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The Anti-Ballistic Missile Treaty Debate: Time for Some Clarification of the President's Authority to Terminate a Treaty

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NOTES

The Anti-Ballistic Missile Treaty Debate: Time for Some Clarification of the President's Authority to Terminate a Treaty

ABSTRACT

This Note explores the legal issues surrounding a president's legal authority to unilaterally withdraw from a treaty. This Note argues that, while international legal issues surrounding treaty termination are not controversial, the domestic legal issues surrounding the president's authority to terminate a treaty are heavily disputed. An analysis of these domestic legal issues does not resolve the controversy. Instead, this Note argues that a functional analysis is required. This functional analysis reveals that the president should have the power to unilaterally terminate a treaty because it maintains foreign policy effectiveness. The Note then argues that the Senate, which informally recognizes this presidential power, should recognize it formally through a Senate resolution.

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I. INTRODUCTION

On December 13, 2001, President George W. Bush announced his decision to terminate the 1972 Anti-Ballistic Missile (ABM) Treaty.¹ President Bush's announcement was significant in two respects. First, the unilateral presidential termination of a treaty is fairly unique in U.S. history.² Second, the legal aspects surrounding the termination of treaties are heavily disputed and highly controversial.³ This Note first takes a look at the background and text of the ABM Treaty. Following this introduction to the ABM Treaty, the Note takes an in-depth look at the domestic history of the treaty and the

1. Press Release, Office of the Press Secretary, President Discusses National Missile Defense (Dec. 13, 2001), at <http://www.whitehouse.gov/news/releases/2001/12/print/20011213-4.html>. See Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T 3435 [hereinafter ABM Treaty].

2. See David E. Sanger & Elisabeth Bumiller, *U.S. to Pull Out of ABM Treaty, Clearing Path for Antimissile Tests*, N.Y. TIMES, Dec. 12, 2001, at 1.

3. David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791, 1848 n.180 (1998).

national missile defense (NMD) debate. Then, this Note sets forth the international and domestic legal concerns surrounding unilateral termination of a treaty. With respect to the domestic legal concerns, this Note focuses on the U.S. Supreme Court case *Goldwater v. Carter*, the leading case dealing with treaty termination.⁴ Finally, this Note presents a potential resolution to the current debate.

II. THE BACKGROUND AND TEXT OF THE TREATY

At the height of the Cold War, both the United States and the Soviet Union feared the outbreak of nuclear war.⁵ The driving force behind each country's nuclear policy, which was employed to prevent such a war, was the doctrine of Mutually Assured Destruction (MAD).⁶ The basic premise of this doctrine is that a country will not launch a preemptive first strike as long as the country it is attacking maintains a second strike capability that can cause massive damage to the initial aggressor.⁷ MAD cannot deter war if either of two scenarios arise.⁸ First, if either country fails to maintain an effective retaliatory capability, then the other country may be tempted to launch a preemptive strike.⁹ Second, if either country develops a shield to protect it from a nuclear attack, then MAD would be undermined.¹⁰

In the 1960s, a concern existed that both of those factors were working against the United States.¹¹ The Soviet Union was in the midst of a buildup that could have directly threatened the second strike capabilities of the United States by allowing the Soviets to destroy the U.S. retaliatory capabilities with a Soviet first strike.¹² In addition, the Soviet Union was working on two different types of missile defense systems.¹³ In this atmosphere, President Lyndon Johnson wanted to start negotiations with the Soviet Union so that the two nations could reach agreements that would limit the Soviet buildup and ban missile defense systems.¹⁴ The concerns over the

4. 444 U.S. 996 (1979).

5. See David Edward Grogan, *Power Play: Theatre Ballistic Missile Defense, National Ballistic Missile Defense and the ABM Treaty*, 39 VA. J. INT'L L. 799, 803 (1999).

6. *Id.* at 804.

7. *Id.*

8. *Id.*

9. *Id.* at 804-05.

10. *Id.* at 805.

11. PAUL H. NITZE, *FROM HIROSHIMA TO GLASTNOST* 286-87 (1989).

12. *Id.*

13. *Id.*

14. *Id.* at 287.

need to limit the arms race carried over to the Nixon administration and ultimately led to the Strategic Arms Limitations Talks (SALT) with the Soviets.¹⁵ These talks began in Helsinki in November 1969.¹⁶ It was not until 1972 that each side finally agreed on the ABM Treaty and an interim agreement limiting offensive nuclear weapons.¹⁷ Both were signed at a summit in Moscow in May 1972.¹⁸

The ABM Treaty codified the MAD doctrine.¹⁹ Several provisions of the treaty were particularly important and should be discussed at this point.²⁰ First, several articles of the treaty explicitly banned ABM systems. Article II defined an ABM system as a missile system that has the purpose of countering "strategic ballistic missiles or their elements in flight trajectory."²¹ An ABM system included the ABM interceptor missiles, launchers, and radars.²² Article II also specified that systems that are under construction or undergoing testing are included in the definition of an ABM system.²³ Article I banned ABM systems, as defined in Article II, for the defense of the territories of each country and banned each country from providing a "base for such a defense."²⁴ Article V mandated that each party not

15. *See id.* at 295.

16. *Id.* at 303.

17. *Id.* at 318.

18. *Id.*

19. Grogan, *supra* note 5, at 806.

20. ABM Treaty, *supra* note 1, arts. I, II, V.

21. *Id.* art. II. The full text of Article II is as follows:

1. For the purposes of this Treaty an ABM system is a system to counter strategic ballistic missiles or their elements in flight trajectory, currently consisting of:
 - a. ABM interceptor missiles, which are interceptor missiles constructed and deployed for an ABM role, or of a type tested in an ABM mode;
 - b. ABM launchers, which are launchers constructed and deployed for launching ABM interceptor missiles; and
 - c. ABM radars, which are radars constructed and deployed for an ABM role, or of a type tested in an ABM mode.
2. The ABM system components listed in paragraph 1 of this article include those which are:
 - a. operational;
 - b. under construction;
 - c. undergoing testing;
 - d. undergoing overhaul, repair or conversion; or
 - e. mothballed.

Id.

22. *Id.*

23. *Id.*

24. *Id.* art I. Article I provides that:

“develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land based.”²⁵

Second, two exceptions to this general prohibition were provided in Article III of the treaty.²⁶ One exception was for an ABM system centered on each nation’s capital, and the other exception was for a system centered on an intercontinental ballistic missile (ICBM) field in each nation.²⁷ The purpose of both of these exceptions was to maintain each nation’s retaliatory capability in the event of a first strike.²⁸ The first exception allowed protection of the nation’s capital

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1. Each Party undertakes to limit ant-ballistic missile (ABM) systems and to adopt other measures in accordance with the provisions of this Treaty.
 2. Each party undertakes not to deploy ABM systems for a defense of the territory of its country and not to provide a base for such a defense, and not to deploy ABM systems for defense of an individual region except as provided for in Article III of this Treaty.

Id.

25. *Id.* art. V. Article V of the Treaty states that:

1. Each party undertakes not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based.
2. Each party undertakes not to develop, test, or deploy ABM launchers for launching more than one ABM interceptor missile at a time from each launcher, nor to modify deployed launchers to provide them with such a capability, nor to develop, test, or deploy automatic or semi-automatic or other similar systems for rapid reload of ABM launchers.

Id.

26. *Id.* art. III. Article III provides, “Each party undertakes not to deploy ABM systems or their component parts except that”

- a. Within one ABM system deployment area having a radius of one hundred and fifty kilometers and centered on the Party’s national capital, a Party may deploy: (1) no more than one hundred ABM launchers and no more than one hundred ABM interceptor missiles at launch sites, and (2) ABM radars within no more than six radar complexes, the area of each complex being circular and having a diameter of no more than three kilometers; and
- b. Within one ABM system deployment area having a radius of one hundred and fifty kilometers and containing ICBM silo launchers, a party may deploy: (1) no more than one hundred ABM launchers and no more than one hundred ABM interceptor missiles at launch sites, (2) two large phase-array ABM radars comparable in potential to corresponding ABM radars operational or under construction on the date of signature of the Treaty in an ABM system deployment area containing ICBM silo launchers, and (3) no more than eighteen ABM radars each having a potential less than the potential of the smaller of the above-mentioned two large phased array ABM radars.

Id.

27. *Id.*

28. Grogan, *supra* note 5, at 808 n.49.

because strategic command centers are located in the capital areas.²⁹ Each country needed to maintain these command centers so it could effectively respond to a first strike.³⁰ The second exception allowed for the protection of an ICBM field because if at least one field could be protected in the event of a first strike, then it would ensure a devastating retaliatory capability for both nations.³¹ In 1974, the ABM Treaty was amended to limit each nation to only one ABM system, so that each nation could protect either its capital or an ICBM field, but not both.³²

Third, Article XIII of the ABM Treaty established the Standing Consultative Commission (SCC).³³ The Commission's tasks were to "resolve compliance issues, share information, resolve questions, consider amendments, and even consider changes in the strategic

29. Grogan, *supra* note 5, at 808.

30. *Id.* at 804.

31. *Id.* at 808.

32. Protocol to the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitations of Anti-Ballistic Missile Systems, July 3, 1974, U.S.-U.S.S.R., art. I, 27 U.S.T. 1647. While the United States never pursued a system falling within the exception to the ABM Treaty, the Soviet Union maintained the "Galosh" system that protected Moscow. Grogan, *supra* note 5, at 809.

33. ABM Treaty, *supra* note 1, art. XIII. Article XIII provides:

1. To promote the objectives and implementation of the provisions of this Treaty, the Parties shall establish promptly a Standing Consultative Commission, within the framework of which they will:
 - a. Consider questions concerning compliance with the obligations assumed and related situations which may be considered ambiguous;
 - b. Provide on a voluntary basis such information as either party considers necessary to assure confidence in compliance with the obligations assumed;
 - c. Consider questions involving unintended interference with national technical means of verification;
 - d. Consider possible changes in the strategic situation which have a bearing on the provisions of this Treaty;
 - e. Agree upon procedures and dates for destruction or dismantling of ABM systems or their components in cases provided for by the provisions of this Treaty;
 - f. Consider, as appropriate, possible proposals for further increasing the viability of this Treaty, including proposals for amendments in accordance with the provisions of this Treaty;
 - g. Consider, as appropriate, proposals for further measures aimed at limiting strategic arms.
2. The Parties through consultation shall establish, and may amend as appropriate, Regulations for the Standing Consultative Commission governing procedures, composition and other relevant matters.

Id.

situation having a bearing on the treaty."³⁴ The SCC met at least twice annually, which provided an opportunity for ongoing dialogues between the two nations.³⁵

Fourth, the ABM Treaty had two built-in escape clauses.³⁶ Article XIV provided that each party "may propose amendments to this Treaty."³⁷ Article XV allowed a party to withdraw from the Treaty under certain circumstances.³⁸ More specifically, Article XV provided that, "each party shall, in exercising its national sovereignty, have a right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests."³⁹

III. THE NATIONAL MISSILE DEFENSE DEBATE

A. President Reagan's Strategic Defense Initiative

Former President Ronald Reagan first thought of the idea to pursue a ballistic missile defense system when he visited the North American Aerospace Defense Command (NORAD); which was built into Cheyenne Mountain, Colorado.⁴⁰ Reagan visited NORAD in 1979, prior to his presidential election in 1980.⁴¹ During his visit,

34. Grogan, *supra* note 5, at 814.

35. *Id.*

36. ABM Treaty, *supra* note 1, arts. XIV, XV.

37. *Id.* art. XIV. Article XIV states:

1. Each party may propose amendments to this Treaty. Agreed amendments shall enter into force in accordance with the procedures governing the entry into force of this Treaty.
2. Five years after entry into force of this Treaty, and at five year intervals thereafter, the Parties shall together conduct a review of this Treaty.

Id.

38. *Id.* art. XV. Article XV provides:

1. This Treaty shall be of unlimited duration.
2. Each party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests. It shall give notice of its decision to the other Party six months prior to withdrawal from the Treaty. Such notice shall include a statement of the extraordinary events the notifying party regards as having jeopardized its Supreme interests.

Id.

39. *Id.*

40. John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851, 851 (2001).

41. *Id.*

Reagan was struck by the fact that the United States had no capability of stopping even a single Soviet missile from striking the United States.⁴² In 1983, Reagan formally announced his decision to pursue a "space-based X-ray and laser weapons system that could shoot down Soviet missiles in flight."⁴³ The Reagan Administration called this system the Strategic Defense Initiative (SDI).⁴⁴ While this system never fully developed technologically, the announcement proved to be a great success for the United States strategically.⁴⁵ The Soviets' fear of a U.S. missile shield forced them to the negotiating table.⁴⁶

Reagan did not just want a bargaining device through SDI; his administration sought an operational system.⁴⁷ A major obstacle to developing, testing, and deploying Reagan's SDI was, of course, the ABM Treaty.⁴⁸ Recall that Article V specifically banned the development of space-based ABM systems.⁴⁹ Reagan called upon Judge Abraham Sofaer, the legal advisor to the State Department, to conduct a study of whether Reagan's SDI violated the Treaty.⁵⁰ Sofaer argued that the Treaty did not prohibit all ABM systems.⁵¹ He believed that Agreed Statement D, which accompanied the Treaty, permitted "ABM systems and components 'based on' . . . technologies not used in the systems and components described and regulated in the Treaty."⁵² Agreed Statement D provided:

In order to insure fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III of the ABM Treaty, the Parties agree that in the event ABM systems based on other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars are created in the future, specific limitations on such systems and their components would be subject to discussion in accordance with Article XIII and agreement in accordance with Article XIV of the Treaty.⁵³

42. *Id.*

43. *Id.*

44. *Id.*

45. *See id.* at 855.

46. *See id.*

47. *Id.* at 858.

48. *See* discussion *supra* Part II.

49. ABM Treaty, *supra* note 1, art. V.

50. Yoo, *supra* note 40, at 858.

51. Abraham D. Sofaer, *The ABM Treaty and the Strategic Defense Initiative*, 99 HARV. L. REV. 1972 (1986).

52. *Id.* at 1972-73; ABM Treaty, *supra* note 1, Agreed Statement D.

53. ABM Treaty, *supra* note 1, Agreed Statement D.

Reagan's SDI was, according to Sofaer, an "exotic" system comprised of technologies that did not exist at the time of the adoption of the Treaty.⁵⁴

Sofaer supported his theory with a textual analysis of the Treaty, the ABM negotiating record between the United States and the Soviet Union, and post-negotiation statements by the United States.⁵⁵ First, Sofaer said his argument could be supported textually because the definition of an ABM system given in Article II of the Treaty can plausibly be read to apply only to systems then in existence.⁵⁶ In addition, Sofaer cited Agreed Statement D in support of his interpretation.⁵⁷ Second, Sofaer looked to the ABM negotiating record.⁵⁸ Even though the negotiating record was classified, Sofaer was able to analyze some of the details of the negotiations that were discussed.⁵⁹ Sofaer argued that the evidence revealed that while the United States tried to ban all systems, the Soviets wanted to limit the ban to those systems currently in existence.⁶⁰ According to Sofaer, the Soviets won this debate; as a result, the Treaty allowed deployment of an ABM system based on technology not in existence in 1972.⁶¹ Finally, Sofaer looked to the post-negotiation statements by the United States.⁶² Sofaer cited statements by the U.S. State Department, by witnesses during the ratification process, and by officials after ratification.⁶³ According to Sofaer, all of these statements indicated that the Treaty allowed for the creation of an ABM system based on technology not in existence at the time the Treaty was adopted.⁶⁴

In October 1985, the Reagan Administration announced the Sofaer reading of the ABM Treaty as its policy.⁶⁵ This sparked a controversy over the proper interpretation of the Treaty that eventually caused the Reagan administration to announce that, while it still believed in the validity of its broad interpretation of the ABM Treaty, it would adhere to the more narrow interpretation of the Treaty that prohibited any form of a national ballistic missile defense system.⁶⁶ Ultimately, Reagan's SDI never left the research and

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54. Yoo, *supra* note 40, at 858-59.
 55. Sofaer, *supra* note 51, at 1973-84.
 56. *Id.* at 1974.
 57. *Id.* at 1975.
 58. *Id.* at 1978.
 59. *Id.*
 60. *Id.* at 1980.
 61. *Id.*
 62. *Id.*
 63. *Id.* at 1981-83.
 64. *Id.*
 65. Yoo, *supra* note 40, at 859.
 66. *Id.* at 859-60.

development stage.⁶⁷ It did, however, start a debate on the legitimacy of actual deployment of a national missile defense (NMD) system that continued for quite some time.⁶⁸

B. President Clinton's National Missile Defense Policy

Moving in history from Reagan's announcement of SDI to the Clinton administration admittedly skips some important developments in the NMD debate. Nevertheless, for the purposes of this Note, an extensive historical review is unnecessary. Instead, having provided a limited background of the origins of the ABM Treaty interpretation debate, this Note moves forward.

One of the main focuses of the Clinton administration was abandoning the development of a NMD system, which was impermissible under the Treaty, and moving toward developing a working theatre missile defense (TMD) system, which was permissible under the Treaty.⁶⁹ The purpose behind TMD is to protect U.S. forces, population centers, fixed civilian and military assets, and mobile military units from theatre missile attacks.⁷⁰ The Patriot Missile is probably the most famous of the TMD systems because of its use in the Gulf War.⁷¹ The four core types of TMD systems under development are the Army Patriot Advanced Capability-3 system, the Navy Area Defense system, the Army Theatre High Altitude Air Defense system, and the Navy Theatre Wide system.⁷²

The development of these systems was surrounded with controversy. Recall that Article I of the ABM Treaty banned "ABM systems" and Article II defined such systems as those that "counter strategic missiles or their elements in flight trajectory."⁷³ The United States defined strategic missiles as those missiles with intercontinental capability.⁷⁴ Therefore, according to TMD supporters, defense systems could be deployed that had the capability of defending against theatre ballistic missiles and not intercontinental missiles with no ABM Treaty compliance problems.⁷⁵ The problem with TMD systems was that, while in theory they did not violate the ABM Treaty, should they have been capable of

67. JAMES LINDSAY & MICHAEL O'HANLON, DEFENDING AMERICA: THE CASE FOR LIMITED NATIONAL MISSILE DEFENSE 3 (2001).

68. See discussion *infra* Part III.B.-C.

69. See Grogan, *supra* note 5, at 832.

70. *Id.* at 817.

71. *Id.* at 825.

72. *Id.* at 819.

73. ABM Treaty, *supra* note 1, arts. I, II.

74. Grogan, *supra* note 5, at 812-13.

75. *Id.*

defending against strategic ballistic missiles—and not just theatre ballistic missiles—they would not have been in compliance with the Treaty.⁷⁶ This area of uncertainty meant that Clinton had to pursue negotiations with the Russians regarding what qualified as a TMD system and what qualified as an NMD system.⁷⁷ After extensive negotiations, the dispute was not fully settled, thus leaving compliance issues largely to the discretion of each nation.⁷⁸

While NMD took a backseat to TMD, it still remained an important topic during the Clinton administration.⁷⁹ Two things should be considered when looking at the NMD debate in the 1990s and continuing into this century. First, the debate surrounding NMD was slightly different because NMD was explicitly banned under the Treaty, so there was not nearly as much room to maneuver as with TMD.⁸⁰ Second, the world changed, which had a major impact on the ABM Treaty debates.⁸¹ First, the Soviet Union dissolved in late 1991.⁸² Opponents of the Treaty argued that the collapse of the Soviet Union meant that the Treaty was no longer binding.⁸³ The argument followed that because “there [was] no state, or group of states, capable of fulfilling the Soviet Union’s obligations under the Treaty,” then the United States should not have been bound by the Treaty.⁸⁴ Another important change is that more than 20 Third World countries now possess ballistic missiles.⁸⁵ These nations include Iran, Libya, and North Korea.⁸⁶ The ABM Treaty was adopted at a time when only the United States and the Soviet Union were threats to one another.⁸⁷ Times changed, according to the opponents of the ABM Treaty; as a result, reluctance to build a NMD system should subside.⁸⁸

The changes in the world led many to argue that the United States should have amended or abandoned the ABM Treaty to allow for actual deployment of a NMD system.⁸⁹ Notice that the text of the ABM Treaty dealt primarily with the deployment of a NMD system.⁹⁰

76. *Id.* at 813.

77. *See id.*

78. *See id.* at 855.

79. *Id.* at 816.

80. *See* discussion *supra* Part II.

81. Baker Spring, *Why the ABM Treaty is Already Dead and What it Should Mean for American National Security*, 4 NEXUS 31, 31 (1999).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 37.

86. *Id.*

87. *Id.*

88. *See id.*

89. *See id.* at 42.

90. *See* discussion *supra* Part II.

Over the years, the Treaty was interpreted to allow both the United States and the Soviet Union to research, develop, and test an NMD system provided that it was non-mobile and land-based.⁹¹

Researching, developing, and testing appeased NMD advocates but it did not settle whether an NMD system would be deployed.⁹² The 1990s marked a time of tumultuous NMD debates with little resolution.⁹³ Obviously, an NMD system was never deployed. Clinton outlined his policy for a NMD system in a speech he made on September 1, 2000 at Georgetown University several months before he left office.⁹⁴ Clinton said that while NMD would not replace diplomacy and deterrence, it could give the United States “an extra dimension of insurance in a world where proliferation has complicated the task of preserving peace.”⁹⁵ In outlining the specific NMD system then under development, Clinton said:

The system now under development is designed to work as follows. In the event of an attack, American satellites would [detect] the launch of missiles. Our radar would track the enemy warhead and highly accurate, high-speed, ground-based interceptors would destroy them before they could reach their target in the United States.⁹⁶

President Clinton further stated that this system would be based in Alaska and would protect all 50 states.⁹⁷ Clinton went on to note that technological advances were still needed in order for NMD to work effectively; as a result, Clinton said he was unwilling to move forward with deployment of a NMD system.⁹⁸ Instead, Clinton authorized a “robust program of development and testing.”⁹⁹

Clinton then addressed the issues surrounding the ABM Treaty.¹⁰⁰ He said that “NMD, if deployed, would require [the United States] to either adjust the Treaty or withdraw from it.”¹⁰¹ Clinton noted that before pursuing such a course the United States must consider the interests of Russia, NATO allies, and several Asian countries.¹⁰² Clinton finished his speech by saying that deployment

91. Grogan, *supra* note 5, at 811.

92. *See generally id.* at 825-58.

93. *Id.*

94. LINDSAY & O'HANLON, *supra* note 67, at Appendix E.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

of NMD was an issue for the next President,¹⁰³ effectively punting the ultimate decision to the Bush Administration.¹⁰⁴

C. President George W. Bush's National Missile Defense Policy

President George W. Bush wasted little time in proposing the deployment of a NMD system.¹⁰⁵ In a speech before the National Defense University, President Bush gave a comprehensive statement of his NMD policy.¹⁰⁶ Bush explained that the United States and the Soviet Union maintained their security during the Cold War on the "grim premise that neither side would fire nuclear weapons at each other, because doing so would mean the end of both nations."¹⁰⁷ He added that the two nations actually codified this relationship by adopting the ABM Treaty.¹⁰⁸

The President then noted that the bipolar world in which the ABM Treaty was created no longer existed,¹⁰⁹ as many nations now have nuclear weapons¹¹⁰ and, of the nations that do have nuclear weapons, many are not "responsible."¹¹¹ As a result, the greatest threat, according to President Bush, is not from the former Soviet Union but from these other nations.¹¹² In this atmosphere, President Bush believed the United States needed more than MAD.¹¹³

President Bush then stated that in the near future, the United States would possess the capability of deploying a system that could counter some ballistic missile threats.¹¹⁴ While the final form of these defenses is not clear from the speech, President Bush explained that his Administration would explore numerous options to come up with an effective defense system.¹¹⁵

President Bush then announced the dispatch of "high-level representatives to capitals in Europe, Asia, Australia and Canada to

103. *Id.*

104. James Lindsay, *Is the Third Time the Charm? The American Politics of Missile Defense*, POLITIQUE ÉTRANGÈRE, July-Sept. 2001, available at <http://www.brook.edu/views/articles/lindsay/2001etrangere.htm> (last visited Nov. 14, 2002).

105. President George W. Bush, Address at the National Defense University, May 1, 2001, at <http://www.brook.edu/fp/projects/nmd/bush20010501.htm>.

106. *See id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

discuss" missile defense systems.¹¹⁶ In addition, President Bush said that the United States must "reach out" to China and Russia as well.¹¹⁷ President Bush indicated that he intended to advocate major changes to the Treaty, or even withdrawal.¹¹⁸ He said:

Russia and the United States should work together to develop a new foundation for world peace and security in the 21st century. We should leave behind the constraints of the ABM Treaty that perpetuates a relationship based on distrust and mutual vulnerability.

This Treaty ignores the fundamental breakthroughs in technology during the last 30 years. It prohibits us from exploring all options for defending against the threats that face us, our allies and other countries.

That's why we should work together to replace this treaty with a new framework that reflects a clear and clean break from the past, and especially from the adversarial legacy of the Cold War.¹¹⁹

This speech left President Bush's plans open regarding the ABM Treaty, although it looked as if he advocated a new treaty to replace the ABM Treaty. Then, on December 13, 2001, President Bush made clear what his plan was for the future of the ABM Treaty.¹²⁰ President Bush announced that he had given "formal notice to Russia, in accordance with the [ABM] Treaty, that the United States of America [was] withdrawing" from the Treaty.¹²¹ Pursuant to Article XV of the Treaty, the United States was required to make the withdrawal effective six months after December 13, 2001.¹²² President Bush said that "[t]he 1972 ABM Treaty was signed by the United States and the Soviet Union at a much different time, in a vastly different world."¹²³ President Bush noted that the Soviet Union dissolved since the signing in 1972 and that the hostilities between the United States and the Soviets that led each nation to keep "thousands of nuclear weapons on hair-trigger alert, pointed at each other" no longer existed.¹²⁴ President Bush's Press Secretary added that a major consideration for withdrawal from the Treaty was the fact that a number of rogue and terrorist states had acquired weapons of mass destruction and the ability to launch such weapons and strike the U.S. mainland.¹²⁵

116. *Id.*

117. *Id.*

118. *See id.*

119. *Id.*

120. Press Release, *supra* note 1.

121. *Id.*

122. *See* ABM Treaty, *supra* note 1, art. XV.

123. *Id.*

124. *Id.*

125. *See* Statement by the Press Secretary, ABM Treaty Fact Sheet, Dec. 13, 2001, available at <http://www.whitehouse.gov/news/releases/2001/12/20011213-2.html>.

IV. LEGAL ISSUES SURROUNDING TREATY TERMINATION

President Bush's decision to terminate the ABM Treaty is fairly unique in U.S. history. It is arguably the highest profile treaty ever terminated solely by the President.¹²⁶ As a result, President Bush's decision to terminate the Treaty did not go unnoticed by the Senate.¹²⁷ Senator Robert Byrd, also an important player in the Mutual Defense Treaty debates, discussed below, made a pseudo-legal argument against President Bush's termination announcement.¹²⁸ Not consulting with the Senate on decision-making involving international agreements is not only dangerous, according to Senator Byrd, but also "undermines the intent of the Framers of our Constitution."¹²⁹ Senator Byrd continued by saying, "Monarchs make treaties. American Presidents propose treaties."¹³⁰

However, after President Bush's announcement, legal arguments were the exception rather than the rule for Senators.¹³¹ Those that challenged the termination of the Treaty did so mostly on political and strategic grounds, rather than on legal grounds.¹³² In fact, Senate Majority Leader Tom Daschle actually acknowledged President Bush's authority to terminate the ABM Treaty without permission from or consultation with Congress.¹³³ Senator Daschle did note that the Democrats were investigating ways to stop the President from terminating the Treaty and that Congress would have to "weigh whatever powers of the purse [it] ha[s] as leverage."¹³⁴ Similar to Senator Daschle's threat, Senator Carl Levin, chairman of the Senate Armed Services Committee, said he would seek legislation

126. Sanger & Bumiller, *supra* note 2.

127. *Id.* This Note focuses on the Senate, as opposed to Congress as a whole, because the Senate is the house of Congress that is given power in the treaty process by the Constitution. See U.S. CONST. art. II, § 2, cl. 2.

128. Steven Mufson & Dana Milbank, *U.S. Sets Missile Defense Treaty Pullout, Bush to Go Ahead with Missile Defense Tests*, WASH. POST, Dec. 14, 2001, at A1.

129. *Id.*

130. *Id.* However, in early June 2002, 30 House Democrats filed suit in U.S. District Court for the District of Columbia challenging Bush's authority to withdraw from the ABM Treaty. Dana Milbank, *U.S. Withdraws from Missile Treaty, Bush Presses Congress for \$7.8 Billion for Defense System*, WASH. POST, June 14, 2002, at A28; *Lawmakers Sue Bush over ABM Treaty Withdrawal*, CNN, June 11, 2002, at <http://www.cnn.com/2002/ALLPOLITICS/06/11/congress.abmtreaty/index.html>.

131. See, e.g., Colin McMahon, *Russia Reacts Tepidly to ABM Pullout, Moscow Long Aware of Bush's Intention*, CHICAGO TRIB., Dec. 13, 2001, at 22; Paul Richter & Robin Wright, *Plan to Quit ABM Treaty Called Timely*, L.A. TIMES, Dec. 13, 2001, at 1; Joseph R. Biden, Jr., *Missile Defense Delusion*, WASH. POST, Dec. 19, 2001, at A39; Mufson & Milbank, *supra* note 128.

132. See, e.g. McMahon, *supra* note 131; Richter & Wright, *supra* note 131; Biden, *supra* note 131.

133. McMahon, *supra* note 131.

134. *Id.*

denying funding to any ABM test that violated the ABM Treaty unless Congress specifically approved the test.¹³⁵

Arguments surrounding the strategic wisdom of President Bush's decision were also put forth.¹³⁶ Senator Levin expressed his concern that termination of the Treaty could set off an arms race.¹³⁷ Echoing Senator Levin's concern, Senator Joseph Biden argued that U.S. withdrawal from the Treaty had the potential to set off an arms race in Asia.¹³⁸ Senator Biden added that termination of the treaty would lead to a misplacement of resources.¹³⁹ According to Biden, instead of focusing on terrorism, which is the greatest threat the United States faces, the United States should focus its resources on an ABM system.¹⁴⁰

The debate among academics is much different. The legal authority of the President to unilaterally terminate a treaty is still a "highly controversial" topic.¹⁴¹ Some have questioned President Bush's decision.¹⁴² This debate raises interesting legal issues regarding the acceptability of President Bush's actions under prevailing international legal norms and under U.S. domestic law. This section of the Note deals with these important issues.

A. *International Legal Issues Surrounding Treaty Termination*

Two leading international legal texts can be used in evaluating the international legal issues surrounding the withdrawal from the ABM Treaty—the Vienna Convention on the Law of Treaties and the Restatement of Foreign Relations Law.¹⁴³ Using these texts as a guide, three international legal issues surrounding the termination of the ABM Treaty will be discussed. First, the plain language of the Treaty allows for U.S. withdrawal.¹⁴⁴ The Vienna Convention provides that "a treaty may be terminated in conformity with the provisions of the treaty,"¹⁴⁵ and the Restatement uses similar

135. Richter & Wright, *supra* note 131.

136. *Id.*; Biden, *supra* note 131; Mufson & Milbank, *supra* note 128.

137. Richer & Wright, *supra* note 131.

138. Biden, *supra* note 131; Mufson & Milbank, *supra* note 128.

139. Biden, *supra* note 131.

140. *Id.*

141. Golove, *supra* note 3, at 1848 n.180.

142. See, e.g., Bruce Ackerman, *Bush Can't Operate as a One-Man Act*, L.A. TIMES, Dec. 16, 2001, at M5; Karin Lee Lawson, *The Constitutional Twilight Zone of Treaty Termination: Goldwater v. Carter*, 20 VA. J. INT'L L. 147, 165 (1979); Walter C. Clemens, *Missile Defense: Who Terminates a Treaty?*, BULL. OF THE ATOMIC SCIENTISTS, Nov.-Dec. 2001, at 38.

143. Yoo, *supra* note 40, at 905-06.

144. ABM Treaty, *supra* note 1, art. XV.

145. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 54, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

language.¹⁴⁶ As noted above, Article XV of the Treaty provides that "each party shall, in exercising its national sovereignty, have a right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests."¹⁴⁷ The phrase "if it decides," allowed the United States and the Soviet Union to decide for themselves whether extraordinary events occurred that would jeopardize their supreme interests.¹⁴⁸ The United States could have argued that more than 20 Third World countries possessed ballistic missiles.¹⁴⁹ The possibility of North Korea and other similarly situated states launching and delivering nuclear weapons to the U.S. mainland could have justified U.S. withdrawal pursuant to the text of the Treaty.¹⁵⁰

Second, the international legal doctrine of *rebus sic stantibus* stands for the notion that all treaties are signed with the circumstances in mind.¹⁵¹ This doctrine is recognized in both the Vienna Convention and in the Restatement.¹⁵² The Vienna Convention provides that a fundamental change in circumstances would justify withdrawal from a treaty if those circumstances were an "essential basis of the consent of the parties to be bound by the treaty."¹⁵³ The Restatement uses almost identical language.¹⁵⁴ Again, many countries now have ballistic missiles and pose a threat to the United States.¹⁵⁵ At the time of the signing of the ABM Treaty, the only nuclear threat to the United States was the Soviet Union. The Treaty was designed to deal with that situation.

Third, some commentators have suggested that the Treaty was no longer in force after the dissolution of the Soviet Union.¹⁵⁶ In 1997, Clinton negotiated Memoranda of Understanding (MOUs) with the Russian Federation, Belarus, Kazakhstan, and Ukraine to expand the Treaty to these four nuclear powers that emerged after the Soviet Union collapse,¹⁵⁷ but Clinton did not submit the MOUs for approval by the Senate.¹⁵⁸ Assuming that these MOUs were not binding on the United States, a plausible argument existed that the ABM Treaty

146. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 332 (1987) [hereinafter RESTATEMENT].

147. ABM Treaty, *supra* note 1, art. XV.

148. *See id.*; Yoo, *supra* note 40, at 913.

149. Spring, *supra* note 81, at 37.

150. Yoo, *supra* note 40, at 913.

151. Lawson, *supra* note 142, at 150.

152. Vienna Convention, *supra* note 145, art. 62; RESTATEMENT, *supra* note 146, § 336.

153. Vienna Convention, *supra* note 145, art. 62.

154. RESTATEMENT, *supra* note 146, § 336.

155. Spring, *supra* note 81, at 31.

156. Yoo, *supra* note 40, at 904.

157. *Id.*

158. *Id.*

was no longer in force under international law.¹⁵⁹ The Restatement provides that “when part of a state becomes a new state, the new state does not succeed to the international agreements to which the predecessor state was party.”¹⁶⁰ The exception to this rule is that the Treaty is binding if “expressly or by implication, [the successor state] accepts such agreements” and the other party to the agreement also consents.¹⁶¹ The Vienna Convention provides that a “newly independent state is not bound to maintain in force, or to become a party to, any treaty” because the predecessor was a party to the treaty.¹⁶² The exception to the rule set forth in the Vienna Convention is that a treaty is binding on the new state if the parties agree to the continuance of the treaty either expressly or by conduct.¹⁶³ Based on these provisions, an argument could have been made that the ABM Treaty was no longer in force.¹⁶⁴ However, considering the MOUs and the fact that both nations continued to comply with the treaty by not deploying a national missile defense system, this was not a very strong argument.¹⁶⁵ In conclusion, while the Vienna Convention on the Law of Treaties and the Restatement of Foreign Relations Law do not support the argument that upon dissolution of the Soviet Union the ABM Treaty was no longer in force, both texts do support the U.S.’s legal authority to unilaterally terminate the ABM Treaty.

B. *Domestic Legal Issues Surrounding Treaty Termination, the Goldwater v. Carter Litigation*

The international legal issues seem fairly clear. The withdrawal provision in Article XV of the Treaty is legal, and, under the words of that clause, it is up to the United States to decide what extraordinary events jeopardize its “supreme interest.”¹⁶⁶ A remaining concern is whether any domestic legal issues surrounding the U.S. withdrawal from the Treaty exist that might place President Bush’s decision in question. This presents a slightly different issue. In the domestic realm the important question is not whether the United States can withdraw from the Treaty. The important question is: Who has the power to withdraw from a treaty? This issue has only been before the

159. See RESTATEMENT, *supra* note 146, § 210.

160. *Id.*

161. *Id.*

162. Vienna Convention, *supra* note 145, art. 16.

163. *Id.* art. 24.

164. See RESTATEMENT, *supra* note 146, § 210; Vienna Convention, *supra* note 145, art. 16.

165. See Yoo, *supra* note 40, at 904.

166. See ABM Treaty, *supra* note 1, art. XV.

Supreme Court one time.¹⁶⁷ That case was the 1979 decision of *Goldwater v. Carter*.¹⁶⁸ What follows is a look at the background to that case, its procedural history in the courts, and the final decision in the Supreme Court.

1. Background to *Goldwater v. Carter*

On December 15, 1978, President Jimmy Carter announced that the United States would recognize the People's Republic of China (P.R.C.) as the sole government of China.¹⁶⁹ This decision also meant that the United States would adopt the P.R.C. belief that Taiwan was part of China, thus necessitating a "simultaneous withdrawal of recognition from [Taiwan]."¹⁷⁰ Along with the withdrawal of recognition, the United States announced that it would terminate the Mutual Defense Treaty with Taiwan.¹⁷¹ The United States and Taiwan entered the Treaty in 1954, and the Treaty had been the centerpiece of U.S.-Taiwan relations.¹⁷² The Treaty was designed as an "anti-communist and anti-mainland China treaty."¹⁷³ Accordingly, the end of the Mutual Defense Treaty was important to China in the normalization of relations between the United States and China.¹⁷⁴ Article X of the Treaty provided that, "either party may terminate [the Treaty] one year after notice has been given to the other party."¹⁷⁵

2. The District Court Decision in *Goldwater v. Carter*

Opposed to Carter's unilateral action, on December 22, 1978 Senator Barry Goldwater, along with numerous other legislators, filed suit in the U.S. District Court for the District of Columbia.¹⁷⁶ Goldwater sought declaratory and injunctive relief against President

167. DAVID GRAY ADLER, *THE CONSTITUTION AND THE TERMINATION OF TREATIES*, at iii (1986); see *Goldwater v. Carter*, 444 U.S. 996 (1979).

168. *Goldwater*, 444 U.S. 996 (1979).

169. Lawson, *supra* note 142, at 147.

170. *Id.*

171. *Id.* This treaty had been the centerpiece of U.S.-Taiwan relations since its inception in 1954. *Id.* at n.3. See Mutual Defense Treaty, Dec. 2, 1954, U.S.-P.R.C., 6 U.S.T. 433.

172. Lawson, *supra* note 142, at 147 n.3.

173. *Id.*

174. *Id.*

175. Mutual Defense Treaty, *supra* note 171, art. X.

176. Plaintiff's Brief submitted by Senator Barry Goldwater to U.S. District Court in *Goldwater v. Carter*, reprinted in 2 UNITED STATES FOREIGN RELATIONS LAW: DOCUMENTS AND SOURCES 473, 475-76 (Michael J. Glennon & Thomas M. Franck eds., 1980) [hereinafter Plaintiff's Brief]. Among the Senators joining the suit were Strom Thurmond, Orrin Hatch, and Jesse Helms. *Id.* at 475.

Carter's termination of the Mutual Defense Treaty.¹⁷⁷ Goldwater's argument was premised upon Article VI of the Constitution, which provides that a treaty is considered the "supreme law of the land," and upon Article II, which provides that "[the President] shall have power, by and with the advice and consent of the Senate, to make treaties, providing two thirds of the Senators present concur. . . ."¹⁷⁸ Goldwater argued that under these provisions, "as a logical and natural consequence, the Senate is part of the authority who possesses the power of deciding upon the termination of a treaty."¹⁷⁹ Therefore, according to Goldwater, the term "party" in Article X of the Treaty did not mean the President alone.¹⁸⁰

In response, the Carter administration made several arguments to the district court.¹⁸¹ First, the administration argued that Article II of the U.S. Constitution does not provide for a congressional role in treaty termination.¹⁸² To construe it in such a way would "be inconsistent with the President's recognized constitutional responsibility for the conduct of foreign affairs and the implementation of treaties."¹⁸³ Second, Carter argued that the Treaty was terminated "in order to permit the establishment of diplomatic relations with the P.R.C. Thus, termination was incident to the President's exclusive recognition power under Article II, [Sections] 2 and 3 of the Constitution."¹⁸⁴ Third, the Carter administration argued that the Mutual Defense Treaty created no domestic law obligations, so its termination fell "squarely within the President's authority as Commander in Chief."¹⁸⁵ Finally, apart from the arguments on the merits of the claim, the President argued that the plaintiff's claim was a non-justiciable political question¹⁸⁶ and that the plaintiffs lacked standing.¹⁸⁷

177. *Id.* at 476.

178. *Id.* at 479; U.S. CONST. art. VI, § 1, cl. 2; *id.*, art. II, § 2, cl. 2.

179. Plaintiff's Brief, *supra* note 176, at 479.

180. *Id.* at 96; See Mutual Defense Treaty, *supra* note 171, art. X. Goldwater argued that the approval of either the Senate or Congress in its entirety is required for the successful termination of a treaty. Plaintiff's Brief, *supra* note 176, at 484-85.

181. For an additional summary of these arguments, see ADLER, *supra* note 167, at 252-53.

182. Defendants' Brief submitted by Department of Justice to the U.S. District Court in *Goldwater v. Carter*, reprinted in 2 UNITED STATES FOREIGN RELATIONS LAW: DOCUMENTS AND SOURCES 473, 501, 533 (Michael J. Glennon & Thomas M. Franck eds., 1980) [hereinafter Defendant's Brief]. The Defendant cited *United States v. Curtis-Wright Export Corp.*, 299 U.S. 304 (1936), in support of this argument. *Id.*

183. Defendant's Brief, *supra* note 182, at 501, 533.

184. *Id.* at 534.

185. *Id.*

186. *Id.* at 534.

187. *Id.* at 535.

On June 6, 1979, Judge Gasch dismissed Goldwater's claim based on lack of standing.¹⁸⁸ The district court's primary concern, at that time, was that a "premature judicial declaration might circumvent the legislative action directed at either approving or rejecting the President's notice of termination."¹⁸⁹ The district court believed that its "judicial powers should be exercised only after the legislative branch had been given the opportunity of acting."¹⁹⁰ Several hours after the dismissal of the suit, the Senate adopted an amendment to Senate Resolution 15, by a vote of 59 to 35, that stated "that it is the sense of the Senate that approval of the United States Senate is required to terminate any mutual defense treaty between the United States and another nation."¹⁹¹ The plaintiffs then filed a motion for the district court to alter or amend its decision on June 6, 1979.¹⁹² In response to this motion, Judge Gasch argued that while the amended resolution was not final action by the Senate, it was "the last expression of the Senate position on its constitutional role in the treaty termination on process."¹⁹³ That was enough to quell his initial fears of circumvention of the legislative process.¹⁹⁴ Consequently, Judge Gasch believed that that plaintiffs did have standing.¹⁹⁵

Having decided that the plaintiffs had standing, Judge Gasch turned to whether the claim was non-justiciable because it presented a political question.¹⁹⁶ The leading case on the political questions doctrine is *Baker v. Carr*.¹⁹⁷ In *Baker*, the Supreme Court held that a case involves a political question if there is

[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.¹⁹⁸

188. *Goldwater v. Carter*, 481 F. Supp. 949, 950 (D.D.C. 1979).

189. *Id.* at 953.

190. *Id.* at 953-54.

191. 125 CONG. REC. S7015 (daily ed. June 6, 1979).

192. *Goldwater*, 481 F. Supp. at 950.

193. *Id.* at 954.

194. *Id.* at 955.

195. *Id.*

196. *Id.* at 956.

197. *Baker v. Carr*, 369 U.S. 186 (1962); ADLER, *supra* note 167, at 255.

198. *Baker*, 369 U.S. at 217.

Judge Gasch primarily focused on whether there was a “textually demonstrable constitutional commitment” to one of the branches.¹⁹⁹ Because the Constitution is silent on the issue, Judge Gasch believed that the “textual commitment formulation” of the doctrine was not satisfied.²⁰⁰

After dispensing with the other formulations of the political question doctrine, Judge Gasch turned to the merits of the case.²⁰¹ Judge Gasch stated that the President’s recognition power under Article II, Sections 2 and 3 of the Constitution did not support his power to terminate a treaty.²⁰² In addition, Judge Gasch argued that since a treaty is the “supreme law of the land,”²⁰³ the termination of a treaty is the repeal of a law.²⁰⁴ Allowing the President to repeal the law conflicts with his obligation to “take care that the Laws be faithfully executed.”²⁰⁵ Because of the foregoing conclusions, Judge Gasch held that “the President’s notice of termination must receive approval of two-thirds of the United States Senate or a majority of both Houses of Congress for it to be effective under our Constitution to terminate the Mutual Defense Treaty of 1954.”²⁰⁶

3. The Court of Appeals Decision in *Goldwater v. Carter*

The Court of Appeals for the District of Columbia reversed the decision of Judge Gasch based on the merits of the case.²⁰⁷ The court limited its holding to the “precise circumstances” of the case.²⁰⁸ The court made numerous arguments and noted that its ultimate decision drew on the “totality” of the arguments.²⁰⁹ First, the court dealt with the argument that because the President needed the consent of the Senate to enter the Treaty, he needed their consent to terminate the Treaty.²¹⁰ The Court of Appeals believed that if this was true, then the same analysis would apply to the removal of executive officers because Senate consent is required for their appointment, but Supreme Court precedent has never required such consent.²¹¹ Second, the Court of Appeals said that just because a treaty and a

199. See *Goldwater*, 481 F. Supp. at 956-57.

200. *Id.* at 957.

201. *Id.* at 958.

202. *Id.* at 961.

203. U.S. CONST. art. VI, § 1, cl. 2.

204. *Goldwater*, 481 F. Supp. at 962.

205. *Id.* at 963; U.S. CONST. art. II, § 3, cl. 2.

206. *Goldwater*, 481 F. Supp. at 965.

207. *Goldwater v. Carter*, 617 F.2d 697, 698 (D.C. Cir. 1979).

208. *Id.* at 699.

209. *Id.* at 703.

210. *Id.*

211. *Id.*

statute are both considered the supreme law of the land under the Constitution's Supremacy Clause, it does not mean they have the same characteristics as far as termination is concerned.²¹² Third, consent by two-thirds of the Senate is an "extraordinary condition of the exercise of the President of certain specified powers" and "is not lightly to be extended."²¹³ Fourth, the court noted that Senate powers are "specific, detailed, and limited," while the powers conferred to the President under the Constitution are "generalized."²¹⁴ "It would take an unprecedented feat of judicial construction to read into the Constitution an absolute condition precedent of congressional or Senate approval for termination of all treaties."²¹⁵ Fifth, requiring the consent of two-thirds of the Senate to terminate a treaty would harm foreign policy.²¹⁶ The President may need to make immediate decisions on treaties. If one-third of the Senate plus one can veto the President's decision to withdraw from a treaty, the President's ability to effectively carry out foreign policy would be harmed.²¹⁷ Sixth, the court noted that while historically a variety of means have been used to terminate treaties, in no situation "has a treaty been continued in force over the opposition of the President."²¹⁸ Seventh, the President's recognition power supports the decision to terminate the treaty with China.²¹⁹ Once the President decided to recognize the P.R.C. as the sole government of China, the defense treaty with Taiwan lost its "meaningful vitality."²²⁰ Finally, the Treaty contained a termination clause.²²¹ The "President's authority as Chief Executive is at its zenith when the Senate has consented to a treaty that expressly provides for termination."²²²

4. The Supreme Court Decision in *Goldwater v. Carter*

Goldwater appealed to the Supreme Court.²²³ The Supreme Court vacated the judgment of the Court of Appeals.²²⁴ Justice

212. *Id.* at 704. This is very similar to another argument the court makes that notes the difference between statutes and treaties, and that analogies between their making and unmaking should be rejected. *Id.* at 705.

213. *Id.* at 704.

214. *Id.*

215. *Id.* at 705.

216. *Id.*

217. *Id.* at 706.

218. *Id.*

219. *Id.* at 707.

220. *Id.* at 708.

221. *Id.*

222. *Id.*

223. *Goldwater v. Carter*, 444 U.S. 996 (1979).

224. *Id.* at 1006.

Rehnquist wrote an opinion joined by Chief Justice Burger, Justice Stewart, and Justice Stevens.²²⁵ Their opinion held that the case involved a political question and thus was nonjusticiable.²²⁶ In support of this decision, Justice Rehnquist noted that there was no constitutional provision dealing with treaty termination and that different termination procedures may be appropriate for different treaties; therefore, termination in this case should be controlled by political standards.²²⁷ Justice Rehnquist believed his decision was further supported by the fact that the case involved an issue dealing with foreign relations.²²⁸

Justice Powell concurred in judgment but would have dismissed the complaint because it was not ripe for judicial review.²²⁹ He believed that the Senate never fully asserted its constitutional authority in the area of treaty termination.²³⁰ No final vote was ever taken on the resolution declaring that Senate approval was required for the termination of any mutual defense treaty.²³¹ According to Justice Powell, until the "political branches reach a constitutional impasse," the court should not act.²³² Justice Powell then said the political question doctrine has three key inquiries:

- (1) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (2) Would resolution of the question demand that a court move beyond areas of judicial expertise? (3) Do prudential considerations counsel against judicial intervention?²³³

Powell then explained why "the answer to each of these inquiries would require [the Court] to decide [the] case if it were ready for review."²³⁴

Two dissents were written in the case, one by Justices Blackmun and White, and another by Justice Brennan.²³⁵ In their dissent, Justices Blackmun and White believed that the case should be set for oral argument and should be given the "plenary consideration it obviously deserves."²³⁶ In his dissent, Justice Brennan argued that the political question doctrine does not apply when "a court is faced

225. *Id.* at 1002-06.

226. *Id.* at 1002.

227. *Id.* at 1003. Justice Rehnquist relied on one previous Supreme Court decision, *Coleman v. Miller*, 307 U.S. 433 (1939), in support of this argument.

228. *Id.*

229. *Id.* at 997.

230. *Id.*

231. *Id.* at 998.

232. *Id.* at 997.

233. *Id.* at 998.

234. *Id.*

235. Justice Marshall concurred, but did not file an opinion.

236. *Goldwater*, 444 U.S. at 1006.

with the antecedent question whether a particular branch has been constitutionally designated as the repository of political decision making power."²³⁷ According to Justice Brennan, this question must be decided as a matter of constitutional law.²³⁸ He then said the decision to terminate the Treaty "was a necessary incident to Executive recognition of the Peking Government."²³⁹ Therefore, under Justice Brennan's view, the decision of the Court of Appeals should have been affirmed "insofar as it rests upon the President's well-established authority to recognize, and withdraw recognition from, foreign governments."²⁴⁰

V. RESOLVING THE TREATY TERMINATION DEBATE

Goldwater v. Carter is the leading case on the topic of presidential treaty termination, but it did not resolve the constitutional issues surrounding treaty termination.²⁴¹ Since the decision, seven new justices have been appointed to the Supreme Court.²⁴² If a new suit challenging the President's authority to terminate the ABM Treaty comes before the court, the outcome is unclear.²⁴³ The most widely-held modern view on the topic is that the President has the authority to terminate treaties, but it is still a "highly controversial" topic.²⁴⁴ Nevertheless, with a Democratic majority, something similar to Senator Byrd's amendment theoretically could be passed in the Senate, which could give the Senators standing to sue the President.²⁴⁵ The rest of this Note evaluates the constitutional and functional arguments and considerations surrounding the presidential termination of treaties.

237. *Id.* at 1007.

238. *Id.*

239. *Id.*

240. *Id.* at 1006.

241. Ackerman, *supra* note 142; Lawson, *supra* note 142, at 165.

242. Of the current U.S. Supreme Court Justices, only Chief Justice Rehnquist and Justice Stevens were on the court at the time of the *Goldwater* decision.

243. Ackerman, *supra* note 142.

244. Golove, *supra* note 3, at 1848 n.180.

245. Democratic Senators have acknowledged the legitimacy of the President's move from a legal standpoint, therefore such a move is probably unlikely. McMahon, *supra* note 131. While House Democrats have filed suit challenging the President's termination of the treaty, but it is unlikely they will have standing considering *Goldwater v. Carter*. See discussion *supra* Parts IV.B.2, IV.B.4.

A. *The Arguments For and Against the President's Unilateral Power to Terminate Treaties*

The arguments surrounding the presidential authority to terminate treaties are a source of great academic debate.²⁴⁶ As will be shown below, while both supporters and opponents of the President's power to terminate a treaty have credible and articulate arguments supporting their position, neither side has the "smoking gun" argument.²⁴⁷ This is why the debate on the legal side of the argument remains unresolved.

Several of the leading legal arguments were set forth in the *Goldwater v. Carter* decisions.²⁴⁸ Two of the more prominent arguments deserve extended attention and critical evaluation. First, some argue that a treaty, like a statute, is the supreme law of the land under the U.S. Constitution.²⁴⁹ Therefore, treaties, like statutes, cannot be terminated through a unilateral presidential act.²⁵⁰ The problem with this argument is that, as the Court of Appeals noted in the *Goldwater* case, just because treaties and statutes are both the supreme law of the land under the Constitution, it does not follow that they are alike in other characteristics.²⁵¹ The Senate Foreign Relations Committee pointed out their differences when it was considering Senator Byrd's amendment.²⁵² The Committee wrote that the President's role is the determinative factor in the treaty process. The Senate only authorizes the ratification of the treaty.²⁵³ In addition, the Committee argued that

[the President] decides at the outset whether to commence treaty negotiations. He decides whether to sign a treaty. He decides whether to exchange instruments of ratification after a treaty has been approved by the Senate. At each of these stages, it is the President who has the power to determine whether to proceed—and thus whether treaty relations will ultimately exist.²⁵⁴

Therefore, the Supremacy Clause can be seen as a "status-prescribing provision, not as a procedure-prescribing provision."²⁵⁵ As a result,

246. Golove, *supra* note 3, at 1848 n.180.

247. See discussion *infra* Part V.

248. See *Goldwater v. Carter*, 481 F. Supp. 949 (D.D.C. 1979); *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979); *Goldwater v. Carter*, 444 U.S. 996 (1979).

249. U.S. CONST. art. VI, § 2.

250. MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 150 (1990) (describing and critiquing this argument).

251. *Goldwater*, 617 F.2d at 704.

252. S. REP. No. 7, at 18 (1979).

253. *Id.*

254. *Id.* (emphasis in original).

255. GLENNON, *supra* note 250, at 150. See *Goldwater*, 617 F.2d at 704.

the argument based on the Supremacy Clause is not as strong as it may appear at first glance.

A second prominent argument by advocates of congressional involvement in treaty terminations is that because the Senate approval is required to enter into a treaty, its consent should be required to exit the treaty.²⁵⁶ As the Court of Appeals noted in *Goldwater*, a major problem with this argument is that

[t]he constitutional institution of advice and consent of the Senate, provided two-thirds of the Senators concur, is a special and extraordinary condition of the exercise by the President of certain specified powers under Article II. It is not lightly to be extended in instances not set forth in the Constitution. Such an extension by implication is not proper unless that implication is unmistakably clear.²⁵⁷

In addition, in response to those that advocate that only a majority of Senators need to approve of the termination, Professor Louis Henkin points out that the Senate acting alone, without the House of Representatives, is an extraordinary circumstance in itself.²⁵⁸ Because advice, consent and Senate action alone are extraordinary conditions and should not be extended by implication, it does not make sense to extend these ideas to the context of treaty termination where there is no language in the Constitution to support such an extension.²⁵⁹

Those who advocate the President's power to terminate treaties also provide a host of arguments in support of their view. Three of the more prominent arguments are discussed below. First, some argue that the President's recognition power, under Article II, Section 3 of the U.S. Constitution "gives him sole authority to recognize or not recognize foreign governments as well as foreign states or the incorporation of territory into a state."²⁶⁰ This argument was important in the *Goldwater* decisions at both the appellate court and the Supreme Court.²⁶¹ However, a problem with an argument based on the President's recognition power is its limited applicability. While the argument applies well to situations where recognition is at issue in a treaty, it does not apply well in a situation, such as the ABM Treaty debate, where recognition of a country was not the

256. Louis Henkin, *Litigating the President's Power to Terminate Treaties*, 73 AM. J. INT'L L. 647, 652 (1979).

257. *Goldwater*, 617 F.2d at 704.

258. Henkin, *supra* note 256, at 653-54.

259. See *Goldwater*, 617 F.2d at 704; Henkin, *supra* note 256, at 653-54.

260. Anna Mamalakis Pappas, *The Constitutional Allocation of Competence in the Termination of Treaties*, 13 N.Y.U. J. INT'L L. & POL. 473, 514 (1981).

261. See *supra* Part IV.B.3.-4.

reason for terminating the Treaty.²⁶² In the ABM debate, the primary reason for pulling out of the Treaty was security concerns.²⁶³ As a result, the recognition argument does not justify the termination of the Treaty.

Historical precedent is another argument supporters of the President's power to terminate treaties utilize.²⁶⁴ The Legal Advisor to the State Department constructed a memorandum during the Mutual Defense Treaty debates that outlined 13 instances in U.S. history where the President unilaterally terminated a treaty.²⁶⁵ From this, one can reasonably argue that the historical trend supports the President's power to terminate treaties.²⁶⁶ However, not all agree with the State Department's analysis.²⁶⁷ One commentator, who supports the view that historical precedent points to the President having sole power in this area, admits that the "many instances of treaty termination are so complex and ambiguous as to allow for conflicting inferences. . . ."²⁶⁸ Judge MacKinnon, in his scathing dissent in the Court of Appeals decision in *Goldwater v. Carter*, wrote,

In almost 200 years of American history these are the only instances that [the President] has been able to dredge up in an effort to support his claim to absolute power. Analysis of such instances, however, does not support the [President's] contentions. . . . On examination it appears that among the 13 instances upon which the President relies, there were only two minor treaties in which the President could be said to have acted alone since 1788. Reliance upon such miniscule precedent forcibly illustrates the great weakness in the President's claim to absolute power in the present circumstances involving a Defense Treaty.²⁶⁹

In addition, David Gray Adler, after an extensive examination of the historical record surrounding treaty interpretation, concluded that "the historical record affords no support for those who would claim a unilateral presidential power for the termination of treaties."²⁷⁰

262. See Press Release, *supra* note 1. This may have been a legitimate argument if Clinton or Bush decided that they would not recognize the Soviet Union after its dissolution.

263. *Id.*

264. See, e.g., Herbert J. Hansel, *Termination of Treaties: The Constitutional Allocation of Power*, reprinted in 2 UNITED STATES FOREIGN RELATIONS LAW: DOCUMENTS AND SOURCES 377, 380 (Michael J. Glennon & Thomas M. Franck eds., 1980).

265. *Id.*

266. See *id.*

267. See, e.g., Pappas, *supra* note 260, at 510; *Goldwater v. Carter*, 617 F.2d 697, 733 (D.C. Cir. 1979) (MacKinnon, J. dissenting).

268. Pappas, *supra* note 260, at 510.

269. *Goldwater*, 617 F.2d at 733-34.

270. ADLER, *supra* note 167, at 206.

From this one can gather, at least, that reasonable minds disagree on the subject.

A third argument in favor of unilateral presidential power is that the President's "preeminent position in controlling foreign affairs encompasses the authority to terminate treaties."²⁷¹ The President's preeminent power to conduct foreign affairs was articulated by the U.S. Supreme Court in *United States v. Curtiss-Wright Export Corp.*²⁷² Writing for the majority, Justice Sutherland stated,

In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. . . . As Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations and its sole representative with foreign nations."²⁷³

Later in the decision, the court used even stronger wording, saying that the Court recognized the "very delicate, plenary, and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its existence an act of Congress."²⁷⁴ There are several problems with the "sole organ" argument. One potential problem with this argument, according to one scholar, is that the *Curtiss-Wright* decision "is deeply flawed and has been soundly repudiated" by subsequent Supreme Court decisions.²⁷⁵ Since the *Curtiss-Wright* decision, the Supreme Court has "uniformly upheld the view that Presidential power over foreign affairs is derived from, and limited by, the Constitution."²⁷⁶ Another argument that undermines the validity of the "sole organ" argument is that textually, under Article II, the President clearly does not have the sole power over treaties.²⁷⁷ As mentioned throughout this piece, Article II requires the President to obtain the advice and consent of two-thirds of the Senate for any treaty he wishes to enter on behalf of the United States.²⁷⁸ At the least, it is not clear that the "sole organ" applies in the context of treaty termination.²⁷⁹

271. *Id.* at 91. Professor Adler does not advocate this position, he simply offers it as an argument in favor of presidential power in treaty termination. *See id.*

272. 299 U.S. 304 (1936).

273. *Id.* at 319.

274. *Id.* at 320.

275. ADLER, *supra* note 167, at 91. In support of this argument, Professor Adler cites *Reid v. Covert*, 354 U.S. 1 (1957), *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 261 (1960), and *Zemel v. Rusk*, 381 U.S. 1, 17 (1965).

276. ADLER, *supra* note 167, at 92.

277. U.S. CONST. art. II, § 2, cl. 2.

278. *Id.*

279. *See id.*

An area that both supporters and opponents look to for answers is the intent of the constitutional framers.²⁸⁰ The Constitution, as noted above, is silent on the matter of treaty termination.²⁸¹ This has led scholars to attempt to discern the intent of the framers. One commentator suggests that

[t]he intentions of the Founding Fathers, with respect to the treaty power, are clear. To secure the ratification of the small states it was essential that all states had equal voice in the treaty power, so that their interests would not be ignored or sacrificed. . . . It seems then wholly unrealistic to believe that the Framers would have unbalanced this carefully drafted system by not providing that the treaty-making power included the power to terminate treaties as well.²⁸²

Commentators that argue in favor of unilateral presidential power to terminate treaties look to the framers, but believe such inquiries are inconclusive.²⁸³ Professor Henkin wrote that "the Constitution does not speak of 'foreign policy,' nor of making or implementing foreign policy. It is not apparent that the Framers thought in those terms."²⁸⁴ Henkin believes that the case for the President's power to unilaterally terminate treaties is not rooted in history "but in the nature the office has become. Termination of a treaty is an international act, and the President, and only the President, acts for the United States in foreign affairs."²⁸⁵ Another commentator has written that "it is not possible to glean the intent of the framers from a few isolated pronouncements. For the most part, the views expressed lack sufficient specificity; they certainly do not address the specific issue of termination of a treaty pursuant to its terms."²⁸⁶ In sum, there is a large and mostly unresolved debate on the intent of the framers.

It is difficult to say what one can take away from all of these conflicting arguments. Professor Glennon summed up the situation fairly well when he wrote

The constitutional text does not address the matter. No Supreme Court case has reached the merits of the controversy. . . . It is thus difficult to find any constitutional custom on the matter; nor is there even the appearance of a *practice* of treaty abrogation, which apparently has occurred only once in American history. . . . The intent of the Framers is thoroughly ambiguous. The most reasonable mode of analysis, therefore, since the application of all other primary, secondary, and

280. Compare ADLER, *supra* note 167, at 112, with Henkin, *supra* note 256, at 652.

281. *Goldwater v. Carter*, 444 U.S. 996, 1003 (1979).

282. ADLER, *supra* note 167, at 112.

283. See Louis Henkin, "A More Effective System" for Foreign Relations: The Constitutional Framework, 61 VA. L. REV. 751, 751 (1975).

284. *Id.*

285. Henkin, *supra* note 256, at 652.

286. Pappas, *supra* note 260, at 508.

tertiary sources fails to resolve the issue, is to resort to functional considerations.²⁸⁷

This Note next turns to functional considerations in the treaty termination debate.

B. *Functional Analysis of the Treaty Termination Debate*

A functional analysis of this debate reveals that the President should have the power to terminate treaties unilaterally. Therefore, this Note concludes that the Senate's tacit acknowledgment of such power should be formally recognized. Before going further, a cursory look at the political theories behind international relations helps demonstrate the structural advantages the President has in the area of foreign affairs. There are two competing schools of international relations theory—realism and institutionalism.²⁸⁸ The basic argument behind realism is that "international politics is shaped by states' pursuit of power and by the distribution . . . of power among states."²⁸⁹ According to the realist school of thought, the international political scene is anarchy and states seek to maximize their power in this anarchy.²⁹⁰ Institutionalism, on the other hand, argues that "states can cooperate in a wide variety of ways that allow them to escape the prisoner's dilemmas created by international anarchy."²⁹¹ Both of these schools of thought operate under the presumption that, for the international system to work, states must be headed by rational, unitary actors.²⁹² These actors "identify threats, develop responses, and evaluate the costs and benefits that arise from different policy options."²⁹³ There are, naturally, limitations to these theories. Political and bureaucratic aspects of the U.S. system will constrain foreign policy, and pressing domestic issues may "overtake national interests" at times.²⁹⁴ Nevertheless, the ideal of unitary national action on the international front that should guide a state's approach to developing effective foreign policy, whether one is a realist or an institutionalist.²⁹⁵

In 1961, William Fulbright published an article calling for greater presidential authority in the area of foreign affairs.²⁹⁶ While

287. GLENNON, *supra* note 250, at 151.

288. Yoo, *supra* note 40, at 871.

289. STEPHEN VAN EVERA, *CAUSES OF WAR* 7 (1999).

290. Yoo, *supra* note 40, at 871.

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. J. William Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 CORNELL L.Q. 1 (1961).

he did not explicitly rely on realism or institutionalism to support his arguments, he did agree that there is a need for unified foreign policy.²⁹⁷ While the world has changed dramatically since his time, much of his theory still has application today.²⁹⁸ When Fulbright wrote his article, the concerns were “communism, fascism, aggressive nationalism, and the explosive awakening of long quiescent peoples.”²⁹⁹ While the concerns are different today, the need for a unified policy is not.³⁰⁰ The concerns of the modern world are different because the world is more international, more than two powers hold nuclear weapons, and terrorism may be the largest threat. However, this type of world demands, just as in the past, a consistent, unified foreign policy.³⁰¹

Fulbright argued that the President’s effectiveness is “principally a function of his own knowledge, wisdom, vision, and authority.”³⁰² It is “not within our powers to confer wisdom or perception on the Presidential person. It is within our power to grant or deny him authority.”³⁰³ Excessive limits on the President in the area of foreign affairs limit such authority.³⁰⁴ In articulating this point, Fulbright said,

It is exceedingly difficult—if not impossible—to devise unified policies oriented to a clear and definite conception of the national interest through a system in which power and responsibility for foreign policy are “shared and overlapping.” Policies thus evolved are likely to be ill-co-ordinated, short-ranged, and often unsuccessful, while the responsibility for failure is placed squarely on the President, neither “shared” nor “overlapping.”³⁰⁵

Similar sentiments existed at the time of the constitutional framers as well.³⁰⁶ In *The Federalist* No. 70, Alexander Hamilton said, “[D]ecision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.”³⁰⁷ From Fulbright’s and Hamilton’s arguments, it follows that the President is best situated to be in charge of foreign affairs.

297. *Id.* at 3.

298. *See generally id.*

299. *Id.* at 4.

300. *See* Condoleezza Rice, *Promoting the National Interest*, FOREIGN AFF., Jan.-Feb. 2000, at 45.

301. *See id.*

302. Fulbright, *supra* note 296, at 2.

303. *Id.*

304. *Id.*

305. *Id.* at 4.

306. *See* THE FEDERALIST NO. 70 (Alexander Hamilton).

307. *Id.*

The foregoing analysis does not mean that Congress should play no role in foreign affairs. While the deliberation of Congress is important in many areas, it can often be a liability in the area of foreign affairs.³⁰⁸ Congress consists of popularly-elected individuals whose main concern, and rightly so, is their local constituents.³⁰⁹ Foreign policy expertise is typically not a virtue of Congress.³¹⁰ Congress does have a role in providing a check should the President get overzealous with his foreign affairs power.³¹¹ Congress has two important tools that act as checks on the Executive Branch if the President uses his authority unwisely.³¹² First, "Congress' control over appropriations is its ultimate constitutional check on the President's foreign relations power."³¹³ Second, if the President continually ignores concerns that the Senate may have in foreign affairs and with respect to treaties, the Senate may not give its consent on future treaties.³¹⁴

In applying functional analysis to the question of who should hold the power to terminate treaties, a strong argument can be made that the President should have unilateral authority to terminate treaties. Using the ABM Treaty as an example, one can see the advantages of having the President in control. President Bush faces a world in which a number of rogue and terrorists states have acquired weapons of mass destruction, along with the ability to launch such weapons and strike the U.S. mainland.³¹⁵ Countering such abilities was a top priority for President Bush from the beginning of his administration.³¹⁶ President Bush sent "high-level representatives to capitals in Europe, Asia, Australia and Canada to discuss" missile defense systems and reached out to China and Russia as well.³¹⁷ Whether one agrees with President Bush's decision, he was elected with knowledge that NMD would be a high priority on his agenda. The ultimate decision President Bush made was the result of months of negotiating with high level officials around the world, and was all part of a unified plan.³¹⁸ Ultimately, President Bush terminated the ABM Treaty pursuant to its terms as part of his plan to ensure the national security interests of the United States.³¹⁹

308. Fulbright, *supra* note 296, at 5.

309. *Id.* at 6.

310. *Id.*

311. Grogan, *supra* note 5, at 860-61.

312. *Id.*

313. *Id.* at 860.

314. *Id.* at 861.

315. See Statement of the Press Secretary, *supra* note 125.

316. President Bush, *supra* note 105.

317. *Id.*

318. See *id.*; *Beyond the ABM Treaty*, WASH. POST, Dec. 14, 2001, at A44.

319. Press Release, *supra* note 1.

The deliberation of Congress in the area of foreign affairs can be problematic at times, as noted above.³²⁰ President Bush would probably still be debating with Congress³²¹ were it involved with the decision to terminate the ABM Treaty. There are two potential problems with such a scenario in the context of this debate. First, Congress would have been working at a large information deficit, not only because of its lack of expertise in foreign affairs, but also because Congress would not be privy to the months of confidential meetings that took place prior to President Bush's decision.³²¹ Second, more delay equates to more time without a missile shield. Assuming such a shield is possible and technology exists that could be deployed and be effective in a relatively short amount of time, the sooner such a shield is established the better, particularly when the stakes are nuclear. It should be noted that even though Congress was excluded from the decision to terminate the treaty, it still maintained its checks on the President.³²² Indeed, both Senator Daschle and Senator Levin threatened to use the power of the purse in the wake of President Bush's decision to terminate the ABM Treaty.³²³

The Senate should take this opportunity to clarify its apparent belief in the President's power to unilaterally terminate treaties. Senate Majority Leader Tom Daschle has made it clear that he believes the President has the power to terminate treaties.³²⁴ The lack of any other vocal opposition based on legal grounds indicates that others share Senator Daschle's view. Thirty members of the House of Representatives did file suit in district court arguing that President Bush did not have the power to terminate the ABM Treaty, but no Senators have joined in that suit.³²⁵ The lack of Senators willing to join the suit further demonstrates the Senate's apparent acknowledgement of a President's power to terminate treaties.³²⁶

It seems, therefore, the debate over whether the President has the authority to terminate treaties has become largely academic.³²⁷ The Senate should take this opportunity to clarify its belief. While the Senate does not have the power to declare constitutionality, it can

320. Fulbright, *supra* note 296, at 5.

321. *See id.*; *Beyond the ABM Treaty*, *supra* note 318.

322. *See Grogan*, *supra* note 5, at 860-61.

323. McMahan, *supra* note 131, at 22.

324. *Id.*

325. Milbank, *supra* note 130; *Lawmakers Sue Bush over ABM Treaty Withdrawal*, *supra* note 130. Senator Russ Feingold is the only Senator who attempted to join the lawsuit, but he was barred from doing so by the Senate Ethics Committee. John Nichols, *Advice and Consent, Democratic Senator Russ Feingold on Anti-Ballistic Missiles*, *NATION*, July 1, 2001, at 8.

326. In addition, it will make it very difficult for the Representatives to establish standing.

327. *See McMahan*, *supra* note 131.

pass a resolution which specifies its apparent belief that the President has the power to terminate treaties.³²⁸ Such an action has several advantages. First, it settles a long existing debate. Second, it closes the door on another *Goldwater v. Carter*. Should the President need to terminate a treaty in the national interests of the United States and pursuant to his vision of U.S. foreign policy, such a resolution would deny Senators standing to challenge the action in the U.S. courts.³²⁹ With an almost entirely new Supreme Court, it is possible that the Court would get to the merits of the next controversy. Such a challenge would be against the interests of the United States for it intrudes on the President's crucial role of shaping U.S. foreign policy.

A possible criticism of such an action is that the Senate would either stop approving treaties or would put many conditions on their approval.³³⁰ One problem with this criticism is that the Senate would have had the same incentive after President Carter unilaterally terminated the Mutual Defense Treaty. The resolution advocated here would not add to that incentive. In addition, this power is something that Congress seems to acknowledge.³³¹ The Senate has made no legal challenge to the President's termination of the ABM Treaty. Also, the Senate, in passing the clarifying resolution, can stipulate that while the President has the power to terminate treaties, he should consult with Congress before doing so. The President probably will not always consult with the Senate, but the resolution will encourage him to do so. More importantly, the Congressional checks on Presidential power discussed above will also encourage the President to keep Congress content.³³² It will be difficult for the President to achieve his goals if the Senate uses its power of the purse or withholds its consent to a treaty.³³³

328. See 125 CONG. REC. S7015 (daily ed. June 6, 1979). A Senate

resolution deals with matters entirely within the prerogative of one house of Congress, such as . . . expressing the opinion of that house on a current issue, and is acted on only by that chamber. A simple resolution is not considered by the another chamber and does not require action by the president. Like a concurrent resolution, it does not have the force of law.

GUIDE TO CONGRESS 479 (5th ed. 2000).

329. For further exposition of this proposition and its implications, see the analysis of standing in *Goldwater v. Carter*, 481 F. Supp. 949, 951-56 (D.D.C. 1979), and *Goldwater v. Carter*, 617 F.2d 697, 701-03 (D.C. Cir. 1979).

330. See Grogan, *supra* note 5, at 861.

331. See McMahon, *supra* note 131.

332. See Grogan, *supra* note 5, at 860-61.

333. See *id.*

VI. CONCLUSION

The continued validity of the ABM Treaty has been a source of controversy, particularly since the announcement of SDI in the Reagan administration.³³⁴ President Bush took a definitive stance on this controversy when he announced his decision to terminate the ABM Treaty on December 13, 2001.³³⁵ There are many legal issues surrounding such a move.³³⁶ While the international legal issues are not very controversial,³³⁷ the domestic issues are more controversial.³³⁸ The *Goldwater v. Carter* litigation demonstrates many of the arguments surrounding the debate over whether the President has the power to unilaterally terminate a U.S. treaty.³³⁹ A close analysis of these domestic legal issues does not resolve the controversy.³⁴⁰ Instead, a functional analysis is required.³⁴¹ This functional analysis reveals that the President should have the power to unilaterally terminate a treaty because it maintains foreign policy effectiveness.³⁴² The Senate, which informally recognizes this power, should recognize it formally through a Senate resolution.³⁴³

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334. See discussion *supra* Part III.
 335. See Press Release, *supra* note 1.
 336. See generally discussion *supra* Part IV.
 337. See discussion *supra* Part IV.A.
 338. See discussion *supra* Part IV.B.
 339. See *id.*
 340. See discussion *supra* Part V.A.
 341. See discussion *supra* Part V.B.
 342. *Id.*
 343. *Id.*

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