic example of such a situation was suggested in *Banco Nacional de Cuba v. Sabbatino*⁹⁸—the “incongruity of judicial ‘recognition,’ by permitting suit, of a government not recognized by the Executive.”⁹⁹

That example, however, is only one of several types of cross-pur-

94. See Frank, *supra* note 26, at 38.

95. See, e.g., *United States v. Washington Post Co.*, 446 F.2d 1327, 1329 (D.C. Cir.) (per curiam) (en banc) (Pentagon Papers case) (stay granted after district court denial of preliminary injunction against disclosure, and continued pending government's petition for certiorari to Supreme Court), *aff'd sub nom.* *New York Times Co. v. United States*, 403 U.S. 713 (1971).

96. See note 92 and accompanying text *supra*.

97. For example, in *Narenji*, the Government petitioned the D.C. Circuit for an “emergency stay” to delay enforcement of the district court's ruling. *Baltimore Sun*, Dec. 13, 1979, at A2, col. 2. Nevertheless, as a direct result of the initial erroneous decision in the case, the Attorney General was forced to alter the timetable chosen by the political branches as the most appropriate response to the fast-moving hostage crisis by having to extend the deadline for checking visas more than two weeks. *Civiletti Extends to Dec. 31 Iran Visa-Review Deadline*, *Wash. Star*, Dec. 20, 1979, at A8, col. 2.

98. 376 U.S. 398 (1964).

99. *Id.* at 410-11.

poses harms that can occur from an initial erroneous decision.¹⁰⁰ A more substantial threat of cross-purposes harms caused by any hearing or decision on the merits is presented by the Iranian Frozen Assets cases.¹⁰¹

Any court action at this particularly sensitive time (whether favorable or unfavorable to Iran) can have adverse consequences on the President's efforts to resolve the problems of the United States with Iran. The Iranians are likely to view court action as U.S. Government action and consequently as a signal of the U.S. Government's attitudes and positions. At this critical juncture in U.S.-Iranian relationships, it is important that there be no unintended signals which the Iranians might construe as representing the policy or position of the U.S. Government.¹⁰²

Goldwater I might have caused specific cross-purposes harms. First, the PRC's decades-long mistrust of the American government, a sworn military and ideological enemy for more than a generation, might have been renewed. As a result, PRC receptivity to developing governmental, commercial, and cultural ties might have cooled. Second, the court's erroneous decision might have led the PRC leadership to conclude that there was greater popular and governmental opposition to the substantive foreign policy decision that triggered *Goldwater* than actually existed.¹⁰³ Finally, this conclusion might have led to a possibly irreversible diminution in the comparative influence of PRC officials favoring closer relations with the United States.¹⁰⁴

100. See, e.g., *Ex parte Peru*, 318 U.S. 578 (1943) (prejudgment seizure of an ally's merchant ship, although political branches had established a contrary policy); *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum Laden Aboard the Tanker Dauntless Colocotronis*, 577 F.2d 1196 (5th Cir. 1978) (cross-purposes harm would occur from taking jurisdiction of case involving Middle Eastern border dispute, since State Department was taking neutral stance), cert. denied, 442 U.S. 928 (1979); *Adams v. Vance*, 570 F.2d 950 (D.C. Cir. 1977) (mandatory injunctions against Secretary of State different from those against other government officials not involved in foreign affairs); *NORML v. United States*, 452 F. Supp. 1226, 1234-35 (D.D.C. 1978) (mandatory injunction sought by plaintiff directing defendants to persuade Mexico to stop herbicide spraying program presented political question).

101. See cases cited note 56 *supra*.

102. Affidavit of G. William Miller, Secretary of the Treasury, July 29, 1980, submitted in *Citibank v. Iran*, No. C79-3542 (pending in N.D. Cal.). The district court accepted the Government's view and stayed for three months all further proceedings in 20 suits in order "to help resolve the U.S. hostage crisis in Iran." Wash. Post, Nov. 14, 1980, at A16, col. 1.

103. See, e.g., Editorial, *The China Treaty Challenge*, Wash. Star, Oct. 19, 1979, at 10, col. 2 (the administration had actually chosen "with few misgivings" to recognize the PRC).

104. The *Goldwater* plaintiffs sought to show that Vice-Premier Deng, contrary to the public official position he had taken, had stated in private talks that immediate termination of the Mutual Defense Treaty with Taiwan was not a precondition to normalization. Plaintiffs submitted declarations from persons to whom Deng had allegedly "personally conveyed" that view. BRIEF SUBMITTED FOR SENATOR BARRY GOLDWATER IN GOLDWATER AGAINST CARTER, 125 CONG. REC. S4839, at S4841 (daily ed. April 26, 1979).

Similarly, the district court decision in *Narenji* may have helped sustain the hard-liners' hold on power in Iran and possibly added to the length of the crisis.

3. *Disclosure of State Secrets Cases*

Once court processes have forced the disclosure of state secrets¹⁰⁵ they cannot by any amount of favorable or expedited appeals be hushed up. All that the law can do to protect against a district court erroneously permitting disclosure is to permit appeal before a discovery order is put into effect or other disclosure is compelled.

In camera inspection¹⁰⁶ does not completely resolve the problems created by an initial erroneous decision. Even if held ex parte and with thorough security precautions, the procedure may not be adequate.¹⁰⁷

The political branches, particularly Congress, have recently disfavored in camera inspection as a way to verify and assess the foreign affairs sensitivity of alleged foreign affairs materials. For example, in *United States v. American Telephone & Telegraph Co.*,¹⁰⁸ the executive branch had ordered warrantless wiretaps, purportedly for national security reasons. Congress subpoenaed the telephone company's records of those wiretaps as part of its inquiry into whether they had actually been used solely for national security purposes. At the urging of the executive branch, the telephone company resisted the subpoena. The two branches attempted to reach a compromise, with the executive branch finally suggesting in camera verification procedures. Congress rejected such procedures on the ground that courts were "not equipped to carry these out properly."¹⁰⁹ Also, when Congress passed legislation to require a judicial warrant in foreign intelligence cases, and thus ensure judicial review of government wiretapping and electronic bugging in such cases, it did not rely on in camera examination by federal judges and magistrates. Instead, it set up a new secret federal court.¹¹⁰ Furthermore, the Executive, following the mandates of effective diplomacy, often makes foreign governments promises that on their face appear to preclude in camera inspection.¹¹¹

105. In this situation there will often be an overlap of some state secrets cases with cross-purposes cases. See, e.g., *Harrington v. Bush*, 553 F.2d 190, 201 n.50 (D.C. Cir. 1977) (plaintiff Congressman attempting to get more information concerning CIA funding than Congress wished him to have, threatened both types of harms).

106. See, e.g., *United States v. Nixon*, 418 U.S. 683, 714-16 (1974).

107. In camera inspection involves the movement of sensitive information, its storage in chambers where security precautions will rarely be as tight as in the material's usual place of storage (e.g., the Pentagon or CIA headquarters), and possible exposure to persons who lack security clearance (e.g., law clerks). The provision of tight security during the transit of the evidence to be inspected, and a requirement that it be delivered for same-day inspection by the judge alone, could obviate some but not all of these security problems.

108. 567 F.2d 121 (D.C. Cir. 1977).

109. *Id.* at 125, 130.

110. See Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-1811 (Supp. II 1978). See also *A Secret Court OK's Buggings*, S.F. Chronicle, Apr. 25, 1980, at 12, col. 1.

111. See, e.g., Anderson, *Treasury's Well-Kept Arab Secrets*, Wash. Post, July 9, 1980, at D8, col. 4: "To encourage the Saudi Arabians to invest their windfall billions in the United States,

III

DOCTRINAL AND INSTITUTIONAL IMPEDIMENTS TO
CORRECT DECISION OF FOREIGN AFFAIRS CASES

The three types of harms discussed above can be caused by any normal judicial consideration of foreign affairs issues and cases. Given the gravity of the harms that might be caused by erroneous district court decisions in the area of foreign affairs, it might seem that only judicial negligence could produce such a decision. Were that the case, this Comment would simply highlight those harms and urge district court judges to take them more seriously. The roots of the problem, however, are much more complex, involving both the foreign affairs nonintervention doctrines—each confusing in its own right—and certain institutional factors.

*A. Doctrinal Problems**1. Nonintervention Doctrines Do Not Apply to All Foreign Affairs Cases*

The decision whether a foreign affairs case is nonjusticiable or an issue nonreviewable depends only partially on its foreign affairs nature. However, neither *Baker v. Carr* nor later cases have specified an operative definition of a foreign affairs case or issue or the weight that should be given to a finding that a case or issue predominantly involves foreign affairs.¹¹² Thus, a court asked to decide whether a noninterven-

President Ford's [administration] promised that their financial holdings in this country would be kept inviolably secret."

112. The confusion of domestic and foreign affairs political questions is a related problem. Current analysis does not distinguish between foreign affairs and domestic cases even though it is generally accepted that decision of political questions in foreign affairs cases causes different harms than does their decision in domestic cases. C. WRIGHT, *supra* note 28, at 52. For example, the *Goldwater III* plurality relied on *Coleman v. Miller*, 307 U.S. 433 (1939), but that case was entirely domestic. In *Coleman*, Congress had proposed a Child Labor Amendment in order to overcome the effect of the Court's holding in *Hammer v. Dagenhart*, 247 U.S. 251 (1918). Kansas' ratification was challenged as invalid, but the Court ruled the issue nonjusticiable. *Coleman* is easily distinguishable from *Goldwater*: it had nothing to do with foreign affairs. Moreover, in *Coleman* there was a compelling reason for judicial abstention: Were the Court to intervene in the *only* constitutional process by which Congress, the states, and the people can overturn the Court's constitutional interpretations—by amendment of the Constitution—it would exceed "the inherent limits of the power of judicial review in a democratic polity." Scharpf, *supra* note 26, at 588. See *Goldwater III*, *supra* note 7, at 536 n.2 (Powell, J., concurring) (suggesting the same idea). The political question holding in *Coleman* was a constitutional decision mandated by separation of powers principles. Indeed, it might be that after *Baker v. Carr*, 369 U.S. 186 (1962) (Court took role in a political case textually committed to a state), and *Powell v. McCormack*, 395 U.S. 486 (1969) (Court took role in a political case textually committed to Congress), *Coleman* stands only for the proposition that the Court will abstain from ruling on matters involving the only constitutional process by which the people and their elected representatives can overturn constitutionally-based Court rulings.

Thus, *Goldwater III*, with its failure to produce a majority on any of the views advanced and

tion doctrine is applicable has little guidance on how to balance the need to abstain from the foreign affairs aspects of the case against the inclination to decide the individual rights questions that may be presented in the case.

2. *Confusion with the Standing Doctrine*

A recurrent source of doctrinal confusion is the interplay of the political question and other nonintervention doctrines with the law of standing. Standing is a complex doctrine¹¹³ based on both constitutional and prudential considerations,¹¹⁴ as to which there is a vast literature¹¹⁵ but few helpful rules for hard cases. For purposes of this Comment, the important aspect of the standing requirement is not its precise definition, but the fact that it is less stringent than before.¹¹⁶ The result is increased access to the federal courts.

For example, the courts have recently permitted Members of Congress who cannot gain legislative majorities sufficient to achieve their goals to air their minority position in court.¹¹⁷ These plaintiffs must convince the courts that as a matter of constitutional law a certain procedure should have been followed in the consideration of their positions—a procedure either between the Houses of Congress,¹¹⁸ or between one House of Congress and the Executive,¹¹⁹ or between both Houses of Congress and the Executive.¹²⁰ The problems in such cases tend to be twofold. First, these are not cases in which a majority of Congress has approved the lawsuit.¹²¹ Instead, the plaintiffs are legisla-

the failure of the plurality to distinguish foreign from domestic affairs, did little to help a district court determine which foreign affairs cases call for judicial nonintervention and which do not. See also C. WRIGHT, *supra* note 28, at 52 (no definite standard for determining whether particular case presents political question).

113. See, e.g., *Flast v. Cohen*, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting) (standing is a "word game played by secret rules").

114. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

115. See Note, *Standing to Sue for Members of Congress*, 83 YALE L.J. 1665, 1665 n.1 (1974) (collecting a sampling of law review articles and treatises).

116. *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring).

117. See, e.g., *Edwards v. Carter*, 580 F.2d 1055 (D.C. Cir.) (challenge to Panama Canal Treaty), *cert. denied*, 436 U.S. 907 (1978); *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973) (challenge to Cambodian bombing), *cert. denied*, 416 U.S. 936 (1974); *Goldwater I*, *supra* note 7, at 949.

118. Compare *Edwards v. Carter*, 580 F.2d 1055 (D.C. Cir.) (challenge to Panama Canal Treaty that would have given the House a voice), *cert. denied*, 436 U.S. 907 (1978), with *Byrd Urges Senate to Vote an End to Taiwan Treaty*, Wash. Post, Oct. 21, 1979, at A30, col. 1 (Senate Majority Leader Byrd stating a Senate vote could resolve the *Goldwater* problem, as the House had no role).

119. E.g., *Goldwater v. Carter*, 444 U.S. 996 (1979).

120. E.g., *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973) (challenge to Cambodian bombing), *cert. denied*, 416 U.S. 936 (1974).

121. See, e.g., *United States v. American Tel. & Tel. Co.*, 551 F.2d 384, 391 (D.C. Cir. 1976) (House sought to compel production of records of Executive-ordered phone taps); Senate Select

tors who have failed to convince their colleagues that adherence to the desired procedure was worth fighting for politically.¹²² Thus, the plaintiffs arrive in federal court having lost in the political arena.¹²³ Second, challenges concerning foreign affairs decisions, although couched in purely procedural terms, almost invariably require for their disposition a judicial inquiry into the "judicial wilderness"¹²⁴ of foreign affairs policies.¹²⁵

These problems should be treated differently. The first is a true question of standing. Since recent law tends toward the view that legislators should receive "no special consideration in the standing inquiry,"¹²⁶ denial of standing to legislative losers is often required. Indeed, they may deserve less consideration on standing than other plaintiffs.¹²⁷ The second problem, however, often requires application of the political question doctrine.¹²⁸ *Goldwater* is an example of just how complicated the standing inquiry can become when it is intermixed with foreign affairs nonintervention issues.¹²⁹ Absent a clear delineation of these doctrines, some procedural remedy is required.

B. Institutional Problems

In addition to the doctrinal problems discussed above, institutional problems also make it unlikely that district courts will consistently avoid the harms of initial erroneous decisions on foreign affairs matters by correctly applying the political question and other judicial nonintervention doctrines. Two important institutional problems are that foreign affairs cases do not call for the use of three-judge district courts, and that judicial temperament tends to make it difficult for judges to treat foreign affairs cases correctly.

Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 727 (D.C. Cir. 1974) (Senate authorized suit to enforce a subpoena duces tecum for production of tapes of conversations between the President and his aides).

122. The majority opinion in *Goldwater II* pointed out that if Congress is aroused about adherence to certain procedures but is nevertheless ignored, "it has its arsenal of weapons, as previous Chief Executives have on occasion been sharply reminded." 617 F.2d at 709.

123. See, e.g., *Harrington v. Bush*, 553 F.2d 190, 215 (D.C. Cir. 1977) (plaintiff Congressman sought "the relief which his colleagues have refused him").

124. *Goldwater II*, *supra* note 7, at 716 (Wright, J., concurring).

125. See *Cominent*, *supra* note 26, at 405-06.

126. *Reuss v. Balles*, 584 F.2d 461, 466 (D.C. Cir.), *cert. denied*, 439 U.S. 997 (1978); see *Harrington v. Bush*, 553 F.2d 190, 204 (D.C. Cir. 1977).

127. *Goldwater II*, *supra* note 7, at 710 (Wright, J., concurring).

128. See, e.g., *Holtzman v. Schlesinger*, 484 F.2d 1307, 1309 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

129. Compare *Goldwater II*, *supra* note 7, at 702 (a minority of Senators have standing), with *id.* at 709-16 (Wright, J., concurring) (his lack of standing argument similar to a ripeness or political question analysis); *Goldwater III*, *supra* note 7, at 997-98 (Powell, J., concurring) (his lack of ripeness argument similar to a standing analysis).

1. Three-Judge District Courts

In 1910 Congress provided for the use of three-judge district courts in certain kinds of cases.¹³⁰ In the aftermath of *Ex parte Young*¹³¹ and faced with "the practice of many Federal judges of [too readily] granting interlocutory injunctions . . . or . . . temporary restraining orders ex parte,"¹³² Congress sought by means of the three-judge district court mechanism to afford a procedural protection against the "improvident . . . doom" of a single federal judge invalidating a state legislative policy.¹³³ As a sponsor of the legislation stated, it protected government programs, particularly state revenue and regulatory programs, from the temporary paralysis sometimes caused by the action of "one little federal judge."¹³⁴ In 1946, Congress extended the use of three-judge district courts to include challenges to Acts of Congress.¹³⁵

Subsequently, statutes and court decisions limited the jurisdiction of the federal courts to review state laws, and the use of three-judge district courts caused such procedural difficulties that its benefits were no longer clear.¹³⁶ In 1976 Congress followed the advice of many scholars and jurists and abolished three-judge district courts in most cases. It retained them only where expressly required by an Act of Congress or in cases involving the apportionment of congressional districts or statewide legislative bodies.¹³⁷ Despite the many administrative and procedural problems that these courts had caused, Congress retained them for reapportionment cases because it felt that reapportionment issues are of such importance that three-judge courts should hear them in the first instance.¹³⁸

The general abolition of three-judge courts, combined with Congress' failure to extend the coverage of such courts to cases involving executive actions, has had its effect on foreign affairs cases. In many such cases the plaintiff seeks *injunctive* relief from the enforcement of a federal statute or Executive regulation.¹³⁹ Such a case is entitled only to a one-judge court, while cases of similar importance are entitled to

130. Act of June 18, 1910, ch. 309, § 17, 36 Stat. 557 (1910) (amended and repealed, Act of Aug. 12, 1976, 90 Stat. 1119 (1976)).

131. 209 U.S. 123 (1908).

132. [1976] U.S. CODE CONG. & AD. NEWS 1988, 1989 (recounting the legislative history of the original 1910 Act).

133. See *Phillips v. United States*, 312 U.S. 246, 251 (1941).

134. 45 CONG. REC. 7256 (1910) (remarks of Senator Overman).

135. Act of June 25, 1948, ch. 646, § 2282, 62 Stat. 968 (1948) (repealed, Act of Aug. 12, 1976, 90 Stat. 119 (1976)).

136. [1976] U.S. CODE CONG. & AD. NEWS 1988, 1996.

137. *Id.*

138. *Id.*

139. See, e.g., *Narenji*, 617 F.2d 745; *Haitian Refugee Center v. Civiletti*, 49 U.S.L.W. 2065 (S.D. Fla., July 2, 1980).

three-judge courts.¹⁴⁰

2. *Judicial Temperament*

The Supreme Court¹⁴¹ has repeatedly agreed with the view that "courts are not equipped or competent to make foreign policy, or to judge the impact of their rulings in occasional cases on the vital concerns of the nation."¹⁴² If judicial unfamiliarity with, and lack of expertise in, foreign affairs were the only "temperament" factors of note, the danger of erroneous decision of foreign affairs cases might not be significant, since great judicial deference could be expected. However, the courts also have great expertise in and solicitude for the protection of individual rights.¹⁴³ This inclination may be a significant factor in the production of erroneous initial decisions in foreign affairs cases.

IV

A PROCEDURAL REMEDY—MANDATORY CERTIFICATION TO THE COURTS OF APPEALS

Present procedures are inadequate to avoid the harms caused by erroneous judicial consideration of foreign affairs matters. Appeals from district courts generally are limited to "final judgments" or "decisions."¹⁴⁴ None of the exceptions to this rule is applicable in this situation. For example, *Ryan* rule treatment, under which a ruling may be immediately appealed if denial of such relief "would render impossible

140. Despite the system's faults, Congress retained the use of three-judge district courts for certain classes of important cases, rather than permit initial decision by a single district court judge. Congress might agree, once the special harms to the national interest from initial erroneous decision of foreign affairs cases are brought to its attention, that those harms, though different than those of apportionment cases, *see* 28 U.S.C. § 2284 (1976), civil rights cases, *see* 42 U.S.C. §§ 2000a-5(b), 2000e-6(b) (1976), and voting cases, *see id.* §§ 1971(g), 1973b(a), 1973c, 1973h(c) (1976), are at least as worth avoiding as the possible harms in those cases.

141. *See, e.g.,* *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 431-32 (1964).

142. Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805, 832 (1964).

143. *See, e.g.,* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS—A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 80-128 (1980) (Court best at protecting individual rights).

In the aftermath of the Watergate scandal, the judiciary is less apt to defer to the Executive. *See* Barbash, *The Explosion of Judicial Power*, S.F. Chronicle, Feb. 10, 1980, Sunday World section, at 24, col. 1, stating that

There is no longer any reservation in the district courts about the presidency.

"Yes, I think that's true," said U.S. District Court Judge Oliver Gasch, who decided the Taiwan treaty case, when asked if he may have been emboldened by the [Watergate] tapes decision. "It may very well have been. I felt the issue should be met," he said. "As a judge, I felt this was my problem."

This change is most pronounced in cases relating to foreign policy.

144. 28 U.S.C. § 1291 (1976).

any review whatsoever of an individual's claims,"¹⁴⁵ is not applicable. Nor can the decision to try a foreign affairs case be immediately appealed as a collateral order.¹⁴⁶ Mandamus is not available.¹⁴⁷ Expe-

145. *United States v. Ryan*, 402 U.S. 530, 533 (1971). This exception was applied in *United States v. Nixon*, 418 U.S. 683 (1974).

In the "unique" circumstances of *Nixon*, the Court held that it would have been "peculiarly inappropriate" to force the President, as his sole means of securing review, to resist the order to turn over tapes in his possession and then challenge the resulting contempt citation. *Id.* at 690-92. The determination that a foreign affairs case should not be aired or decided on the merits would not render review "impossible" in the *Ryan* sense, nor would it be "peculiarly inappropriate" in the *Nixon* sense.

146. In order to alleviate the hardship caused by the final judgment rule, the judiciary has created the fiction that a certain class of orders is final for purposes of 28 U.S.C. § 1291 (1976), "even though further proceedings remain to resolve fully the dispute between the parties." Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 364 (1961). The two leading cases in this area, however, involve a trial court cancellation of deeds and immediate transfer of real property, *Forgay v. Conrad*, 47 U.S. (6 How.) 200 (1848), and a trial court refusal to condition plaintiff's right to maintain a derivative action on the posting of a bond, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

Although it might be argued that the hearing and decision of a foreign affairs case forces the government to incur irreparable harm, there are at least three significant distinctions that suggest that such a decision is not an immediately reviewable "collateral order." First, the harms of embarrassment, cross-purposes, and state secrets disclosure are often speculative and somewhat hard to show, while the harms from the *Forgay* and *Cohen* orders were definite and tangible. In *Cohen*, for example, "immediate appeal was necessary to assure the defendants that the bond could be collected should they win on the merits." Note, *supra*, at 364.

Second, foreign affairs nonintervention doctrines, rather than being "collateral" to the issues left pending before the court, may often be closely connected to the issue still pending—the merits of the dispute. That is, if a balancing of the merits is necessary, the same foreign affairs harms that urged application of a nonintervention doctrine will be a factor in that balancing.

Third, a "collateral" order must be so related to the case that "if erroneous, [the collateral order] would not be grounds for reversing the final judgment," *id.* at 365, and thus "final" for § 1291 purposes. That is not the case with determinations on the applicability of foreign affairs nonintervention doctrines.

147. 28 U.S.C. § 1651(a) (1976), the All Writs Statute, authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Under this provision, "the courts of appeals will on occasion issue the extraordinary writs of mandamus, prohibition, and certiorari to review action taken by district judges." Note, *supra* note 146, at 375. For purposes of this discussion, the relevance of § 1651(a) writs is that the appellate courts have frequently issued them "to prevent a trial judge from . . . hearing a case after erroneously finding jurisdiction over the subject matter or the parties." *Id.* This may appear to be good authority for the use of mandamus to compel the district court not to hear or decide a case on the merits, at least for those cases in which a foreign affairs nonintervention doctrine would deprive the court of jurisdiction. Nevertheless, such a solution to the unique problems of foreign affairs cases would be quite unsatisfactory.

First, the appellate court is unlikely to issue the writ if jurisdiction is doubtful or depends on a question of fact. *Id.* at 375 n.216. Second, mandamus has not been traditionally reserved for those situations in which the consequences of the suit have been extraordinarily momentous, but rather for those in which the trial judge's mishandling of the case was extraordinary. Thus, mandamus is used principally to correct a gross abuse of discretion or improper conduct; it is the means for overriding judicial abuse. *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964). Mandamus thus is not an appropriate remedy for the type of problem addressed in this Comment. See generally Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 HARV. L. REV. 595 (1973).

dited appeals and stays are not sufficiently effective to prevent erroneous judicial hearing of foreign affairs matters.¹⁴⁸ Nor are voluntary certification procedures adequate to prevent the harms that often occur from such a hearing.¹⁴⁹

148. Procedures such as expedited appeals and stays may be somewhat helpful in dealing with the problem addressed in this Comment, but do not significantly prevent the embarrassment, cross-purposes, or disclosure harms that occur from *any* such airing.

As to harms from an initial erroneous decision of the merits, stays and expedited appeals substantially avoid many cross-purposes harms, since if the trial order is stayed, then the judiciary will not, at cross-purposes with the goals of the political branches, order or enjoin their acts until there has been appellate review.

However, stays and expedited appeals will have little impact on the embarrassment harms of many initial erroneous decisions. Of course, some embarrassment harms will be of an ongoing nature; in those cases a stay of the order or its early reversal might dispel the perception that the United States government is confused, disorganized, or duplicitous. As desirable as that is, it is insufficient. Likewise, stays and expedited appeals would not suffice in the situation in which an initial erroneous decision in a foreign affairs case leads to compulsion of the United States government, foreign governments, or other foreign entities to turn over data. It might, in a given case, be sufficient to stay a district court order permitting discovery or compelling production of such data, *see, e.g.*, *United States v. Nixon*, 418 U.S. 683, 689 (1974) (district court stayed its order compelling in camera inspection of materials alleged to be protected by executive privilege pending appellate review, provided such review was speedily sought), but inclusion of cases of this type under the proposed statute is better tailored to avoiding substantial harms to the effective conduct of foreign affairs. *See Note, Jurisdiction and Procedure—Discovery—Party Unable to Comply with Discovery Order Which Contravenes Foreign Nondisclosure Law Is Not in Contempt of Court*, 11 VAND. J. TRANSNAT'L L. 351, 359 (1978) (international discovery problems require diplomatic, not judicial, resolution).

In sum, stays, *see* note 95 *supra*, and expedited appeals, *see, e.g.*, *Edwards v. Carter*, 580 F.2d 1055, 1056 & n.2 (D.C. Cir.) (Panama Canal Treaty) (decided by the appellate court only days after the lower court decision), *cert. denied*, 436 U.S. 907 (1978), have been used and should be used in cases of the type discussed here. However, they do not meet the underlying problem of the harms caused by any airing or initial erroneous decision of a foreign affairs matter.

149. 28 U.S.C. § 1292(b) (1976) provides that:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

Voluntary certification is not sufficient to avoid the harms of incorrectly decided foreign affairs cases—although it has been used effectively in a variety of cases, *see, e.g.*, *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142 (6th Cir. 1975) (standing); *Calvin v. Conlisk*, 520 F.2d 1, 4 (7th Cir. 1975) (police department internal procedures); *Higgins v. Board of Educ.*, 395 F. Supp. 444 (W.D. Mich. 1973) (busing); *Potter v. Meier*, 338 F. Supp. 1353 (D. N. Dak. 1972) (delegate selection to national political convention), including foreign affairs political question cases. *See, e.g.*, *Mottola v. Nixon*, 464 F.2d 178 (9th Cir. 1972) (allegation of illegality of American involvement in Southeast Asia as grounds to cancel plaintiff's orders to go to Vietnam); *Kelley v. Société Anonyme Belge D'Exploitation*, 242 F. Supp. 129 (E.D.N.Y. 1965) (whether Belgium's procedure constituted ratification of Warsaw Convention). The ineffectiveness exists in part because certification lies within the unfettered discretion of the trial judge. While there are instances in which district courts have resolved an issue, yet nevertheless "switched hats" ably and recognized that its resolution was sufficiently debatable that the decision should be certified, *see Mottola v. Nixon*, 464 F.2d at 182; *Potter v. Meier*, 338 F. Supp. at 1357, it is unrealistic to expect that virtually every foreign affairs matter will be so certified. Indeed, recent experience fails to bear out the hypothesis that at least in cases in which there was no doubt that the order, if erroneous, might harm the national

In order to avoid these harms in an efficient way, this Comment suggests enactment of the following proposed statute:¹⁵⁰

Be it enacted, That a civil action filed in a United States district court in which the Government, either as a party or as amicus, claims nonfrivolously that the action, or an issue in the action, is a foreign affairs matter, inquiry into which is barred by a judicial nonintervention doctrine, shall be certified as a whole, or on the issues so challenged, to the appropriate United States court of appeals which shall determine as a matter of law whether a judicial nonintervention doctrine applies to such case or issues: *Provided*, that such claim must be made within ten days of service of process.

(a) Certification shall stay all proceedings in the district court, including discovery.

(b) No preliminary injunction or other temporary relief shall be ordered before or during certification of the case.

(c) The court of appeals decision may be challenged by a petition for a writ of certiorari to the United States Supreme Court. However, the court of appeals may, at any time after its decision, permit discovery and other pretrial matters to resume in the district court.

A. The Use of Three Appellate Judges is Proper

It may appear surprising that the proposed statute requires *three* judges to look at a foreign affairs issue or case before the district court can consider its merits. If one judge makes erroneous decisions, wouldn't three do the same?

This Comment does not argue that all judges give too much weight to the protection of individual interests, or that any do so intentionally, but rather that because of judicial training, orientation, and experience, a judge might incline toward the individual interest where the law is as

interest, judges will virtually always certify it. In *Goldwater, Narenji*, and *Haitian Refugees*, the district court did not certify its determination that the foreign affairs matters raised could be aired and decided, as important and controversial as the decisions were in those cases. One reason for this, most likely, is the same reason that § 1292 is used infrequently in other types of cases: Certification can appear to be a concession by the district court that it is not sufficiently able or energetic to tackle the certified issue successfully.

Although the harms threatened by an airing or initial erroneous decision of the merits of foreign affairs cases seem to present an "extraordinary" circumstance, some courts have suggested that the legislative history of § 1292 indicates that "extraordinary" means "avoiding extraordinarily protracted and expensive litigation." *E.g.*, *United States Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966). Protracted and expensive litigation is not the harm threatened by district courts erroneously airing and deciding foreign affairs matters.

150. Congressional power to enact such a statute is not in doubt. *Cf.* *Buckley v. Valeo*, 424 U.S. 1, 8 (1976) (procedures under 2 U.S.C. § 437h(a) (1970 & Supp. IV) calling for mandatory certification of all challenges to constitutionality of Federal Election Campaign Act).

Compare the proposed statute with 5 U.S.C. § 553 (a)(1) (1976) (removing matters raised in a "foreign affairs function" of the government from the requirements of the Administrative Procedure Act, thereby placing them outside of the jurisdiction of the administrative law judge).

unclear, often inherently so, as it is in foreign affairs. Thus, the substantive law of the foreign affairs nonintervention doctrines may be left unchanged but the number of judges who must concur before a foreign affairs case can be tried on the merits should be increased.¹⁵¹ Since the three-judge district court has presented so many operational problems, the proposal uses the normal federal judicial structure to ensure three-judge examination and assessment.

B. The Risks of the Proposal

1. Possible Deprivation of Individual Rights

Application of a nonintervention doctrine has the effect of impeding judicial inquiry into acts that may infringe constitutional rights. The proposal, however, does not affect the principle that, even in foreign affairs cases, the judiciary must be willing to intervene if concerns for the national interest do not excuse or outweigh the resultant infringement of constitutional rights.¹⁵² This proposal merely requires that this decision be made by a panel of appellate judges or by the Supreme Court¹⁵³ rather than by a single district court judge.

Admittedly, this proposal may produce occasional delays in the vindication of constitutional rights. It will take some time for the court of appeals to decide the nonintervention issue, during which the plaintiff must wait. However, the gravity of the harms that occur because of frequent initial erroneous decisions substantially outweighs the temporary deprivation of individual rights. Such factors as the likelihood of an expedited appeal of a foreign affairs ruling¹⁵⁴ and the improbability that the plaintiff would ultimately prevail¹⁵⁵ reinforce this conclusion.

151. The district court decisions in *Goldwater* and *Narenji* "may have turned in the first place on the individual quirks of individual judges in individual and very different cases." Barbash, *The Explosion of Judicial Power*, S.F. Chronicle, Feb. 10, 1980, Sunday World section, at 24, col. 1.

152. See, e.g., *Afroyin v. Rusk*, 387 U.S. 253, 257 (1967) (Congress cannot take away citizenship without the citizen's assent). See also *Gilligan v. Rhodes*, 423 U.S. 1, 11-12 (1973) (conduct and training of National Guard not always beyond scope of judicial review); *Tigar*, *supra* note 26, at 1159 (decisions of military tribunals reviewable on habeas corpus).

153. It might be argued that decision of judicial nonintervention in foreign affairs cases by the Supreme Court rather than the courts of appeals is more consistent with historical and functional considerations. See generally C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (1947). The Supreme Court has "a high sense of strategy and tactics," Scharpf, *supra* note 26, at 353 (quoting E. ROSTOW, *THE SOVEREIGN PREROGATIVE* 34 (1962)), both from its constitutional position at the apex of the judicial system and its constitutionally granted status as a check on the political branches, and from its position as the only court that effectively controls its own docket. However, a proposal for mandatory certification directly to the Supreme Court would be too great a burden on the Court's resources.

154. Recent foreign affairs cases in the D.C. Circuit have been consistently expedited and the time lags have been brief. For example, in *Narenji* the interval between the district court ruling and reversal on appeal was 16 days. See note 8 *supra*. In *Goldwater*, it was about six weeks. See note 7 *supra*.

155. Since *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (seizure of steel

It is certainly possible to imagine a case in which the unavailability of an injunction, even for a short time, would greatly harm vital constitutional interests. Such a case, however, has not arisen in recent years.¹⁵⁶

Such a case would present the hardest test for the proposed statute. For example, suppose a situation similar to that presented in *Korematsu v. United States*,¹⁵⁷ in which the federal government¹⁵⁸ decides to round up and confine all citizens and noncitizens whose ancestors came from a country with which the United States is at war. If an individual internee files suit challenging his confinement on substantial constitutional grounds, the United States would be likely to ask for certification of the case to the court of appeals. The foreign affairs nonintervention defense would not be frivolous because of the belligerency of the internee's alleged nation of allegiance toward the United States; thus, the district court should probably certify the case.

Given the importance of the claim, the appellate court would be likely to expedite the appeal. The Supreme Court would also be likely to act quickly.¹⁵⁹ Thus, if the ultimate decision were that the courts should hear the case on the merits, any eventual relief would have been delayed only by a few weeks.¹⁶⁰ Although this hypothetical is chosen

mills by President Truman), the ultimate decision in a case that has an arguably serious impact on foreign affairs has virtually never gone against the Government, and "the few celebrated cases [that did] were often announced after the emergency that gave rise to the violation had passed." Scharpf, *supra* note 26, at 584. See *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) (Court disapproved war-time suspension of constitutional rights in Hawaii after the war was won); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

The problem of *later* review in foreign affairs cases raises another set of issues. For example, suppose that two widows file suit against the Government seeking damages for alleged negligence that caused the wrongful deaths of their spouses. The first seeks to show that the recent raid in Iran to free the hostages was poorly and rashly planned and negligently conducted. Under the proposal set out here, her suit would be a foreign affairs case that the district court would have to certify.

In the second case, the plaintiff makes similar allegations, but the underlying raid is the one in Cambodia in 1975 to free the crew of the S.S. Mayaguez. In that case, the Government might not elect to assert a nonintervention doctrine. Even if it did, a court could rule that the assertion was frivolous due to the lapse of time and the changes in the Cambodian (now Kampuchean) governments. Cf. *Bernstein v. Van Heyghen Freres, S.A.*, 163 F.2d 246 (2d Cir.) (government that post-World War II inquiry would appear likely to embarrass was the extinct and universally discredited Third Reich), *cert. denied*, 332 U.S. 772 (1947).

156. The most recent occurrences of such a case were *Korematsu v. United States*, 323 U.S. 214 (1944) (Japanese relocation during World War II), and *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) (internees under Hawaiian martial law).

157. 323 U.S. 214 (1944).

158. If a state government makes this decision, the federal government probably would not assert that it involves a foreign affairs matter. Thus, this proposal would not apply.

159. See Remarks of Chief Justice Burger, before American Bar Association, San Francisco (August 14, 1972): "There are adequate means to secure an expedited appeal to the Supreme Court if the circumstances genuinely require it," reprinted in [1976] U.S. CODE CONG. & AD. NEWS 1988, 1990.

160. By comparison, interjurisdictional certification—federal court certification of a close,

as an extreme case, the overall balance is still in favor of the proposal's adoption.¹⁶¹

2. *The Proposal Would Not Waste Judicial Resources*

The proposal should not increase the burdens on judicial resources. When the procedure results in avoiding a hearing and subsequent appeal on the merits, judicial resources will have been conserved. Furthermore, due to the lesser need for the time-consuming consideration of motions for stays,¹⁶² the proposal may lessen the burden on appellate courts.

It might be argued that the proposal is so open-ended that it would permit the foreign affairs nonintervention doctrines to swallow up the rule of judicial review. Artful pleading, it might seem, could show a connection between any significant act of Congress or the President and foreign affairs.¹⁶³ This proposal, however, does not call for the dismissal of cases that would not have been dismissed, in any event, on appeal. It simply provides for a faster determination of whether cases involving foreign affairs should be dismissed.

Moreover, the proposal contains three important limitations: 1) a requirement that it be the Government, whether as a party or as amicus, that states that a particular case involves foreign affairs; 2) a non-frivolousness threshold for the district court; and 3) appellate review of the decision. The second limitation is meant to be the least significant, since much of the point of this proposal would be lost if the district court were to inquire aggressively into the foreign affairs nexus of the case in making its decision concerning certification. In those instances in which the first limitation is subverted—*i.e.*, when the Administration uses the foreign affairs claim in order to cover up its transgressions out of a fear of domestic repercussions¹⁶⁴—appellate review should serve to

controlling question of state law to the highest court of the state—has worked well. It "can normally produce a definite statement of state law without excessive delay or burdens for the court or litigants." Note, *Scope of Certification in Diversity Jurisdiction*, 29 RUTGERS L. REV. 1155, 1175 (1976). Federal-federal certification should work at least as well as federal-state certification.

161. *Cf. Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 185 (1954) (dictum) (generalizations as to efficiency of interlocutory appeals difficult to make); *United States v. American Tel. & Tel. Co.*, 567 F.2d 121, 133 (D.C. Cir. 1977) (explaining that complicated procedure ordered for production of documents was worth the delay it would cause).

162. See Leventhal, *Appellate Procedures: Design, Patchwork, and Managed Flexibility*, 23 U.C.L.A. L. REV. 432, 442 (1976).

163. *Cf. Halperin v. Kissinger*, 606 F.2d 1192, 1201 (D.C. Cir. 1979) (wiretaps of former member of National Security Council staff) (claimed national security justification rejected).

164. "[D]omestic repercussions, embarrassment to the officials involved, or administrative inconvenience unconnected with any foreign policy interest should not enter into the calculus" of deciding whether the "foreign affairs functions" exception to the APA, see note 151 *supra*, is applicable. Comment, *supra* note 26, at 421. See also Bonfield, *Military and Foreign Affairs Function Rule-Making Under the APA*, 71 MICH. L. REV. 221, 258-70 (1972).

expose the "cover-up." In many other cases this limitation will be significant. For example, the Government has on occasion represented to the courts that application of the Act of State doctrine would not advance the interests of American foreign policy.¹⁶⁵ It has also left to the courts the responsibility for deciding whether ships owned or operated by foreign governments are immune from suit during peacetime.¹⁶⁶ In addition, the Government may often be eager for a judicial determination of the merits of a case, whether to buttress a rule of international law,¹⁶⁷ or to impede a state's attempt to inject itself into the conduct of foreign affairs.¹⁶⁸ And even if the choice is between an occasional erroneous district court decision that causes the harms described in this Comment and an occasional certification that merely delays the exposure of an attempt to cover up Administration transgressions, the public interest strongly favors a procedure that permits the latter, but not the former.

3. *Stays of Discovery are Necessary*

Even if the proposal is otherwise meritorious, is it necessary to stay discovery in all cases, even in those not involving disclosure of state secrets? There are two responses. First, in virtually all cases the defendant will refuse to comply with discovery requests on the basis of the alleged foreign affairs sensitivity of the evidence sought to be discovered. In such a situation, the court, unless discovery has been stayed, must impose sanctions on the recalcitrant party. If that party is a foreign government or entity, imposition of discovery sanctions would in itself cause embarrassment and/or cross-purposes harms. If that party is a branch or agency of the United States Government, such sanctions may also cause both types of harm.¹⁶⁹ Rarely will a case

165. See *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1972).

166. Scharpf, *supra* note 26, at 577 n.214.

167. See, e.g., *Filartiga v. Pena-Irala*, No. 79-6090 (2d Cir. June 30, 1980) (Lexis). Dr. Filartiga and his daughter had been opponents of the Stroessner dictatorship in Paraguay. Before the Filartigas left Paraguay, Pena-Irala, the head of the police, had allegedly ordered their son to be tortured to death as a means of intimidating them. A criminal action against Pena-Irala filed in Paraguay was unsuccessful. The Filartigas, now in the United States, learned that Pena-Irala was also in the United States and brought a civil action against him in federal court. The district court, agreeing that there was probably emerging universal acceptance that official deliberate torture violates international law, ruled, however, that the case fell into an exception to judicial inquiry by an American federal court: it involved a foreign State's treatment of its own citizens. Therefore, the court dismissed for lack of subject matter jurisdiction. On appeal, the Departments of Justice and State appeared as *amicus curiae* arguing that deliberate torture of *anyone*, perpetrated under color of official authority, violates universally accepted norms of the international law of human rights. The court of appeals agreed and reversed.

168. The Government asked to intervene on the side of several hundred Iranian students seeking to declare unconstitutional a Mississippi law that would force Iranian students to pay five times as much tuition as other students. *Wash. Post*, June 22, 1980, at A5, col. 1.

169. Sanctions would embarrass the branch or the agency, in turn embarrassing the govern-

threaten only disclosure of state secrets harms.

Second, many disclosure situations may involve a direct conflict between an order of an American court and the pronouncement of a foreign government.¹⁷⁰ Since the harms that result from a failure to order a stay in a case involving foreign affairs are substantial, a stay of proceedings should be accompanied by a mandatory stay of discovery rather than a continuation of normal discovery procedures or resort to confidentiality orders¹⁷¹ and similar devices.

CONCLUSION

American jurisprudence has long and correctly recognized that foreign affairs and intergovernmental relations differ from domestic affairs. The main point of difference for the judicial branch is that in foreign affairs cases the potential harms from independent judicial review of legislative and executive decisions are particularly significant. Although judicial recognition of that difference has been expressed under many doctrinal and conceptual names—extreme deference to decisions concerning war, national defense, immigration and naturalization, sovereign immunity, Act of State, and particularly the political question doctrine—these doctrines can be organized around three kinds of harm to the national interest: embarrassment, cross-purposes, and state secrets disclosure. These harms can occur from *any* hearing on or initial erroneous decision of the merits of a foreign affairs decision, not only from an ultimate erroneous decision to interfere with such a decision. However, doctrinal and institutional factors impede consistently correct district court decision of foreign affairs matters.

This Comment suggests a statute requiring mandatory district court certification of a foreign affairs matter before it can be aired in court or decided on the merits. The proposed statute addresses the problem of the harm caused by an initial erroneous decision, a harm that ultimate judicial invocation of a foreign affairs nonintervention doctrine does not of its own force prevent. The statute is not aimed at

ment. Sanctions might also cause cross-purposes harm, if they forced disclosure of information that caused America's allies to cooperate less in the pooling of intelligence, or if they inhibited intelligence-gathering activities and procedures. *See generally* *Hayden v. National Sec. Agency/Cent. Sec. Serv.*, 608 F.2d 1381, 1385 (D.C. Cir. 1979) (nation has legitimate interest in secrecy).

170. *See, e.g., In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, 563 F.2d 992 (10th Cir. 1977) (reversing district court, which had held corporation in criminal contempt for refusing to produce records stored in Toronto, since production could have resulted in criminal prosecution in Canada, and Canadian government refused consent to allow production).

171. For a discussion of the advantages and disadvantages of confidentiality orders in general, see Dore, *Confidentiality Orders—The Proper Role of the Courts in Providing Confidential Treatment for Information Disclosed Through the Pre-Trial Discovery Process*, 14 N. ENG. L. REV. 1 (1978).

changing the substantive contours of any of the nonintervention doctrines. It does seek to avoid the very substantial harms to the national interest that result from a single judge's misapplication of those contours. The entire nation has an interest in achieving that goal.

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