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Unilateral Termination of the 1954 Mutual Defense Treaty between the United States and the Republic of China Pursuant to the President's Foreign Relations Power

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UNILATERAL TERMINATION OF THE 1954 MUTUAL DEFENSE TREATY BETWEEN THE UNITED STATES AND THE REPUBLIC OF CHINA PURSUANT TO THE PRESIDENT'S FOREIGN RELATIONS POWER

I. BACKGROUND

The act of terminating a treaty may initiate an international embroglio or create international arrangements as effectively as the act of entering into a treaty. Although the ramifications of each act may be significant, recent United States commentary has expressed greater concern over the constitutional efficacy of the methods by which the United States has entered international agreements than over the methods by which the United States has removed itself from them. President Carter's unilateral termination of the 1954 Mutual Defense Treaty between the United States and the Republic of China[1] has raised the issue of which branch ought to play the major role in the termination of treaties.

The terms of the defense treaty provide that either party may terminate the treaty after giving one year's notice to the other party.[2] Pursuant to this provision, on December 15, 1978 the President declared that notice of termination would be sent to the Republic of China and that the treaty would terminate on January

1. Mutual Defense Treaty Between the United States of America and the Republic of China, Dec. 2, 1954, 6 U.S.T. 433, T.I.A.S. No. 3178. The treaty provides in relevant part,

Article II

In order more effectively to achieve the objective of this treaty, the Parties separately and jointly by self-help and mutual aid will maintain and develop their individual and collective capacity to resist armed attack and communist subversive activities directed from without against their territorial integrity and political stability.

Article V

Each Party recognizes that an armed attack in the West Pacific Area directed against the territories of either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes.

Article VI

For the purposes of Articles II and V the terms "territorial" and "territories" shall mean in respect of the Republic of China, Taiwan and the Pescadores . . . .

2. Article X states: "This treaty shall remain in force indefinitely. Either Party may terminate it one year after notice has been given to the other party."

1, 1980.[3] At the same time the President informed the American public that full diplomatic recognition would be granted to the People's Republic of China while the Republic of China would forfeit recognition and official government representation. Both decisions came unexpectedly and it is unclear to what degree prior consultation with legislative leaders occurred.[4] Although the termi-

3. 125 CONG. REC. S209 (daily ed. Jan. 15, 1979); *Id.* S102. The President's message to Congress of January 26, 1979 described the manner in which he expected relations between the United States and the Republic of China would thereinafter proceed. Although the Repulbic of China would not have official government or diplomatic representation, the American people were to "maintain commercial, cultural, and other relations with the people of Taiwan." The President sought to promote ties between the United States and the Republic of China in two ways. First, departments and agencies were to unofficially conduct programs, transactions and other relations with the Republic of China. Second, the President proposed legislation that would continue relations with the Republic of China through a non-profit corporation, the American Institute in Taiwan. 125 CONG. REC. S761 (daily ed. Jan. 29, 1979). The Institute would not be an agency or instrumentality of the United States, according to Title II, section 205 of the proposed legislation, but funding for the Institute would be channeled by the Secretary of State, according to Title III, section 302. Message from Jimmy Carter to the Congress of the United States (Jan. 26, 1979).

4. The defense treaty was not terminated in the same manner as the 1844 commercial treaty between the United States and China. The earlier commercial treaty was terminated in 1946 by entering into a new treaty that met the changing needs of both parties. The State Department cited the relinquishment of extraterritorial claims by the United States and other States and economic and commercial changes as the motivating forces behind the termination. Moreover, the treaty was submitted to the Senate for its approval prior to its termination. 15 DEP'T STATE BULL. 866 (1946). It is the contention of the Executive that sufficient prior consultation did occur. State Department officials maintain that at least 150 members of Congress were "engaged in . . . discussions" in 1977 and 1978 prior to the announcement of December 15, 1978. Points and Authorities in Support of Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment at 45, Goldwater v. Carter, No. 78-2412 (D.D.C., filed Feb. 26, 1979) [hereinafter cited as Defendants Motion to Dismiss]; Declaration of Richard Holbrooke, No. 78-2412 (D.D.C., filed Feb. 26, 1979). The State Department apparently followed the consultation procedure it normally undertakes prior to the United States entry into treaty. Before electing a specific procedure, according to State Department guidelines, the following factors, among others, must be considered: the extent to which the agreement involves commitments or risks to the United States; whether the agreement can be given effect without the enactment of subsequent legislation; past United States practice; the preference of Congress with respect to the particular type of agreement; the need for prompt conclusion of an agreement; and, the general international practice with respect to similar agreements. U.S. DEP'T OF STATE, 11 FOREIGN AFFAIRS MANUAL 721.3 (Oct. 25, 1974). Consideration of these factors could dictate extensive Congressional con-

nation of the defense treaty will end executory obligations of the United States, the United States must perform obligations owed as a consequence of rights acquired by the Republic of China while the treaty remains in effect.[5]

The reaction of the Ninety-Sixth Session of Congress included the introduction of a flurry of bills, resolutions and joint resolutions[6] intended to mitigate the consequences of the action by the

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sultation; State Department procedure for the making of treaties, however, requires only that "[c]onsultations on such questions [as to the type of agreement] will be held with Congressional leaders and committees as may be appropriate." *Id.* 721.4. The Executive argues that as long as some form of consultation occurred prior to termination of the defense treaty, the judicial branch may not inquire into the scope and nature of the consultations. Defendants Motion to Dismiss at 46. Reliance upon this theory was not the central argument of the Executive since the defendants refer to twelve instances in which the Executive has acted to terminate treaties "without the authorization, direction, or ratification of either the Senate or both Houses of Congress and interpret these instances to suggest that recent practice recognizes" the President's power to terminate the United States "involvement in a treaty without the participation of the Congress." Defendants Motion to Dismiss at 33-35. Plaintiffs contend that there was no prior consultation. Goldwater v. Carter, Complaint for Declaratory and Injunctive Relief 10, No. 78-2412 (D.D.C., filed Feb. 22, 1978) [hereinafter cited as Complaint].

5. *See, Draft Convention, with Comment, Prepared by the Research in International Law of the Harvard Law School,* 29 A.J.I.L. 653, 1171 (1935) [hereinafter cited as Draft Convention].

6. For example, Senate Bill 8 and Senate Bill 46 authorize and request the President to continue diplomatic relations with the Republic of China and extend the same privileges that are accorded to other diplomatic missions to any liaison offices of the Republic of China that will be established in the United States. *Congressional Record,* 96th Cong., 1st Sess., 125 CONG. REC. S101 (daily ed. Jan. 15, 1979); *Id.* S146. Senate Resolution 13 indicates the Senate's position that any threat of the use of force by the People's Republic of China against the Republic of China would not be condoned and that the United States should take all necessary steps to assist the Republic of China to assure her security. *Id.* S102. Senate Resolution 10 disapproves of the President's action in sending the notice of termination. *Id.* S209. Senate Resolution 12 and 13 state, more forcibly, that in the event of aggression by the People's Republic of China directed against the Republic of China, the United States must take whatever action would be necessary to preserve the independence and freedom of Taiwan. *Id.* S210. Senate Concurrent Resolution 22 resolves that the President should not "unilaterally abrogate, denounce or otherwise terminate, give notice of intention to terminate, alter, or suspend any of the security treaties" without the advice and consent of the Senate or the approval of both Houses of Congress. *Congressional Record,* 96th Cong., 1st Sess., 125 CONG. REC. S219 (daily ed. Jan. 18, 1979). Senate Resolution 15 declares that the approval of the United States Senate was required to terminate any Mutual Defense Treaty. *Id.* S220. A joint resolution was introduced on

President and to alleviate the concern expressed by the Republic of China. In addition, Senator Goldwater and other members of Congress[7] brought a court challenge to the constitutionality of the President's tender of notice of intent to terminate the defense treaty.[8] Among the arguments urged in favor of the congressional initiatives and the Goldwater suit was the proposition that the bipartisan nature of United States foreign policy required the President to consult congressional members of both parties, and concomitantly, that the lack of congressional participation created an "atmosphere of confrontation between the Senate and the President."[9] According to Senator Goldwater, the necessity for Senate consultation is great where the treaty involves defense because it is tide to the war power that is vested in Congress.[10] Goldwater additionally notes that there is no precedent for the President to terminate a defense treaty.[11]

February 1, 1979 which declares that it is United States policy to meet, in any manner permitted by the Constitution, any danger to the interests of the United States and Taiwan. *Congressional Record,* 96th Cong., 1st Sess., 125 CONG. REC. H431 (daily ed. Feb. 1, 1979).

7. The plaintiffs include Senator Thurmond and Senator Curtiss. Both Senators were members of the Senate in 1955 and voted in favor of the defense treaty. Senators Thurmond and Curtiss maintain that they have standing to bring the court challenge in order to preserve both the effectiveness of their past votes on the defense treaty and the allocation of powers between the branches of the federal government because they have been deprived of their constitutional and statutory rights to be consulted regarding the continued application of the defense treaty and because they have suffered injury-in-fact to the exercise of their legislative duties.

8. Goldwater v. Carter, No. 78-2412 (D.D.C., filed Dec. 22, 1978). The plaintiffs request that the court declare President Carter's tender of notice unconstitutional and that the court enjoin the action. Plaintiffs further request that the court declare that termination of the defense treaty cannot be accomplished without the advice and consent of the Senate, or the approval of both Houses of Congress. In the alternative, plaintiffs assert that if the tender of notice is valid, then the defense treaty will not terminate after the one year notice period unless there is another action which is approved by the Senate or both Houses of Congress. Complaint 3, 13-14. The latter argument would be less difficult for a court to accept than the former because a holding for plaintiffs on that ground would not interfere with the President's foreign affairs power to the same extent as the enjoinment of the tender of notice.

9. 125 CONG. REC. S210 (daily ed. Jan. 15, 1979).

10. Senator Goldwater stated on the Senate floor that "[t]he framers of the Constitution viewed the termination of a defense treaty as being equivalent to an act of war." 125 CONG. REC. S219 (daily ed. Jan. 18, 1979).

11. *Id.*

II. Accepted Methods of Termination Pursuant to International Law

A treaty[12] may be terminated by several methods. Acceptable approaches include: 1)notice given by one of the contracting states to the other contracting state; 2)fulfillment of the purpose of the treaty; 3)expiration of a fixed period of time during which the treaty was to remain effective; 4)extinguishment of one of the parties to a bilateral treaty or of the subject matter of the treaty;[13] 5)agreement of the parties; 6)implication where a subsequent agreement covers the same subject matter or is inconsistent with the first treaty; and 7)denouncement by one state where the other state acquiesces.[14]

The weight of opinion in the United States permits a state to unilaterally terminate a treaty with another state on the ground that the other state had previously violated the treaty.[15] Although writers have stated that the breach of any term by one state releases the other, this view has not been adopted as international law. A distinction can be drawn between the breach of a material term that is the main object of a treaty and the breach of other terms.[16] *Charlton v. Kelly*[17] held that the United States has the alternative of waiving the breach of a contracting state in violation of a treaty stipulation.[18] In that case, although Italy had violated

12. A treaty is a "formal instrument of agreement by which two or more States establish or seek to establish a relation under international law between themselves." Draft Convention, *supra* note 5, at 686. The termination of executive agreements and other international arrangements is beyond the scope of this article.

13. According to the doctrine of *rebus sic stantibus* a treaty becomes void if the state of facts that existed when the parties entered into the treaty changes. The change, however, should not have resulted from actions by the State asserting the changed conditions to the detriment of the other State. Draft Convention, *supra* note 5, at 1096-1101.

14. 5 G. Hackworth, Digest of International Law 297 (1943) [hereinafter cited as Hackworth].

15. *Id.* 346.

16. J. Brierly, The Law of Nations 200 (2d ed. 1936) [hereinafter cited as Brierly].

17. 229 U.S. 447 (1913).

18. In a memorandum transmitted to Senator Lenroot by Assistant Secretary Olds, the State Department reiterated that there is no implied right of a State to withdraw from a treaty when the treaty does not provide for withdrawal, unless the other State has first substantially violated the treaty in a manner which will justify its termination. Memorandum, Dec. 30, 1925, MS Department of State, file 500.C114/428a, *as cited in* 5 Hackworth 299.

the extradition treaties of 1882 and 1884 by refusing to surrender her nationals, the Court held that the United States could either denounce the treaties or conform to the obligations of the treaty as if there had been no breach.[19]

Article 56 of the Vienna Convention on the Law of Treaties[20] indicates that international law permits the denunciation of treaties in only two circumstances. When a treaty makes no provision for its termination, denunciation or withdrawal, it must be "established that the parties intended to admit the possibiliity of denunciation or withdrawal." Alternatively, there must be an implied right to denounce or withdraw that can be found within the treaty.[21] States have often entered treaties with the intent to establish a permanent international arrangement. In such a case there is no general right of denunciation.[22] While there is no right of denunciation in treaties of indefinite duration, the question of whether or not the right can be implied is one of the intention of the parties. The observance of good faith between the contracting states and the corresponding "sanctity" of treaties is of paramount interest.[23]

The defense treaty, although expressly stating that the pact intended to be of indefinite duration, provided terms by which the states could withdraw from the treaty by the giving of notice by one of the contracting states to the other.[24] Thus, serving notice by the United States to the Republic of China did not contradict the tenet that a treaty may be modified, suspended or terminated according to the provisions that are included for that purpose.[25] The practice in the United States is to terminate international agreements according to the rules of international law and pursuant to domestic law.

The severance of diplomatic relations between the United States and the Republic of China will not constitute changed conditions such that the doctrine of *rebus sic stantibus* terminates the defense treaty. The severance of diplomatic relations between two contracting states normally has the effect of suspending a treaty between them for the duration of the period of severed relations. The

19. 229 U.S. at 474-76.
20. U.N. Doc. A/Conf. 39/27 (May 23, 1969).
21. *Id.*
22. BRIERLY, *supra* note 16, at 201.
23. *Id.*
24. *See* note 2.
25. RESTATEMENT (SECOND) OF FOREIGN RELATIONS S155 (1965).

treaty is revived by the re-establishment of relations.[26] The alternative to suspension would be termination. Since the severence of diplomatic relations is normally temporary, except where the outbreak of war follows, international law does not require that treates be terminated by the severance. If termination were the required consequence of the severance, a state might seek to free itself of the obligations of a treaty by simply severing diplomatic relations with the other state. Suspension is, therefore, generally the more appropriate consequence and would provide only temporary relief from obligations to be performed pursuant to a treaty.[27]

If the severance of diplomatic relations does in fact precede the outbreak of hostilities between the two contracting states, then different rules of international law determine whether treaties remain in effect. Writers in the past have stated that war *ipso facto* terminates treaties. The modern view, however, is that whereas treaties of alliance will fall as a result of war, treaties that are "compatible with a state of hostilities, unless expressly terminated, will be enforced."[28]

The execution of some treaties depends on the continuation of diplomatic relations between the contracting states.[29] In these instances, the severance of diplomatic relations between the United States and the Republic of China fits the unusual circumstance of not only appearing that the severance will be of lengthy, if not permanent, duration, but also appearing that the outbreak of war between the contracting states is unlikely. Grounds exist for the proposition that the recognition of the People's Republic of China together with the severance of diplomatic relations with the Republic of China necessitated termination of the defense treaty.[30]

26. Draft Convention, *supra* note 5, at 1055.

27. *Id.* at 1056.

28. Techt v. Hughes, 229 N.Y. 222, 128 N.E. 185, 191 (Ct. App. 1920).

29. Draft Convention, *supra* note 5, at 1059.

30. According to the defendants' motion to dismiss, an understanding between the United States and the People's Republic of China that the United States would "cease government-to-government relations with the authorities on Taiwan" was a key element that led to the recognition of the People's Republic of China. Defendants' Motion to Dismiss, *supra* note 4, at 1. In United States v. Belmont, 301 U.S. 324 (1937) the Court upheld an agreement between the President and the Soviet Government that the Soviet Government would not enforce claims against United States nationals pursuant to diplomatic recognition of the Soviet Union by the United States. This international compact did not require Senate participation. *Id.* at 330. In United States v. Pink, 315 U.S. 203, 229 (1941) the Supreme Court stated that when recognition is conditional the President has

Suspension would not be an appropriate solution since the rearrangement of international relations between the affected states does not purport to be of limited duration, and the continuation of relations between the states is essential to the continued enforcement of the treaty. Moreover, the situation is analogous to treaties of alliance that fail when the states are at war. Although no state of hostilities exists between the United States and the Republic of China, the instant case falls between those treaties that are clearly terminated because of the outbreak of war and those that are merely suspended because of a temporary severance of diplomatic relations. The conclusion could be drawn that the termination of the defense treaty was inevitable and termination pursuant to the terms of the treaty appropriate. The question remains, however, of what procedure is the proper, and constitutionally correct, one to to utilize in order to unilaterally terminate United States treaty obligations.

III. The Termination of Treaties Pursuant to Notice

Treaties that provide for their termination pursuant to notice usually require that notice be given by either one of the "parties" to the treaty.[31] No United States court has directly decided the

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the implied power to remove obstacles, such as the settlement of claims of United States nationals, to full recognition. In the instant case, the defendants extrapolate from *Belmont* and *Pink* the conclusion that the Executive can unilaterally terminate a defense treaty if it is an "obstacle" to recognition by the United States of a foreign government. If this obstacle is not removed then normalization of relatons with the People's Republic of China would be impossible. Declaration of Warren Christopher, No. 78-2412 (D.D.C., filed Feb. 26, 1979).

31. *See* note 2. The Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water between the United States, the United Kingdom of Great Britain and Northern Ireland and the Union of Soviet Socialist Republics provides that although the treaty is to be of "unlimited duration," each party has the right to withdraw, in exercising its national sovereignty, if it decides that extraordinary events have demanded such action. Aug. 5, 1963, 14 U.S.T. 1313,1319, T.I.A.S. No. 5433. The Warsaw Convention provides that any one of the "High Contracting Parties" may withdraw from the convention after giving notice to the Government of Poland. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876. Provision for terminating treaties by tender of notice by one of the contracting states is an element of most international agreements. Senator Goldwater and the other plaintiffs argue that, if left unchallenged, the Executive could unilaterally terminate or remove the United States from the following treaties pursuant to their notice provisions: North Atlantic Treaty Between the United States and Other Governments, Apr. 4, 1949, art. 13, 63 Stat. 2241, T.I.A.S. No.

issue of which branch of the federal government is the proper one to terminate treaties. Questions involving treaty powers have been avoided by Supreme Court in *Chicago & Southern Air Lines v. Waterman Steamship Corp.*,[32] *Terlinden v. Ames*,[33] and *Doe v. Braden*,[34] among others[35] because they were too political in nature. The dispersion of power to conduct various aspects of foreign policy between the executive and legislative branches has historically raised conflicting claims to the authority to terminate treaties. The President's broad powers include his power as Commander-in-Chief[36] and Chief Executive[37] as well as his duty to see that the laws

1964; Treaty of Mutual Cooperation and Security Between the United States and Japan, Jan. 19, 1960, art. X, 11 U.S.T. 1632, T.I.A.S. No. 4510; Mutual Defense Treaty Between the United States and the Republic of the Phillipines, Aug. 30, 1951, art. VIII, 3 U.S.T. 3947, T.I.A.S. No. 2529; Mutual Defense Treaty Between the United States and the Republic of Korea, Oct. 1, 1953, art. VI, 5 U.S.T. 2368, T.I.A.S. No. 3097; Treaty on the Nonproliferation of Nuclear Weapons, *done* July 1, 1968, art. X, 21 U.S.T. 483, T.I.A.S. No. 6839; Bacteriological (Biological) and Toxin Weapons Convention, *done* Apr. 10, 1972, art. XIII, 26 U.S.T. 583, T.I.A.S. No. 8062; and, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, *done* Jan. 27, 1967, art. XVI, 18 U.S.T. 2410, T.I.A.S. No. 6347.

32. 333 U.S. 103 (1948). Certificates of the Civil Aeronautics Board that were subject to Presidential approval and either granted or denied applications by United States citizens for the authority to engage in overseas or foreign air transportation were held to involve presidential discretion regarding political matters that were "beyond the competence of the courts to adjudicate." *Id.* 114. Judicial review had been sought after the Board submitted its decisions to the President, received advice from the President and modified its order and opinion at the direction of the President. The nature of the President's participation was deemed to be political, not judicial, and was not subject to judicial review because it was within the Executive's foreign affairs power and his power as Commander-in-Chief. *Id.* 110-11.

33. 184 U.S. 270 (1902). In *Terlinden*, a Prussian fled to the United States after counterfeiting stock certificates. A warrant was issued for the extradition of Terlinden and he petitioned for a writ of habeas corpus on the ground that the applicable extradition treaty had been terminated by the creation of the German Empire in 1871. The Court would not accept the argument because both the German Government and the Executive regarded the treaty as in effect.

34. 57 U.S. (16 How.) 635 (1853). In Doe v. Braden certain Spanish grants of land in Florida had been annulled by the treaty that ceded Florida to the United States. The Court held that the question of whether or not the King of Spain had the power to annul grants of land was political, rather than judicial in nature, and had already been decided through the process of ratifying the treaty.

35. *See also*, The Chinese Exclusion Case, 130 U.S. 581 (1889); Clark v. Allen, 331 U.S. 503 (1947).

36. U.S. CONST. art. II, § 2, cl. 1.

37. U.S. CONST. art. II, § 1.

are faithfully executed.[38] The President also has the power to make treaties, with the advice and consent of the Senate,[39] to receive representatives of foreign governments,[40] and to nominate representatives to foreign governments with the advice and consent of the Senate.[41] On the other hand, the Senate has the power to ratify treaties, providing that two-thirds of the Senators present concur, as well as the power to approve or disapprove the President's nominations of representatives to foreign governments.[42] Congress has the power to regulate interstate and foreign commerce, to declare war, to regulate the armed services, to exercise the taxing power to provide for the common defense and general welfare, and to implement all powers that are necessary to the federal government through the necessary and proper clause.[43] Each of these powers could be interpreted to support the existence of a power to terminate treaties within the executive or legislative branches of the government.

The decision to terminate a treaty is distinguishable from the act of giving notice of the intention to terminate a treaty. While the former is the subject of debate the latter is clearly a function of the Executive. The International Law Commission has indicated that the procedural act required to terminate a treaty pursuant to a tender of notice requires notification in writing that emanates from an authority competent for the purpose. It must be the subject of an official communication to the other state and must conform to any provisions of the applicable treaty.[44] It is widely accepted that the President is "the only instrumentality for maintaining international contacts" between the United States and other states; these contacts are made through the Department of State.[45] Although the old Circuit Court for the Southern District of New York, in dicta, stated that Congress could give notice of the denunciation of a treaty,[46] this clearly has not been United States

38. U.S. CONST. art. II, § 3.
39. U.S. CONST. art. II, § 2, cl. 2.
40. U.S. CONST. art. II, § 3.
41. U.S. CONST. art. II, § 2, cl. 2.
42. *Id.*
43. U.S. CONST. art. I, § 8.
44. II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 214 (1963).
45. J. Reeves, *The Jones Act and the Denunciation of Treaties,* 15 A.J.I.L. 33, 34 (1921); *see also,* S. Riesenfeld, *The Power of Congress and the President in International Relations: Three Recent Supreme Court Decisions,* 25 CALIF. L. REV. 643, 659-60 (1937).
46. Ropes v. Clinch, 20 F. Cas. 1171,1174 (C.C.S.D.N.Y. 1871) (No. 12,041).

procedure. The New York decision has been overshadowed by the pronouncement of Justice Sutherland in *United States v. Curtiss-Wright Export Corp.*[47] Since *Curtiss-Wright,* the President has been virtually unchallenged as the "sole representative with foreign nations" and the "sole organ" in the conduct of the external relations of the United States.[48] Therefore, it is the Executive who gives notice of the intention to terminate treaties. The question of which body makes decisions concerning the termination of treaties is a question of United States constitutional law. Although the Constitution states the methods by which treaties are created, it is silent about the manner in which treaty termination is to occur.

Justice Story, in *The Amiable Isabella,*[49] indicated that the obligations of a treaty could not be changed or varied except "by the same formalities with which they were introduced; or at least by some act of as high an import, and of as unequivocal an authority."[50] Since treaties must be made with the advice and consent of two thirds of the Senators present, there is a compelling argument that the termination of treaties similarly requires the advice and consent of the Senate.[51] The underlying hypothesis is that the same body that makes a treaty must terminate the treaty. When a treaty provides for termination pursuant to notice given by a "party"

47. 299 U.S. 304 (1936).

48. Justice Sutherland, reiterating the position once taken by Justice Marshall, stated that "[t]he President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it." *Id.* 319.

49. 19 U.S. (6 Wheat.) 1 (1821). The case involved a ship sailing under the Spanish flag and travelling from Havana to London. The ship was captured by a privateer and the ship and cargo were condemned by the District Court of North Carolina as a prize of war. The claimants denied that they were bound for England but maintained that they were Spanish and properly documented according to the Spanish treaty of 1795. The Court held that since the treaty did not include the official form of the Spanish passports, verification of the documents by low level Spanish officers was tantamount to a modification of the treaty because the treaty contained no provision for verification by this method.

50. *Id.* at 8.

51. The President sought and received the "advice and consent" of the Senate before the United States denounced the 1903 International Sanitary Convention. The Convention had no provision for denunciation but did provide the right to denounce. 5 HACKWORTH, *supra* note 14, at 322. Whereas some scholars have found no constitutional obligation on the part of the Executive to submit all treaty terminations to Congress for approval, the State Department has on one occasion advised that modification of an existing treaty requires the advice and consent of the Senate. *Id.* at 322, 333.

then that "party" is the United States Government as represented by the President and the Senate. There are arguments, however, to support the theory that the power ought to rest with the executive branch. In times of crisis the President's ability to respond to international events ought not be circumscribed. The President arguably has more information at his disposal and is in a better position to decide whether or not a treaty ought to be terminated. Additionally, the President may need to use the threat of the termination of a treaty in order to conduct foreign relations.[52] If the President's power to terminate treaties were conditional upon the approval of the Senate, then his ability to discharge his responsibilities as the "sole representative with foreign nations" could be hampered. On the other hand, if the President should seek and receive the approval of the Senate prior to threatening termination of a treaty, then his bargaining posture vis-a-vis the other contracting state(s) ought to be strengthened.[53]

The supremacy clause of the United States Constitution[54] states that all treaties made by the United States are the "supreme law of the land," which binds the courts of all states, notwithstanding other provisions of the Constitution or the laws of the states or federal government. The argument follows that since the creation of a treaty is a legislative power, then the termination of a treaty is also a legislative function. This can be rebutted, however, because although there may be a great need for checks and balances on the President's ability to entangle the United States in international arrangements, the same checks and balances are not necessarily needed when the President seeks to disentangle the United States from her international obligations.[55] Moreover, because the President is already admitted to the legislative procedure of creating treaties, there exists an exception to the vesting of all legislative power in Congress.[56] It should also be noted that if the power

52. For discussion of the President's use of the threat of withdrawal from the Warsaw Convention in order to raise liability limitations for air carriers see J. Riggs, *Termination of Treaties by the Executive without Congressional Approval: The Case of the Warsaw Convention,* 32 J. AIR L. & COM. 526 (1966) and *Presidential Amendment and Termination of Treaties: The Case of the Warsaw Convention,* 34 U. CHI. L. REV. 580 (1967). In that case the notice of termination was withdrawn by the President before the termination became effective.

53. R. Nelson, *The Termination of Treaties and Executive Agreements by the United States: Theory and Practice,* 42 MINN. L. REV. 879, 891 (1958).

54. U.S. CONST. art. VI, cl. 2.

55. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 169 (1972).

56. 3 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 342

is legislative there are few mechanisms to prevent its usurpation by the Executive. The Senate is in a weak position in the event that the President gives notice of the intent to terminate a treaty, and is without any post-fact remedy other than impeachment. Once the notice of termination is given, that notice can be recalled only by the President.[57] Congress is in a slightly stronger position because they possess the power to deny the internal enforcement of a treaty by either repealing its provisions or repealing the legislation that necessarily accompanies non-self-executing treaties.[58] Such action by Congress, however, would represent a breach of obligations under the treaty according to international law.

In *Whitney v. Robertson,*[59] the Supreme Court indicated that because the Constitution places treaties on an equal footing with an act of legislation, when a treaty and an act of legislation relate to the same subject matter, the courts must strive to construe their language in a manner which will give effect to both. If that cannot be done because the language of the treaty and the act of legislation are inconsistent, then the one that is last in date will control, provided that the treaty is self-executing. But when the treaty is not self-executing the treaty's stipulatons can only be enforced pursuant to the legislation that carries them into effect. This legislation, like any other type of legislation, is subject to modification by Congress.[60]

Article 9 of the Articles of Confederation granted Congress both the power to enter into and terminate treaties.[61] This power was

(1911) [hereinafter cited as FARRAND].

57. Nelson, *supra* note 53, at 890.

58. *Id.* 888. Treaties act as international obligations and as statements of federal law. Therefore, a treaty's provisions prior in date to a federal law may be superseded by that law. The enactment of a later inconsistent statute would not abrogate, but would violate, the treaty. On the other hand, a treaty may amend or repeal "a prior expression of the legislative will as expressed by Congress." Reeves, *supra* note 45, at 34; Whitney v. Robertson, 124 U.S. 190,194 (1888).

59. 124 U.S. 190 (1888). In *Whitney v. Robertson,* the plaintiffs were engaged in the business of importing molasses from San Domingo. The plaintiffs sought to have their products admitted free of duty pursuant to a treaty between the United States and San Domingo that guaranteed rates that were as favorable as those granted to other States. Similar products were admitted duty-free from Hawaii pursuant to a treaty between the United States and Hawaii. Subsequent to the creation of the treaty between the United States and San Domingo, Congress passed an act that permitted the exaction of duties. The port collector's exaction of duties on the molasses was upheld by the Court.

60. *Id.* at 194.

61. *See, Congressional Power to Abrogate the Domestic Effect of a United*

removed by the Constitution. The remarks of the framers of the Constitution made during the Federal Convention of 1787 do not refer to the manner in which treaties are to be terminated. One participant, however, stated that the Executive ought to be possessed with the powers of secrecy, vigor and dispatch in order to faithfully execute the laws.[62] There was some concern that irresponsible exercise of the treaty power by the Senate might produce undesirable results without legislative sanction.[63] During the first legislative sessions some congressional leaders expressed fear that the Senate's involvement in the process would usurp the powers of the House since the House had no similar treaty-making authority. The House adamantly refused to have their legislative powers involving the appropriation of money, the declaration of war, and the regulation of foreign commerce preempted by the treaty-making power. Many also believed that the House could best protect their constitutionally enumerated powers by giving their assent, in some manner, to treaties entered into by the President and the Senate on behalf of the United States.[64]

John Jay was not persuaded by the argument that since treaties have the force of law they must be made only by those who are entrusted with legislative authority. He reasoned that all constitutional acts of power, whether originating from the executive or judicial branch, have the same legal validity as acts originating from the legislature. The fact that the legislature is entrusted with the power to make laws does not compel the conclusion that it must be given the power to perform all acts of sovereignty which bind United States citizens.[65] Lastly, according to the framers the

Nations Treaty Commitment, 13 COLUM. J. TRANSNAT'L L. 155, 159 (1974).

62. 1 FARRAND, *supra* note 56, at 70.

63. 2 FARRAND, *supra* note 56, at 297-98; 3 FARRAND, *supra* note 56, at 162.

64. E. BYRD, TREATIES AND EXECUTIVE AGREEMENTS IN THE UNITED STATES 52 (1960).

65. THE FEDERALIST No. LXIV (J. Jay). Senate Debate on the Chinese Immigration Act indicated the sentiment that the Executive and the Senate were the treaty-making power and that it was proper for the President to protect the sanctity of the treaty by vetoing legislation. 13 CONG. REC. 3268 (1882). Congressional frustration resulting from the exclusion of Congress from the treaty-making and treaty-terminating process is evidenced by a reservation that was offered as a mechanism to effect the potential withdrawal of the United States from the League of Nations. According to the reservation, notice of withdrawal was to be given by a concurrent resolution of the Congress. 59 CONG. REC. 5423 (1920). In *Goldwater v. Carter*, defendants posit that the same frustration motivated passage of section 26 of the International Security Assistance Act of 1978, *infra* note 97. Defendants Motion to Dismiss at 36.

entire legislature was not a desirable party to the process because it could not be trusted with the necessary degree of secrecy that the framers attributed to the Senate.[66] The Senate was also a preferable treaty-making partner for the President because it assured representation for the various states.[67]

Early Senate debate distinguished the President's foreign affairs power as it related to the reception of foreign ambassadors from the other aspects of the management of foreign affairs. In the former, the President had exclusive binding power because it involved the "decision of the competence of the power" which sent the ambassadors. The advice and consent of the Senate was required in the case "of all other definitive proceedings in the management of foreign affairs."[68] In practice, the Senate has not exercised this degree of control over United States foreign affairs. Early congressional history indicates the existence of an appreciation for the necessity of settling constitutional issues, including the rival powers of treaty-making, through practice or by amendments during the progress of the government.[69]

Even if the advice and consent of the Senate were to be required prior to terminating a treaty, the question arises of what constitutes "consultation" and the "advice and consent" of the Senate. President Washington first attempted to gain the advice and consent of the Senate to the terms of a treaty to be negotiated with the southern Indians. Oral consultation served only to belabor the treaty-making process and the President subsequently resorted to written communications. Today consultation takes place primarily

66. 2 FARRAND, *supra* note 56, at 538. The President was not solely vested with the treaty power because, according to General Pinckney, the President was not above reproach due to the temporary nature of his office. Therefore, "it was agreed to give the President the power of proposing treaties, as he was the ostensible head of the Union, and to vest the Senate . . . with the power of disagreeing to the terms proposed." 3 FARRAND, *supra* note 56, at 251.

67. 2 FARRAND, *supra* note 56, at 392-93.

68. 2 FARRAND *supra* note 56, at 524. Senator King described the role of the Senate in the conduct of foreign relations as follows:

> In these concerns the Senate are the Constitutional and the only responsible counsellors to the President. And in this capacity the Senate may, and ought to, look into and watch over every branch of the foreign affairs of the nation; they may, therefore, at any time call for full and exact information respecting the foreign affairs, and express their opinion and advice to the President respecting the same, when, and under whatever other circumstances, they may think such advice expedient.

Id.

69. *Id.* 370.

between the President and several influential members of the Senate in an informal manner.[70] This is the limit of the Senate's involvement in the actual making of treaties. Consequently, "advice and consent" has been interpreted to mean merely that the Senate has the power to veto that which the Executive has already negotiated.[71] As the defendants suggest in *Goldwater v. Carter,* this power has evolved into a negative limitation on the President's treaty-making power.[72]

IV. JUDICIAL FORMULATION OF THE POWER TO TERMINATE TREATIES WITHIN THE FOREIGN RELATIONS POWER

Certain powers to conduct foreign relations are vested in the Senate. Other such powers are vested in Congress and the President. The situation therefore is one in which each branch struggles against the other to direct the foreign policy of the United States.[73] In *Myers v. United States*[74] the Court upheld the President's removal of an executive officer without congressional approval although he had been appointed by the President with the advice and consent of the Senate. Judge Taft's conclusion in *Myers* that the removal of an executive officer is a distinctly executive power can be applied to support the contention that the President can terminate a treaty without the advice and consent of the Senate. The argument follows that since treaties are terminated by the President pursuant to the conduct of foreign relations, therefore, the power to terminate is a distinctly executive power. The power to make appointments, however, does not involve the interest of the states to the same extent that the power to make and terminate treaties does, although both must be accomplished with the advice and consent of the Senate.[75] Therefore, the analogy is strained.

Treaties have been terminated by the President on his own initiative, subsequent to a resolution of Congress and also after sanction by the Senate.[76] Very little case law exists to distinguish those instances in which it is proper for Congress to terminate treaties from those in which it is proper for the Executive. In practice, few

70. E. CORWIN, PRESIDENT: OFFICE AND POWERS 232-33 (1940). *See* note 4.
71. Mathews, *The Constitutional Power of the President to Conclude International Agreements,* 64 YALE L.J. 345,349 (1955); CORWIN, *supra* note 70, at 234.
72. Defendant's Motion to Dismiss at 26.
73. CORWIN, *supra* note 70, at 208.
74. 272 U.S. 52 (1926).
75. Nelson, *supra* note 53, at 887-88.
76. CORWIN, *supra* note 70, at 243.

treaties have been terminated solely by the President. One reason is that there are not many treaties that are self-executing. Additionally, congressional legislation is often an integral aspect of the treaty process.[77]

Several federal cases outline the usual role that Congress plays in the process of treaty termination. The Supreme Court in *Taylor v. Morton*[78] upheld the exaction of customs duties in excess of limits imposed by a commercial treaty between the United States and Russia. The effect of the decision was recognition of congressional authority to "void the domestic application of a treaty" when Congress had legislated within its legitimate legislative sphere.[79] *Diggs v. Shultz*[80] represents the manner in which Congress, by legislating within its legitimate legislative sphere, may denounce treaties.

In 1966 the United Nations Security Council, with the affirmative vote of the United States, adopted Resolution 232, which imposed an embargo on trade with Southern Rhodesia. At that time Congress passed legislation which imposed criminal sanctions for violations of the resolution. Five years later, the Byrd Amendment to the Strategic and Critical Materials Stock Piling Act[81] provided that the President of the United States could not prohibit or regulate the importation of any strategic materials if they were from non-Communist countries. The amendment was designed to resume trade with Rhodesia in order to discontinue the practice of purchasing chromite from Communist countries that had originally purchased the same chromite from Rhodesia. The court held that Congress could "nullify, in whole or in part, a treaty commitment . . . ."[82] and that when Congress chose to denounce a treaty there was little that the other branches could do.[83]

77. Riggs, *supra* note 52, at 528.

78. 67 U.S. 481 (1862).

79. 13 COLUM. J. TRANSNAT'L L., *supra* note 61, at 156.

80. 470 F.2d 461 (D.C. Cir. 1972), *cert. denied* 411 U.S. 931 (1973).

81. 50 U.S.C. § 98-98h-1 (1976).

82. 470 F.2d at 466. The original complaint in *Diggs* was for declaratory and injunctive relief designed to prevent the importation of metallurgical chromite from Southern Rhodesia. The lower court dismissed the complaint on the ground that there was no standing to bring the suit. Appellants argued that the Byrd Amendment could not authorize a "General License" for the importation of the metals because it was contrary to United States treaty obligations. The Court of Appeals for the District of Columbia affirmed on the ground that the case was not justiciable, *i.e.*, the question of abrogation was an issue of legislative policy.

83. *Id.* 466-67.

Termination of treaties by the President pursuant to congressional direction has been sanctioned by the Supreme Court. In *Van Der Weyde v. Ocean Trans. Co.*,[84] dismissal of a seaman's libel action was affirmed by the Circuit Court of Appeals on the ground that article XIII of the 1827 Treaty of Commerce and Navigation between the United States and the Kingdom of Sweden and Norway denied the court jurisdiction. Article XIII, however, had been terminated in 1919 by the President pursuant to congressional authorization of section 16 of the 1915 Seaman's Act.[85] The Court held that the Circuit Court erred in affirming dismissal based on lack of jurisdiction and stated that in light of the congressional authorization of section 16 it was incumbent upon the Executive to determine whether there was any inconsistency between the treaty provisions and the provisions of the new law. Although the Court held that the President could terminate a treaty's provisions pursuant to congressional direction, the Court expressly declined to decide the question of what authority the President possessed regarding the termination of treaties in the absence of congressional authorization. The Court further declined to define under what circumstances the treaty-making power of the United States could denounce a treaty.[86]

Although congressional action has frequently provided the impetus for the termination of treaties, it is the Executive's duty to determine whether a treaty remains in force. War has served to either terminate or suspend treaties. This has placed the Execu-

84. 297 U.S. 114 (1936).

85. The treaty provided that it could be terminated by the giving of one year's notice after a period of ten years. The United States Government had given notice to Norway on February 2, 1918 of the intention to denounce the treaty in its entirety but after an exchange of diplomatic notes the Government formally withdrew its notice for all provisions except for articles XIII and XIV. The tender of the notice of the intention to terminate the treaty was prompted by section 16 of the 1915 Seaman's Act which states in relevant part:

> That in the judgment of Congress articles in treaties and conventions of the United States, . . . in conflict with the provisions of this Act, ought to be terminated, and to this end the President be, and he is hereby, requested and directed, within ninety days after the passage of this Act, to give notice to the several Governments, respectively, that so much . . . of all such treaties and conventions between the United States and foreign Governments will terminate on the expiration of such periods after notices have been given as may be required in such treaties and conventions.

Seaman's Act of March 4, 1915, Pub. L. No. 63-302, 38 Stat. 1164, 1184 (1915).

86. 297 U.S. at 117.

tive[87] in the position of deciding whether it is in the interests of the United States for a treaty to be either suspended or terminated. The Court stated in *Society for the Propagation of the Gospel in Foreign Parts v. Town of New Haven*[88] that treaties were extinguished by war unless they were revived by either an express or an implied renewal upon the return of peace. Those treaties that were expressly contracted for in the event of an outbreak of war or that contemplated permanent arrangements of territorial or national rights are not extinguished by the outbreak of war.[89] For example, in *Clark v. Allen*[90] the Court determined that the political departments had acted consistently with the maintenance and enforcement of the Treaty of 1923 between the United States and Germany and found no evidence that the political departments considered the surrender of Germany after the Second World War to have terminated the applicability of the treaty's provisions.[91] In addition, The Department of State Assistant Legal Advisor for Treaty Affairs has counselled the President that notifications of treaties that are to be terminated as a result of war may be given without Senate or congressional concurrence. This practice has been followed by the Executive.[92]

The decisions of United States courts as well as the practices of the political departments illustrate that the conduct of international relations rests more upon the cooperation of the branches of the federal government than it does upon the questions of allocating power between the branches.[93] Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*[94] indicated

87. 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 462-63 (1970). The Department of State, acting for the President, determines whether or not a treaty remains in full force and effect. W. MCCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS 20 (1941) [hereinafter cited as MCCLURE].

88. 21 U.S. (8 Wheat.) 464 (1823).

89. *Id.* 494. The Court of Appeals of New York followed a similar analysis in Techt v. Hughes, 229 N.Y. 222, 128 N.E. 185, 191-92 (Ct. App. 1920). *See also,* Karnuth v. United States, 279 U.S. 231 (1929). In *Karnuth,* two Canadian citizens sought admission to the United States in 1927 as non-immigrants but were denied admission because they were "quota-immigrants" as defined by the Immigration Act of 1794. The Government argued that the treaty provision was abrogated by the War of 1812 and the Court reiterated the position that treaties of alliance fail as a result of war whereas others may remain. *Id.* 236-37.

90. 331 U.S. 503 (1947).

91. *Id.* 514.

92. 14 WHITEMAN, *supra* note 87, at 462-63.

93. Reeves, *supra* note 45, at 38.

94. 343 U.S. 579 (1952). In order to avert a nation-wide steel strike, the Presi-

that when the Constitution was unclear concerning the limits of Presidential powers reference must be made to three situations in order to determine whether or not a particular act of the Executive was within the broad powers that are necessarily lodged within that office. First, the powers of the President are at their greatest when the President has acted pursuant to an express or an implied authorization by Congress. The President possesses not only all of the powers of the Executive but also those Congress can delegate. Second, when the President and Congress have concurrent authority or uncertain distribution of power, as with the power to conduct international affairs and to make treaties, a "zone of twilight" exists in which the President can rely only upon his own independent powers in the event that he acts in the absence of either a congressional grant or denial of authority. Congressional indifference or acquiescence may operate to give the President independent powers based on the "imperatives of events." It is clear that in this situation the President's powers are not as great as in the first. Lastly, when the President acts in a manner incompatible with the express or implied will of Congress, Executive power is at "its lowest ebb" because the President is relying only on his own constitutional powers. Courts can sustain actions by the President only "by disabling the Congress from acting upon the subject." These actions must be scrutinized carefully because the equilibrium established by the Constitution is at stake.[95]

To determine whether the Constitution would sustain the President's action of terminating the defense treaty with the Republic of China the case should be analysed to see if it fits within one of the three aforementioned categories of actions. There was no express or implied authorization by Congress for the President to give notice of the intent to terminate. On the contrary, Congress enacted a section of the International Security Assistance Act of 1978,[96] which clearly indicated that it was the intent of Congress

dent directed the Secretary of Commerce to take possession of and operate most of the steel mills in the United States. The owners argued that the President's order amounted to lawmaking, which is a legislative function. The Government contended that the President was acting in order to avert a national catastrophe which would result in the event that steel production were to stop. In so acting, the President argued that he was within the aggregate of his constitutional powers as Chief Executive and Commander in Chief. Justice Black, for the Court, held that the seizure could not withstand judicial scrutiny.

95. *Id.* 635-38.

96. Pub. L. No. 95-384, § 26, 92 Stat. 746 (1978).

that the President consult with them before taking action to terminate the treaty.[97] The measure was originally passed in the Senate by a roll call vote of 94 to 0.[98] This legislative act, as well as the post-notice reaction on the part of many congressional leaders, indicates that the President's decision to terminate the defense treaty was incompatible with the express will of Congress because the decision was made without the benefit of prior consultation. Since the incident is not one of congressional indifference or acquiescence, a United States court, according to Justice Jackson, can sustain the President's action only if it can decide that Congress is "disabled" from acting on the subject.

V. Prior Practice as Precedent

In sum, the Goldwater position appears to be that the President cannot justify his act based on precedent. Alleged precedent can be distinguished on the following grounds: 1) federal courts have recently decided against the President in issues involving the distribution of powers; 2) the precedent the President relies upon involved treaties in which there were no provisions for termination pursuant to notice; 3) the tender of notice was withdrawn before the termination took effect; 4) the President acted pursuant to congressional direction or acted to terminate a treaty because Con-

97. Section 26 states in subsection (b) that, "[i]t is the sense of the Congress that there should be prior consultation between the Congress and the executive branch on any proposed policy changes affecting the continuation in force of the Mutual Defense Treaty of 1954." *Id.* It was apparently the view of some members of Congress that inclusion of this measure would encourage the President to consult with them prior to policy changes regarding the defense treaty. Moreover, consultation was assumed to consist of participation by the Congressmen and not merely of an impromptu recitation of the intention on the part of the President to radically shift foreign policy. 125 Cong. Rec. E61 (daily ed. Jan. 15, 1979). The passage of section 26 suggests that consultations prior to the act were insufficient. On October 10, 1978 Senator Goldwater and 24 other Senators submitted legislation in the form of a concurrent resolution which was subsequently referred to the Foreign Relations and Judiciary Committees. The resolution states that the President should not "unilaterally take any action which has the effect of abrogating or otherwise affecting the validity of any of the security treaties comprising the post-World War II complex of treaties . . . without the advice and consent of the Senate, which was involved in their original ratification, or the approval of both Houses of Congress." S. Con. Res. 109, 95th Cong., 2d Sess. Introduction of this resolution suggests that members of the Senate were concerned about the possibility that the President might abruptly terminate mutual defense treaties although this could be accomplished without abrogation.

98. 125 Cong. Rec. E287 (daily ed. Jan. 31, 1979).

gress had enacted subsequent inconsistent legislation; 5) the doctrine of *rebus six stantibus* or war were the causal factors in the termination; or 6) Congress was uninformed of the termination and thus there was no meaningful acquiescence.[99] It is not clear whether the practice that has evolved would sanction the termination of the defense treaty without the advice and consent of the Senate. There is, however, precedent for the termination of a defense agreement by the Executive pursuant to its terms.

Iceland and the United States entered into a defense agreement in 1941 in order to combat the Axis powers.[100] The agreement was effected by an exchange of diplomatic messages and contemplated expiration after the end of World War II. In 1946 the parties agreed to terminate the agreement and to enter into a new arrangement effected by the exchange of diplomatic notes.[101] It is accepted international practice that treaties may be terminated by the consent of the parties when the later treaty specifically provides for termination of the earlier treaty.[102] Termination of the Icelandic defense agreement is distinguishable from termination of the defense treaty with the Republic of China because the former provided that it would be terminated at the end of the war whereas the latter was to be of "indefinite duration." Therefore, the contracting states had different expectations in each case.[103] Treaties made for an express purpose or for a limited duration expire after the purpose has ceased to exist or the time period has lapsed.[104] If the

99. 125 CONG. REC. S1387-91 (daily ed. Feb. 9, 1979).

100. Agreement between the United States of America and Iceland respecting the defense of Iceland by United States Forces, *effected* July 1, 1941, 55 Stat. 1547, E.A.S. No. 232.

101. 15 DEP'T. STATE BULL. 583-84 (1946).

102. 5 HACKWORTH, *supra* note 14, at 304. *See, e.g.*, the proclamation regarding termination of the Brazilian Trade Agreement, 19 DEP'T. STATE BULL. 211 (1948).

103. The understanding between the United States and the Republic of China was that the joint military efforts of the two States would "not be removed from the treaty area to such an extent as substantially to affect its defensibility without mutual agreement." Exhibit 1, Complaint, *citing* text of statement by John Foster Dulles, Secretary of State, submitted to the President on December 22, 1954.

104. 5 HACKWORTH at 301. The Executive gave notice of the United States denunciation of the 1929 Protocol on the Inter-American Registration of Trade Marks because it "failed to serve any purpose which would adequately justify the annual quota of funds contributed by it for the support of the Bureau." 11 DEP'T. STATE BULL. 442 (1944). Notice of the intent to terminate the United States Extradition Treaty with Greece was tendered without either Congressional or Senate activity after efforts to obtain the extradition of Samuel Insull proved fruitless. CORWIN, *supra* note 70, at 417 n.107.

President must rely on precedent to justify termination of the defense treaty with the Republic of China then the precedent must consist of an amalgam of the methods by which treaties have been terminated in the past. Reliance upon termination of the Icelandic agreement will not suffice.

Wars and the threat of war have provided numerous instances of treaty terminations. In one such instance Congress took the lead in termination and openly declared a treaty to be void although the treaty did not provide for terminaton by the giving of notice.[105] Congress abrogated the treaties of 1778 with France by a 1798 legislative act[106] based on the justification that they had already been violated by France. It is not clear whether or not the congressional action was officially brought to the attention of the French Government.[107] Other contracting states have taken the lead in terminating treaties with the United States. The Napoleonic Wars brought about the termination of the 1782 Treaty of Amity and Commerce between the United States and the United Netherlands. The United Netherlands was absorbed by the French Empire and after the Congress of Vienna reconstructed the Kingdom of the Netherlands. The new state differed in name, territory and form from that which had entered into treaty with the United States. The official view of the Government of the Netherlands was that the treaty was no longer in force. As a result, the Government of the United States subsequently considered the treaty no longer in force.[108]

The Executive has also taken the lead in terminating a treaty where war was involved. The earliest instance of the Executive giving notice of the intent to terminate a treaty without the advice and consent of the Senate concerned the Great Lakes Agreement of 1817 between the United States and Great Britain. In October of 1864 Secretary of State Seward instructed the United States minister in London to give Britain six months notice of the intention of the United States to terminate the disarmament arrangement of the Great Lakes. The Senate subsequently approved the action and in February of 1865 Congress ratified the notice that had been given. Seward subsequently withdrew the notice before the termination became effective and the governments of both

105. Reeves, *supra* note 45, at 34.
106. 1 Stat. 578 (1798).
107. CORWIN, *supra* note 70, at 417 n.107.
108. S. CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT (2d ed. 1916).

states considered the agreement to remain in effect.[109]

The cooperation of the branches of the federal government was evident in terminating treaties in other cases. In 1835 President Pierce decided to give Denmark notice of the intention to terminate the 1826 commercial treaty between Denmark and the United States. The Senate authorized the President to give notice and the President gave the notice to Denmark pursuant to the authority conferred upon him.[110] Congress passed a joint resolution in 1846 that authorized the President to give notice of the abrogation of the Oregon Convention of 1827.[111] The method by which the Russian Treaty of 1832 was terminated in 1911 also arguably follows the precedent of the legislative post-fact authorization of 1864. In this case the House had passed a joint resolution that provided for the abrogation of the treaty. President Taft disapproved the form of the abrogation and while the joint resolution languished in the Senate Committee on Foreign Relations the President informed the Senate that he had given notice to Russia, in a different form, and requested Senate approval. This action implies that some type of approval was required before the notice of termination could be tendered. Members of the House of Representatives, however, were reluctant to relinquish their role in the termination of the treaty.[112] Senate proponents of the President's approach relied on the proposition that the "party" that contracted for the treaty, *i.e.*, the President and the Senate, was the party that could terminate the treaty according to its terms. This power was absolute. According to that view, when the Senate and President acted alone to terminate a treaty a two-thirds vote was required. If the treaty were to be terminated through the process of joint resolution then a majority vote was required.[113] As an act of comity, the Senate acted with the House, and the President's action was ratified by a joint resolution.[114]

109. 5 J. MOORE, DIGEST OF INTERNATIONAL LAW 323 (1906).

110. *Id.*

111. MCCLURE, *supra* note 87, at 22.

112. 48 CONG. REC. 455 (1911).

113. *Id.* 479. Senator Lodge presented the view that the Senate and the President ought to terminate the treaty and stated that, "those who represented the high contracting party in the making of the treaty are capable of representing the high contracting party in its unmaking." *Id.* Lodge did not suggest that the President and the Senate must represent the contracting party in all circumstances but only that they were capable of so doing in some situations. His conclusion rested in part upon the fact that the Senate and President could end an existing treaty by entering into a new treaty.

114. *Id.* An interesting constitutional question is raised in the event that the

Prior to the termination of the 1832 treaty with Russia the President terminated the 1850 Commercial Convention between the United States and the Swiss Confederation[115] without the Senate's advice and consent and without subsequent ratification by Congress.[116] The Acting Secretary of State later relied on this instance to recommend to President Roosevelt that the Executive possessed the authority to give notice of termination of the 1871 Treaty of Commerce and Navigation with Italy[117] without seeking the advice and consent of the Senate or the approval of Congress.[118] In another example of Executive action without congressional participation, President Coolidge terminated the 1925 Convention for the Prevention of Smuggling with Mexico pursuant to the notice provision of article XV.[119] Congress, however, was not informed of the notice and the action went unchallenged.[120] The Convention for the Abolition of Import and Export Prohibitions and Restrictions of 1927 was terminated by President Roosevelt in 1933 pursuant to a stipu-

President's request for notice of the intent to terminate a treaty is denied. According to Senator Lodge, if Congress disapproved of the action of the Executive then the notice must fail. There is, however, no Congressional mechanism to recall the notice in the event that it is tendered by the President in contradiction to a Congressional directive.

115. Convention of friendship, commerce and extradition between the United States and the Swiss Confederation, Nov. 25, 1850, 11 Stat. 587.

116. *Id.* In 1898 the United States decided to discontinue favorable trade concessions to Switzerland and gave notice of termination of the most-favored-nation clause of the 1850 treaty. Switzerland received and accepted the notice of the intention to terminate the treaty. 5 HACKWORTH, *supra* note 14, at 330-31. Senator Goldwater contends that the treaty between the United States and Switzerland had been superseded by the Tariff Act of 1897 (the Dingley Tariff). The United States had entered an agreement with France and Switzerland requesting the same concession for her products. Switzerland was unwilling to make reciprocal concessions as required by the Dingley Tariff. Section 3 of the tariff act denied the President the authority to negotiate trade agreements unless reciprocal arrangements were granted. Since the President was faced with an act of Congress that was arguably inconsistent with the earlier treaty, the President terminated the treaty pursuant to the later expression of Congressional will. 125 CONG. REC. S1388-89 (daily ed. Feb. 8, 1979).

117. The treaty provided for termination upon the giving of one year's notice by the "high contracting parties."

118. The State Department justified the conclusion that the President could act unilaterally because there was no "settled rule or procedure." 5 HACKWORTH, *supra* note 14, at 330-31.

119. Convention for the Prevention of Smuggling and for Certain other Objects, Dec. 25, 1925, 44 Stat. 2358, T.S. No. 732.

120. 125 CONG. REC. S1389 (daily ed. Feb. 8, 1979).

lation in the treaty that provided for denunciation by notification on behalf of any "non-Member (League of Nations) State" after the expiration of an initial five year period.[121] The treaty was not of indefinite duration and passage of the National Industrial Recovery Act of 1933 apparently contradicted provisions of the treaty. The President gave notice of United States withdrawal without consulting Congress.[122]

The President has terminated a treaty to facilitate an economic embargo of the other contracting state. On August 21, 1962 President Kennedy terminated the 1902 Commercial Convention between the United States and Cuba.[123] This action came six months after the President announced an embargo on all trade between the United States and Cuba[124] and eight weeks before the naval blockade. Two rationales support the President's action. First, because the President was responding to an emergency situation the circumstances demanded that he act with speed and dispatch. Second, the President's termination was a response to the congressional directive of the Foreign Assistance Act of 1961 which authorized the President to establish and maintain a total embargo of all trade between the United States and Cuba.[125]

Presidents have balked at the suggestion by Congress that the Executive must terminate treaties pursuant to congressional directives. The Executive vetoed the 1880 congressional bill restricting Chinese Immigration in part because it impaired the obligations of the Burlingame Treaty by authorizing the President to terminate provisions of the treaty although the treaty did not contain any provisions for termination by the tender of notice.[126] The Jones Act "authorized and directed" the President to terminate treaties and conventions that restricted the right of the United States to impose discriminatory customs duties on imports.[127] The President

121. Abolition of Import and Export Prohibitions and Restrictions—Convention and Protocol between the United States and Other Powers. Jan. 30, 1928, 46 Stat. 2461, T.S. No. 811.

122. McCLURE, *supra* note 87, at 18.

123. 47 DEP'T. STATE BULL. 438 (1962).

124. The President relied on the authority of section 620(a) of the Foreign Assistance Act of 1961 to place pressure on the Castro government by ending trade between Cuba and the United States. 46 DEP'T. STATE BULL. 283-84 (1962).

125. Act for International Development of 1961, Pub. L. No. 87-195, 75 Stat. 424, 444-45 (1961).

126. Reeves, *supra* note 45, at 36.

127. Section 34 of the Merchant Marine Act of 1920 (the Jones Act), Pub. L. No. 66-261, 41 Stat. 988, 1007 (1920) follows:

failed to respond during the 90 day period in which the treaties were to have been terminated. It was the President's position that compliance would require the breach of 32 commercial treaties and that congressional direction was not an exercise of a constitutionally authorized power.[128]

The most recent independent Presidential exercise of the termination power, prior to notification of the intent to terminate the defense treaty, occurred when the Department of State delivered notice to the Polish Government of the United States intention to withdraw from the Warsaw Convention[129] in November of 1965.[130] One day before the denunciation would have taken effect it was withdrawn by the Executive. Neither the House nor Senate had taken any formal action to advise or ratify the termination.[131] The notice was withdrawn because the Executive had successfully negotiated new treaty terms with the other contracting states.

VI. The Possibility of Judicial Resolution

The practice of terminating treaties in the United States has varied. Presidents have terminated treaties with the advice and consent of the Senate. Congress has declared a treaty void. The disappearance of the other contracting state resulting in its reemergence as a different state has served to terminate a treaty. The President has given notice of the termination of a disarmament agreement with congressional ratification and has terminated commercial treaties after receiving congressional authorization. The President has also given notice of the intent to terminate a treaty in order to preempt a congressional joint resolution that would have accomplished termination in a manner inimical to the conduct of diplomatic relations between the United States and the other contracting state. Also, the President has terminated trade

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That in the judgment of Congress, articles or provisions in treaties or conventions to which the United States is a party, which restrict the right of the United States to impose discriminatory customs duties on imports entering the United States . . . should be terminated, and the President is hereby authorized and directed within ninety days after this Act becomes law to give notice to the several Governments . . . ."

128. Reeves, *supra* note 45, at 33.

129. Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876.

130. Article 39 provides that "any one of the High Contracting Parties" may denounce the convention by a notification addressed to the Government of Poland, which would then inform the other contracting States.

131. Riggs, *supra* note 52, at 526-27.

agreements without either the advice and consent of the Senate or the subsequent ratification by Congress. In those cases subsequent legislation usually existed that required the Executive to decide whether later statutes had an impact on the provisions of the earlier treaty. The Executive has also terminated trade agreements during periods of strained relations. In addition, the President has given notice of intent to withdraw from an international convention regulating air transport without either the advice and consent of the Senate or subsequent approval of Congress. Presidents have also both signed and vetoed legislation in which Congress authorized and directed the President to terminate treaties.

Therefore, the question arises whether United States practice, in its entirety, sanctions the decision to terminate a mutual defense treaty without congressional consultation or approval. Practice suggests both that the decision is within the discretion of the Executive pursuant to the President's foreign affairs power and that the circumstantial exigencies dictate the propriety of the method of termination to be pursued. A stronger case for termination exists when war is either imminent or an undeclared war is in progress with the other contracting state(s). If unilateral termination solely by the Executive on behalf of the United States becomes the accepted mode of termination in less than critical circumstances the credibility of the United States as a party of international conventions and treaties may be jeopardized by abrupt invocations of the sovereign right to terminate treaties. Therefore, although precedent may support unilateral Presidential termination of treaties, the judicial branch may be hesitant to define the Presidential termination power this broadly. Precedent also illustrates that Congress and the Senate have played an important role in the process of treaty termination. The Executive has generally obligated itself to consult with or seek the approval of either or both bodies before terminating treaties. It is not clear whether or not the issue of termination is justiciable. The court could decline the case because the issue is political in nature.[132] Defendants argue that by merely

132. Defendants suggest that plaintiff's challenge is a non-justiciable political question due to the following factors: courts have traditionally declined to adjudicate issues involving the allocation of political powers in the foreign relations area; the question arises out of the President's exercise of his exclusive authority over the recognition of foreign governments; and, the instant case meets the *Baker v. Carr* definition of a political question. Defendant's Motion to Dismiss at i, 9, 14, 15. Among the elements which *Baker v. Carr* delineated as indicative of political questions are cases where there are the following: a textually demon-

entertaining the suit the Executive's ability to act as the sole representative of the nation will be impaired because the finality of the Executive's actions with respect to other states will be subject to judicial scrutiny.[133]

If *Goldwater v. Carter* can also surmount the hurdle of the standing issue[134] then the judicial branch ought to closely scruti-

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strable constitutional commitment of the issue to a coordinate political department; a lack of judicially discoverable and manageable standards for resolution; impossibility of decision without expressing a lack of respect due to coordinate branches of government; an unusual need for unquestioning adherence to a political decision already made; or the potential for embarrasshment from multifarious pronouncements by various departments on the same question. 369 U.S. 186, 217 (1961).

133. Defendant's Motion to Dismiss at 12-13.

134. The defendants contest the plaintiffs standing to bring suit. The Executive maintains that because the issue is a non-justiciable political question no one has standing, according to Schlesinger v. Reservist Committee to Stop the War, 418 U.S. 208, 215 (1974), and that none of the plaintiffs meets the injury in fact requirement if the question were justiciable. The Executive urges that the ruling by the Court of Appeals for the District of Columbia in Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974), is of little precedential value and was curtailed by Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1971). Defendants' Motion to Dismiss at 19-22. In *Kennedy*, the court held that certain bills that had been passed by Congress were validly enacted laws without the President's signature and that the President's pocket veto was ineffective. The court stated that "an individual legislator has standing to protect the effectiveness of his vote with or without the concurrence of other members of the majority." 511 F.2d at 434. In *Harrington* the same court dismissed an action to declare illegal certain activities by the Central Intelligence Agency brought by a member of the House of Representatives. Defendants in *Goldwater v. Carter* rely on the opinion in *Harrington* that neither the mere status of a Congressman nor a Congressman's need to protect the effectiveness of past and future votes that are unrelated to specific legislation will confer standing when seeking a declaration that certain activities by a government agency are illegal. 553 F.2d at 198-99, 211. Defendants distinguish the instant case from *Kennedy* on the ground that since the defense treaty has remained in effect for over 20 years, votes cast in favor of the treaty in 1954 by plaintiffs Thurmond and Curtiss were not nullified to fulfill the injury-in-fact requirement of *Harrington*. Defendants' Motion to Dismiss, at 21. However, *Harrington* provides an alternative. In order to establish standing, a member of Congress may demonstrate an indirect injury-in-fact if there has been an injury-in-fact done to the Congress and if "he, as an individual legislator, has been injured-in-fact because of the harm done to the institution." 553 F.2d at 199, n.41. That characterization is more appropriately applied to the instant case than the *Harrington* situation. In this case, if the plaintiffs can demonstrate that Executive unilateral termination of treaties will injure the Senate's treaty power, or other congressional powers that are conferred by the Constitution, and that plaintiffs will thereby be injured in their individual capacities as legislators, *e.g.*, disenfranchisement of the legisla-

nize the recent action. The President did not act in response to a crisis situation although he did terminate a military agreement closely involving the war powers of Congress.[135] Moreover, the new commercial arrangements envisioned by the President will require extensive legislation and the cooperation of Congress.[136] Most importantly, the Executive proceeded in spite of an express statement of the will of Congress which indicated that prior consultation was required before the defense treaty was to be altered or terminated. The conduct of United States foreign affairs is a cooperative effort. Therefore, because the President is relying on his powers over and above those that have been delegated to Congress, his power is at its "lowest ebb."

Utilizing Jackson's test in *Youngstown,* the courts could decide that Congress was disabled from acting on the subject and rule in favor of the defendants. Judicial construction of the Constitution and United States practice illustrate that whereas the Senate, or Congress, have historically played a positive role in the termination of treaties, they have not played a negative role in the treaty-terminating process, *i.e.,* they have never exercised a veto power over treaty terminations. Although the Senate's modern role respecting the giving of advice and consent to treaty-making has assumed the posture of a veto there is reason to distinguish that role from its role in treaty-terminating. In the former situation, a vote by the Senate to refuse its advice and consent would prevent the United States from entering into a treaty with another state. This is quite different from the impact of a vote by the Senate to

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tors with regard to specific legislation, then they have standing to bring the cause of action.

135. Some member of the Court considered the congressional abrogation of the 1778 treaties with France as a partial declaration of war. CORWIN, *supra* note 70, at 416 n. 107, *citing* Bas v. Tingley, 4 Dall. 37 (1800).

136. Senator Stone indicated that the more likely avenue for congressional opposition will involve the numerous alterations of existing treaties between the United States and the Republic of China. Since there are approximately 50 commercial arrangements, many which involve legislation, the posture of Congress vis-a-vis the President may be more potent than the Senate's. 125 CONG. REC. S23-31 (daily ed. Jan. 18, 179). Congressional-executive agreements have been frequently employed when Senate opposition has made use of the treaty-making power impractical. The annexation of Texas and Hawaii, termination of the First World War, and entrance into the International Labor Organization were effected by joint resolution. 55 YALE L.J. 349. If Senate opposition to future treaties with the People's Republic of China is substantial, resort to the joint resolution may be helpful to effectuate foreign policies by the Executive.

refuse termination or, in effect, to maintain a treaty against the desire of the Executive. Courts can avoid this phenomenon by defining the Senate's, or Congress', treaty-terminating role as one of initiation rather than of veto.

There should be a strong presumption that when the Executive acts to terminate a treaty pursuant to a notice provision the action is discretionary and within the Executive's foreign relations power. When, however, the President acts counter to the express will of Congress his authority is not beyond question. To overcome this presumption, the need to check the potential for hasty and possibly detrimental treaty terminations by the Executive must outweigh the handcuffing effect that such resolution would have upon the Executive's ability to conduct the foreign affairs of the United States and the international confusion that would result. The need for congressional cooperation with the Executive with respect to both implementing legislation of treaties and international agreements and to Presidential programs in general should inhibit the President's exercise of the treaty-terminating power without prior consultation or the advice and consent of the Senate.

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