CARTER'S CONSTITUTIONAL CONUNDRUM: AN EXAMINATION OF THE PRESIDENT'S UNILATERAL TERMINATION OF A TREATY

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Although the U.S. Constitution defines the procedure for the Executive to enter into treaties with the advice and consent of the Senate, it says nothing about how such obligations may be terminated. This open constitutional question, a true conundrum, was directly raised by the Carter Administration's unilateral termination of the United States' Mutual Defense Treaty with Taiwan, upon normalization of relations with the People's Republic of China. Alan M. Wachman explores the constitutional origins of this problem and analyzes the development of the legislative and legal approaches to resolving it which, he contends, have raised as many questions as they have answered about this important issue in the separation of American foreign policy powers.

INTRODUCTION

On December 15, 1978, President Carter stunned the nation with his announcement that the United States and the People's Republic of China (PRC) had reached an agreement to normalize diplomatic relations. As part of the agreement, the President resolved that on January 1, 1979, the U.S. would notify the Republic of China (ROC) on Taiwan that diplomatic relations would be terminated and that the Mutual Defense Treaty between the United States and the Republic of China would be terminated in accordance with the provisions of the Treaty.[1]

Three decades of official American enmity towards the communist regime governing the Chinese living in mainland China ended with the announcement. Apart from multitudinous political ramifications, waves of which will continue to toss us about for some time, President Carter's actions were historic for other than obvious reasons.

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1. Statement reprinted in 18 I.L.M. 273 (1979).

In unilaterally deciding to terminate the Mutual Defense Treaty (MDT) with Taiwan, Carter committed what some believe was an unconstitutional act, attempting to extend the President's authority beyond legal limits. The investigation of the process of terminating treaties which ensued was the most thoroughgoing Congressional, legal, and scholarly examination of that issue on record.

The crux of the controversy was whether President Carter violated the Constitution by neglecting to consult the United States Senate prior to declaring the intentions of the United States to terminate the MDT with Taiwan. The power to make treaties is precisely defined by the Constitution in Article II, section 2, which states that the President:

> shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur.[2]

Nothing in the Constitution speaks explicitly about the legal process needed to terminate treaties. This silence has led to great speculation, none of it consclusive, about what are and what are not the legal means by which the United States may terminate a treaty.

The conflict over the Constitution triggered by the abrogation of the MDT with Taiwan was not of such grave import that the pillars of the U.S. federation trembled as they did during the Nixon tragedies of the early 1970s. In fact, the legal controversy was clearly ancillary to the normalization of Sino-American relations which many of Carter's constitutional adversaries reluctantly supported.

The issue is not, however, one which may be readily dismissed as trivial. It would be easy, but not justifiable, to assume that there was no serious constitutional question raised; that the issue was essentially a partisan controversy in which conservative forces in the Senate opposed to normalization of U.S. relations with the communist Chinese at Taiwan's expense chose the Constitution as a battlefield of last resort. Regardless of the motives of Carter's critics, the issue they raised is a legitimate constitutional puzzle.

II. Constitutional Silence

One may read into the Constitution an implied parallelism in allocation of authority such that the powers that make a treaty (the President by and with the consent of the Senate) must participate in breaking it. John Jay expressed this view in a general sense, stating that "they who make laws, may, without doubt, amend or repeal them; and it will not be

2. U.S. Const., art. II, sec. 2.

disputed that they who make treaties may alter or cancel them."[3] However, no such authority is expressly stated in the Constitution. The "they" Jay writes of refers to the contracting parties; that is, the Republic of China as one party and the United States, not just the President, as the other.

Jay's understanding of what was written in the Constitution is no substitute for a clear statement in the document itself. To posit authority where it so glaringly does not appear would be tampering with a fragile balance of power that, once disturbed, might not easily be regained. The resilient fabric of the Constitution has withstood the trials of time, the challenges of self-serving ingenuity, and other assaults which the authors of the document could not have envisioned. The characteristics which may explain the enduring vitality of the document are that it is neither wholly inflexible nor entirely flexible. Rather, there are strands of great uncompromising fortitude and other fibers consciously designed with tremendous laxity. The weave of law and social order created by these threads may not be altered by usurpations of authority or by unjustified assumptions about what was really meant.

Although one is inclined to be frustrated by the absence of a constitutional directive on the powers needed for treaty termination, the omission by the authors of the Constitution may have been deliberate. Abraham Baldwin, a representative from Georgia at the Constitutional Convention in Philadelphia and later a congressman from that state, spoke on this topic on March 14, 1796. His remarks were recorded in the stilted third person style of the Annals of Congress:

> He would begin . . . by the assertion, that those few words in the Constitution on this subject (of treaty making powers vested in the President and Senate, and that treaties are to be the supreme law of the land) were not those apt, precise definite expressions which irresistably brought upon them the meaning which he had been . . . considering. He said it was not to disparage the instrument, to say it had not definitely, and with precision, absolutely settled everything on which it had spoke. He had sufficient evidence to satisfy his own mind that it was not supposed by the makers of it at that time, but that some subjects were left a little ambiguous and uncertain . . . : the few that were left a little unsettled might, without any great risk, be settled by practice or by amendments in the progress of the government. He believed this subject of the rival powers of legislation and treaty was one of them.[4]

3. *The Federalist,* Benjamin Fletcher Wright, ed. (Cambridge: Belknap Press of Harvard University Press, 1961), no. 64 (J. Jay).
4. Max Farrand, ed. *The Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1911), vol. 3, pp. 369-70.

Clearly to maintain the balance struck by the authors, arbitrary tamperings cannot be tolerated. Baldwin's recognition that codification is not always possible or practicable should encourage contemporary analysts to shun dogma and seek compromises consistent with the texture of the document as it stands. A contemporary scholar of U.S. Constitutional and international law notes that:

> There are many gray areas in the Constitution, areas in which general grants of authority to the Executive and to the Congress may overlap, and areas in which neither political organ has clear authority. To assert an exclusive authority in one branch or the other, and to structure the confrontation in such a way that the other branch must yield its portion of the gray areas or marshal its own confrontational forces, is to force the defending branch into a choice that is rarely conducive to wise policy. Moreover, it undercuts the sort of cooperation based on persuasiveness that our system of checks and balances requires.[5]

The constitutional puzzle is easily described. The Constitution defines how the United States must make treaties, but does not explain how to terminate those that have been made. Lawmakers are free to decide how to terminate treaties and to amend the Constitution. In the absence of such an amendment, two camps have formed; one to defend the presumed rights of the Senate to participate with the President in treaty termination as it does in treaty formation, the other to assert that authority for the President to act independently of the Senate in terminating treaties is implied in the Constitution. Emotional and political factors during the period of normalization of relations with the PRC charged the atmosphere in Washington, elevating this conflict of interpretation to a confrontation of ideology.

III. Origins of the Treaty Making Powers

The rationale for a joint legislative-executive treaty-making power is well worth considering as a basis for understanding the vehement reaction to the President's unilateral act. Alexander Hamilton believed the Constitution's provision for shared treaty-making power was "one of the best digested and most unexceptionable parts of the Plan."[6] Indeed, the authors of the Constitution were well aware of the consequences of international commitment and sought safeguards to prevent the haphazard engagement

5. Alfred P. Rubin, "Constitutional Confusion: Treaty Denunciation," *Fletcher Forum* 4 (Winter 1980): 89.

6. *The Federalist*. no. 75 (A. Hamilton).

of the United States in such compacts.[7] Louis Henkin commented that "they were not eager for the U.S. to conclude treaties lightly or widely, and were disposed to render it difficult to make them."[8] This may overstate the issue.

As a reaction to the power of the British monarch to conclude treaties unilaterally at will, the Articles of Confederation provided for a radically populist process whereby the elected representatives of the people, rather than an individual, would have the authority to commit the nation to international agreements. Fears surfaced again and again that the President's power to commit the entire union to a treaty might damage economic interests of certain regions. Other delegates were more concerned about the possibility that the Senate would be an unreliable depository for the vast power of committing the Union to treaty. Representatives to the convention were uneasy with the concept of a federal government and uncertain whether to trust the welfare of their region to the representatives of another.

It is interesting to note that the treaty-making power was initially placed in the hands of the legislature alone. The decision to share the responsibility for the authority was not designed as a concession of power to the legislature, as one might imagine from contemporary conduct in treaty enactment; rather, the concession was to the executive branch.

In the Virginia Plan (Randolph Resolutions, as amended by Benjamin Franklin on May 31, 1787) "The National Legislature" had the power "to negative all laws passed by the several states or any treaties subsisting under the authority of the Union."[9] The Pinckney Plan (the date and origin of which are subject to doubt) includes a phrase which reads, "The Senate shall have the sole and exclusive power to declare War and to make treaties and to appoint Ambassadors and Ministers to Foreign Nations . . ."[10] Hamilton urged Federalism on his colleagues and proposed a plan on June 18, 1787 in which the "supreme Executive" would "have with the advice and approbation of the Senate the power of making all treaties" and the Senate would "have the sole power of declaring war, the power of advising and approving all Treaties . . ."[11]

7. They had recently experienced the extent to which a nation could unwittingly be manipulated by international agreements. During the American Revolutionary War, the colonies' agreements with France nearly cost the colonists their independence. The French were eager to manipulate colonists' concerns to suit their own interests in preserving a European balance and to use alliance with the colonies as a counterforce to the British.
8. Louis Henkin, *Foreign Affairs and the Constitution* (Mineola, N.Y.: Foundation Press, 1972), p. 129.
9. Farrand, *Records of the Federal Convention,* vol. 4, p. 593.
10. Ibid., p. 595.
11. Ibid., p. 599.

The authors of the Constitution sought to balance regional interests within the Senate by giving to a representative of all the states, the President, a role in the treaty-making process. Another issue which supported the move away from the system as it existed under the Articles of Confederation was the question of states' obedience. That is, the drafters of the Constitution were concerned because "Congress had been given the power to make treaties, but this power could not be properly exercised; and our commissioners . . . could not negotiate with assurance or make equitable treaties as long as the states, feeling they were quite as wise as Congress, were ready to disregard all foreign obligations when they chose."[12]

The enforcement of federalism was, apparently, a great hurdle. Ultimately, on September 7, the Convention approved the procedure involving both the Senate and the President. This joint possession of authority was meant to assuage the fears of all factions. The joint executive-legislative mechanism was a novel solution. Hamilton wrote:

> certain it is, that the people may, with much propriety, commit the power to a distinct body from the legislature, the executive, or the judicial.[13]

Hamilton was quite clearly thinking of a fourth branch of the federal government which would oversee the process of committing the United States to other nations in international agreements. He argued that placing the treaty-making power in the hands of one branch or the other was arbitrary because treaty making does not fall strictly into the domain of either the legislature or executive branch. He wrote:

> The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of society, while the execution of the laws, and the employment of common defense, seem to comprise all the functions of the executive magistrate. The power of making treaties is, plainly, neither the one nor the other. It relates neither to the execution of the subsisting laws, nor to the enaction of new ones; and still less to an exertion of the common strength. Its objects are CONTRACTS with foreign nations which have the force of law, but derive from the obligations of good faith. They are not rules prescribed by a sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems

12. Andrew Cunningham McLaughlin, *The Confederation and the Constitution* 1783-1789 (New York: Harper and Row Publishers, 1905), p. 174.
13. *The Federalist*, pp. 223-224 (A. Hamilton).

> therefore, to form a distinct department and to belong, properly, neither to the legislative nor to the executive.[14]

The inspirations for Hamilton's proposal for a distinct department, according to Henkin, may have been Locke and Vattel.

> Locke spoke of a 'federative' power as distinct from the executive power but saw them as belonging in the same hands . . . Vattel however, noted that some rulers are obliged to take the advice of a senate or of the representatives of the nation.[15]

The agreement to empower this "fourth branch" was not easily reached but the rationale, once agreed to, bears the mark of deliberation and reason. The designation of the Senate, rather than the House, to be bound with the President in making treaties was intended to forge a strong pillar of stability in the conduct of our international affairs. Jay wrote:

> Nor has the convention discovered less prudence in providing for the frequent election of Senators in such a way as to obviate the inconvenience of periodically transfering those great affairs entirely to new men: for by leaving a considerable residue of the old ones in place, uniformity and order, as well as a constant succession of official information, will be preserved . . . The power of making treaties is an important one, especially as it relates to war, peace, and commerce; and it should not be delegated but in such a mode and with such precautions, as will afford the highest security that it will be exercised by men the best qualified for the purpose, and in the manner most conducive to the public good.[16]

Jay wrote that it ought to be the Senate and not the "popular assembly" which shared the treaty-making power because the House would be:

> . . . composed of members constantly coming and going in quick succession and that such a body must necessarily be inadequate to the attainment of those great objectives which require to be steadily contemplated in all their relations and circumstances . . .
>
> It was wise, therefore, in the convention to provide not only that the power of making treaties should be committed to able

14. Ibid., p. 476.
15. Henkin, *Foreign Affairs and the Constitution*, p. 297, no. 10.
16. *The Federalist*, no. 64, p. 422 (J. Jay).

> and honest men, but also that they should continue in place a sufficient time to become perfectly acquainted with our national concerns.[17]

IV. The History and Relevant Provisions of the MDT

At the end of the Korean War, the United States concluded a number of Mutual Defense Treaties with nations in East Asia. In 1954, the United States and the Republic of China entered into a MDT in which each party agreed to respond to an attack against the other by acting "to meet the common danger in accordance with its constitutional process."[18] This was not a "self-executing" treaty whereby specific action was mandated.[19] As to the life of the agreement, 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.[20]

The PRC made it clear that normalization of relations with the United States could not occur until the MDT with Taiwan was terminated. Reluctance to accept this condition kept the United States from normalizing relations earlier than 1978. In May of that year, National Security Adviser Zbigniew Brzezinski travelled to China, heightening concern among Senate conservatives opposed to the "abandonment" of Taiwan that Carter was considering abrogating the MDT.

Speculation that the Carter Administration might circumvent the sticky issue of requesting Senatorial consent to terminate the MDT with Taiwan emerged publicly on the Op-Ed page of the *New York Times*. On May 21, 1978, a letter by Professor Jerome Cohen of the Harvard Law School (a specialist in Chinese law) was published in which he articulated the theory of "abrogation by de-recognition." Cohen suggested that, once the United States recognized the PRC and, thus, de-recognized the ROC, there would be no need for a formal vote on whether to terminate the MDT. The treaty would lapse as a consequence of the United States recognizing that the PRC, not the ROC, was the government of China. The government of the PRC would succeed to the treaty as the recognized government of China and would itself decide to abrogate it. No function

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17. Ibid.
18. U.S. Congress, Senate. *Senate Treaty Termination, Hearings before the Committee on Foreign Relations on S. Res. 15.* 96th Cong., 1st Sess., (1979), p. 570.
19. Congressional Digest Corporation, "The Question of Presidential Power to Terminate Treaties: Pro and Con," *The Congressional Digest*, (June-July 1979), p. 161.
20. *Treaty Termination Hearings*, p. 570.

would be served by maintaining treaty relations with the United States to protect Taiwan from an invasion that only the PRC government would have an interest in staging.[21]

On June 1, 1978, Senator Barry Goldwater replied to the contention in Cohen's letter that the treaty would lapse, so Senate approval was unnecessary for its termination. In his reply Goldwater stated that Cohen's suggestion was legally unfounded and had no historical precedent.[22] Cohen countered with another letter on June 8, reiterating his earlier points.[23]

On July 25, the Senate was considering the International Security Assistance Act of 1978 which had, as its primary focus, the lifting of an arms embargo on Turkey. Senator Robert Dole introduced an amendment (The Dole/Stone Amendment) concerning the MDT with Taiwan. His proposed amendment read:

> The Senate finds that —
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> (1) the continued security and stability of East Asia is a matter of major strategic interest to the United States;
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> (2) the United States and the Republic of China have for a period of twenty-four years been linked together by the Mutual Defense Treaty of 1954;
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> (3) the Republic of China has during that twenty-four year period faithfully and continually carried out its duties and obligations under that treaty;
>
> (4) the United States-Republic of China Mutual Defense Treaty is integral to the broader North Asian Security arrangements between the United States, the Republic of Korea and Japan; and
>
> (5) it is the responsibility of the Senate to give its advice and consent to treaties entered into by the United States;
>
> (6) it is the sense of the Senate that any proposed policy changes affecting the continuation in force of the United States-Republic of China Mutual Defense Treaty shall be a matter for prior consultation with the Senate.[24]

The amendment, particularly section 5, was "designed specifically to correct any misconception that the treaty would automatically 'lapse' if

21. *New York Times*, May 21, 1978, IV, p. 21.
22. Ibid., June 1, 1978, p. 20.
23. Ibid., June 8, 1978, p. 14.
24. U.S. Congress, Senate, 95th Cong., 2d. sess., 25 July 1978, *Congressional Record*, 124:17, p. 22558.

the administration recognizes the Peking government and to ensure that the Senate will be given an advisory role if the President should decide to abrogate the treaty by a unilateral initiative."[25]

In support of his amendment, Dole outlined the scenario proposed by some in the Carter Administration whereby recognition of the PRC contemporaneous with de-recognition of the ROC would effectively abrogate the MDT with Taiwan, "A simple scenario — no mess, no fuss, no hand wringing about legal complications."[26] He then rightfully noted the legal complications which would be engendered, analyzing the significance of Article X of the MDT:

> 'This treaty shall remain in force indefinitely. Either party may terminate it one year after notice has been given to the other party.' There is no way the U.S. Government can legally or morally circumvent that provision. Significantly, no President of the United States has ever unilaterally abrogated a treaty with any foreign government in violation of the provisions of that treaty.[27]

Senator Goldwater rose in support of the proposed amendment. In comments echoing Abraham Baldwin's suggestion that ambiguous elements in the Constitution related to treaties be "settled by practice," Goldwater remarked that the dominant practice in the United States has been to seek Congressional (Senatorial) consent prior to terminating a treaty. He cited several exceptional treaties terminated without Senate consent. He outlined the circumstances under which such an exception might be made:

> One of these is the outbreak of war, where changed conditions not of our own action make it impossible to perform a treaty. Another exception is where the other party has already committed a serious breach of the treaty. And a third situation is where Congress enacts a law, or the Senate ratifies a treaty which the President interprets as having superseded an earlier treaty. None of these narrow exceptions, which are far outnumbered by the instances where Congressional approval was required, apply to the situation of Taiwan.[28]

The Dole/Stone Amendment (which was modified by a proposal submitted by Senator Kennedy) passed 94-0 and went to the House where the word

25. Ibid., p. 22559 (remarks of Sen. Dole).
26. Ibid.
27. Ibid.
28. Ibid., p. 22561 (remarks of Sen. Goldwater).

"Senate" was replaced by "Congress."[29] The bill which President Carter signed into law on September 26, 1978 stated, in part, that it was the:

> sense of Congress that there should be prior consultations between the Congress and the executive branch on any proposed policy changes affecting the continuation in force of the Mutual Defense Treaty of 1954.[30]

On October 10, 1978, five days before the 95th Congress adjourned, Senator Goldwater and twenty-five co-sponsors introduced Concurrent Resolution 109 which sought to prohibit the President from taking unilateral action to abrogate mutual defense or security treaties without Senate consent. The relevant section states:

> That in accordance with the separation of powers under the Constitution, 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 including mutual defense treaties, without the advice and consent of the Senate, which was involved in their initial ratification, or approval of both Houses of Congress.[31]

The bill was referred jointly to the Committee on Foreign Relations and the Judiciary Committee and was not reported out before the end of the

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29. Before the Dole/Stone amendment was voted on, Senators Glenn and Kennedy offered a substitute for the text Dole had proposed, claiming to be concerned with a matter unrelated to the termination power, per se. The language of the substitute and the original were almost identical, but the substitute excluded one paragraph of the Dole/Stone text that linked the MDT with Taiwan to the security of East Asia.

    In pressing for support, Senator Kennedy entered into the *Congressional Record* a letter from Secretary of State Vance to Senator John Sparkman, Chairman of the Committee on Foreign Relations. In the letter, dated July 25, 1978, Vance expressed the State Department's views that:

    > If an amendment is deemed necessary, we would strongly favor the one offered by Senators Byrd, Kennedy, Cranston, Church, and Glenn. We take this position for several reasons. Three Administrations have been committed to the effort to improve our relationship with the P.R.C. while maintaining the many mutually beneficial relationships which link us to the people of Taiwan. This Administration, like its two predecessors, believes that it is important for the maintenance of a stable balance of power and the preservation of world peace that we move to the normal state-to-state relationship with the P.R.C., but only in ways which do not endanger the well-being of the 17 million people on Taiwan . . . This Administration has consulted and will continue to consult with Congress on developments affecting our security commitments to the R.O.C. as well as Korea and Japan.

    See U.S. Congress, Senate, *Congressional Record,* 95th Cong., 2d sess., 124:17, 25 July 1978, p. 22572.

30. Pub. L. 95-384, 92 Stat. 746 (1978).

31. *Treaty Termination Hearings,* p. 559.

session on October 15. Two months later, the President announced U.S. recognition of the PRC and the termination of the MDT on January 1, 1980, after the requisite one year's advance notice. The negotiations leading up to the recognition had been conducted in great secrecy and no formal consultation of the Senate prior to the announcement was sought.

V. Attempt at Redress: The Court Challenge

Reactions to President Carter's announcement were swift and varied. Senators challenged Carter's authority to abrogate a treaty unilaterally on two fronts, litigative and legislative. While the former resulted in a Supreme Court decision, the Court did not resolve the Constitutional issue. The legislative approach has also not yet yielded a solution to this matter.

On December 22, 1978, one week after President Carter's televised announcement of normalization, Senator Goldwater, in concert with fourteen other Senators and Congressmen, filed suit in the U.S. District Court for the District of Columbia against the President and the Secretary of State. The Goldwater suit sought to:

> (1) Declare that the Defense Treaty with the Republic of China is still in full force and effect;
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> (2) Declare that the notification by the President that has been made publicly or otherwise which has the effect of causing the termination of the Defense Treaty is unconstitutional, illegal, null and void, and that the President cannot unilaterally terminate any law;
>
> (3) Enjoin the defendants from taking any further action or making any statements which will have the effect of terminating, or creating any expectations that the Defense Treaty has been or will be terminated;
>
> (4) Declare that any decision by the United States to terminate that Defense Treaty cannot be made by the President alone since he is not the party to that treaty as specified under Article X of that treaty;
>
> (5) Declare that any decision of the United States to terminate the Defense Treaty must be made by and with the full consultation of the entire Congress, and with the advice and consent of the Senate, or with the approval of both Houses of Congress;
>
> (6) Declare that the defendants have violated Public Law 95-

> 384 [the Dole-Stone Amendment] by failing to consult with the Congress on the termination of the Defense Treaty.[32]

Goldwater based his complaint on several constitutional provisions. He pointed to Article VI which states that treaties are to be considered as the "Supreme Law of the Land" and Article II, section 3 which requires the President to "take care that the laws be faithfully executed." The implication is twofold: first, a President cannot unilaterally repeal a law. It requires Congressional concurrence to undo what the two branches enacted together. As a "Supreme Law of the Land," a treaty may not be unilaterally terminated by a President; that would amount to a repeal by one partner of a law which was made by both. Second, in that the President is charged to "take care that the laws be faithfully executed" he may not abrogate the treaty unilaterally by virtue of Article X of the treaty itself. Article X, in asserting that the treaty is to remain in effect indefinitely, also provides that "Either Party may terminate it one year after notice has been given to the other Party."[33] The key is the word "party." Senator Goldwater emphasized that the President is not a party to the treaty, the United States is. His court brief stated:

> There is no evidence in the negotiations leading to the signing of the Defense Treaty, in the official documents and papers relating thereto which were transmitted to the Senate by the President, or in any of the proceedings of the Senate during its consideration of the resolution of ratification to show that the term "party" in Article X of the Defense Treaty means the President acting alone.[34]

He bolstered this argument by referring to Article 2 of the Vienna Convention on the Law of Treaties which "defines the term 'party' as a 'state which has consented to be bound by the treaty and for which the treaty is in force' and not the President thereof."[35]

Senator Goldwater's reasoning was founded on the simple logic of constitutional parallelism. He argues that because Article II, section 2, clause 2 of the Constitution mandates that the Senate be a partner in the treaty-making process, "as a logical and natural consequence, the Senate is a part of the authority who possesses the power of deciding upon the

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32. Ibid., pp. 564-565.
33. Mutual Defense Treaty, December 2, 1954, U.S.-Rep. of China, art. X, 6 U.S.T. 435, 437, T.I.A.S. No. 3178.
34. *Treaty Termination Hearings*, p. 557.
35. Ibid., p. 558.

termination of the treaty."[36] Those who expound this view may be wrong for discrete technical reasons, but not logical ones. Their reasoning is based on simple symmetry of functions; that the President needs Senate consent to terminate treaties which he needed their consent to ratify. While this construction does seem to be the most reasonable, considering the structure of our constitutional balance of powers, it is not explicitly included in the Constitution.[37]

Goldwater's brief included an extensive study of how treaties have been terminated by the United States in the past. Throughout the debates and discussions of the abrogation issue, advocates of both camps have tried to draw conclusive support from the evidence of past practice.

In February 1979, the State Department Bulletin[38] cited the opinion of legal scholars in support of the view that the President did have the power to act independently of the Senate. The article also listed as historic precedents treaties which were presumably terminated by a President acting alone. The Bulletin did not refer to legal scholars whose views differed from those of the administration nor did it indicate that, among the treaties which it claimed were terminated unilaterally by Presidents, several were officially terminated by the President only after some significant change of circumstances (such as an outbreak of war between the two parties) which had already been recognized by the Congress.

The Carter brief stated: "The State Department has identified 25 instances of treaty termination action taken by the President. In 12 of those instances, the President acted without the authorization, direction, or ratification of either the Senate or both Houses of Congress."[39] If this is so, it means that in the majority of instances the President had Congressional authorization.

A review of contradicting comments about the historic record by lawyers, legislators, and scholars indicates that no single process for terminating

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36. Ibid., p. 556.

37. Professor Alfred P. Rubin of the Fletcher School of Law and Diplomacy wrote that, "breaking treaties, builds nothing; it restores the legal situation to the status quo ante . . . (t)here is no significant change in legal relations other than to abolish special rights and avoid special obligations built on the lasting substructure of international law . . . denouncing (treaties) . . . cannot go farther than to restore our legal relations to what they would have been had there never been a treaty." "Constitutional Confusion: Treaty Denunciation," *Fletcher Forum* 4 (Winter 1980): 89, 92.

    From a solely legal perspective, these views are acceptable. But, there is more at stake than solely legal relations. While legal relations may be restored to the status quo ante, the effects on our interaction with other nations may be dramatically transformed by abrogating a treaty. Goldwater's concern was not only the results of the termination per se, but the process by which that change was effected; who had the authority to cause the reversion to the status quo ante?

38. U.S. Department of State, *Bulletin of the Department of State*, 79, no. 3 (February 1979).

39. *Treaty Termination Hearings*, p. 132.

treaties has been established. Further, advocates of polarized views provide different interpretations of the same examples. However all the disputants in this debate:

> (1) All concur that the first treaties terminated by the nascent United States were the Treaties of 1778 with France. These treaties, all agree, were terminated by an act of Congress on July 7, 1798.
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> (2) All concur that the last treaty terminated by the United States to date was the MDT with Taiwan. This treaty was terminated by the President without the consent of the Senate or Congress.
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> (3) All concur that, of the remaining precedents, no one method for termination was used. In fact, a number of practices are evidenced by the historic record. Treaties have been terminated by an act of Congress, a Joint Resolution, a Senate Resolution, supersedence by subsequent legislation, a new treaty, and by independent action of the President.
>
> (4) All concur that there are disagreements about which treaties were terminated by one or another of these processes.

None of this aids the resolution of the constitutional conflict. Even if all parties were to agree about all the examples of past practice, it would scarcely illuminate the constitutional issue. Regardless of how our predecessors dealt with this dilemma, we must realize that they, too, were groping. In deciding a constitutional issue there is no legal value in citing precedents in the absence of a constitutional foundation. What is noteworthy is that there has been no consistency to past practice. It is also of interest that the Carter Administration did not contest Senator Goldwater's claim that Carter's action was the first example of a President unilaterally terminating a defense treaty with a friendly government.

The consequence of Carter's actions which most alarmed Goldwater was the perception that the Senators had been deprived "of their substantial constitutional and statutory rights to be consulted."[40] Moreover:

> If left unchallenged, the unilateral action by defendant Carter will set a dangerous precedent which will enable him to abrogate or terminate any defense treaty at will, such as the North Atlantic Treaty Alliance (NATO), those with Japan or South Korea, or any other treaty that the United States may be a party to, or may in the future be a party to with any other

40. Ibid., p. 556.

> foreign nation, such as those in the Middle East. Such unchecked concentration of power in one person is totally inimical to our democratic form of government.[41]

The significance of this final point is well worth considering. Congress can incapacitate a President when he attempts to circumvent their approval by, for example, concluding an arrangement with a foreign nation through an executive agreement. Congress holds the pursestrings. But, if a President is permitted to terminate an agreement without Congressional approval, the only weapon in the Congressional arsenal is impeachment. The Congress cannot force the President to enter a treaty. Even with a Joint Resolution or by overriding a Presidential veto, Congress cannot force the President to implement relations (other than to declare war) with another nation. Though individuals in Congress may be tempted to employ their ultimate weapon — impeachment — it would certainly benefit the stability of our government, to say nothing of relations with other goverments, if there were less destructive weapons in the Congressional arsenal.

The Justice Department's brief, prepared in defense of President Carter and Secretary Vance, reflected two major strategies. The first strategy was to persuade the court that it lacked jurisdiction over the dispute between the President and the Congress, calling into play the "political question" doctrine.[42] The brief then argued that the President had the power to abrogate unilaterally the MDT.

The Carter brief asks the court to dismiss the complaint because the circumstances at the time, as in *Baker v. Carr*, called for "an unusual need for the unquestioning adherence to a political decision already made"[43] and, later, the need to avoid "embarrassment from multifarious pronouncements by various departments on one question."[44]

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41. Ibid.
42. The "political question" doctrine is articulated in the Supreme Court decision in Baker v. Carr, 369 U.S. 186 (1962). The court wrote:
    > It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of separate powers. Prominent on the surface of any case held to involve a political question is found 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 non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing a 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. U.S. at 217.
43. *Treaty Termination Hearings*, pp. 101-02.
44. Ibid., p. 110.

This approach would favor that party which speaks first, not that which speaks with legal authority. It also attempted to put the President beyond court rebuke even though it was the President's precipitous announcement which put the United States in a position where a contrary pronouncement would have been embarrassing. Finally, it is exactly this kind of embarrassment which consultation between the branches would likely have avoided. The President, then, was pleading for a show of unity after it was he who scrambled to a position he knew would be controversial.

A careful reading of the Carter court brief reveals that his attorneys were not vigorously pressing forward a legal basis for the President's unilateral termination of the MDT. By relying on *Baker v. Carr* and the "political question" doctrine, the Justice Department attorneys circumvented the constitutional issue and, in a sense, lent credence to the argument espoused by Senator Goldwater that there is no constitutionally-mandated authority granted the President to unilaterally terminate a treaty without Senatorial consent.

In asserting the President's power to terminate treaties unilaterally, the Carter brief cites a phrase in *United States v. Curtiss-Wright Export Corp.* which identifies the President as the "sole organ of the federal government in the field of international relations."[45] This phrase, emphasized by a number of advocates of Presidential power, does not nullify the Goldwater claim.

The most persuasive explanation of why the *Curtiss-Wright* phrase does not eliminate the role of the Senate in a treaty termination was in a statement made by Professor Michael Reisman, of the Yale University Law School, during testimony before the Senate Committee on Foreign Affairs. Professor Reisman identified four steps in the termination of treaties: (1) the formulation of the policy to terminate, (2) the negotiations to affect the termination, (3) the repeal of the "supreme law of the land," and (4) the formal notification given to the other nation.[46] Consistent with *Curtiss-Wright*, the President is indisputably the sole organ of external relations with regard to our foreign affairs and the only official authorized to give notice of a U.S. decision to terminate a treaty, but the President is not necessarily the only entity with authority to decide to terminate a treaty.

The Carter brief goes on to quote the *Restatement (Second) of the Foreign Relations Law of the United States* which, though of enormous scholarly value, is not in itself law.[47] The Restatement offers the interpretation that

45. 299 U.S. 304, 320 (1936).
46. *Treaty Termination Hearings*, pp. 390-391.
47. Sec. 163 (1965).

"the President . . . has, with respect to an international agreement . . . the authority to . . . take the action necessary to accomplish . . . the termination of the agreement in accordance with provisions included in it for that purpose . . ."[48] It is not clear whether this applies to treaties, too, or only Executive Agreements.

Perhaps the most revealing trap into which the authors of the Carter brief fall is not realizing the shallowness of their own logic. The brief argues that the plaintiffs:

> cannot answer . . . by what judicially discoverable standards this court could determine what constitutes an appropriate allocation of power between the two political branches of government with respect to treaty termination.[49]

Further on they say, "It is difficult to ascertain from where in the Constitution plaintiffs derive the right . . . to control the termination of treaties."[50] But, the Carter brief does not answer this critical question either. In a sense, the Carter brief admits the lack of purely constitutional grounds for the President's action. Why is the President's "autointerpretation" of the constitutional powers granted to the two branches in this instance more persuasive, per se, than that of the Senators (which at least relies on simple parallel logic)?

As mentioned above, the President's brief quoted a number of scholarly opinions consistent with its view and listed a number of historic examples which are subject to differing interpretations. In an attempt to consolidate its position, the Carter brief states:

> with respect to the practice over the last sixty years, it is important to note that no effort has been made by Congress to impose a constitutionally based objection on the President's unilateral actions . . . indeed, the silence of the Congress in modern times is completely inconsistent with the claim now advanced by the plaintiffs.[51]

The simple explanation for this congressional silence is that in the last sixty years, no President has ever attempted to assert his power to terminate unilaterally a defense treaty with a friendly nation.

Contrary to the statement made in the brief, however, Congress has not been silent. Section 26 of the International Security Assistance Act and Concurrent Resolution 109 sponsored by Senator Goldwater were

48. Ibid.
49. Ibid., p. 111.
50. Ibid., p. 122.
51. Ibid., p. 130.

aimed at defining the President's role and that of the Senate in the process of treaty termination. Both were proposed in 1978 in response to the MDT controversy.

Initially, the District Court dismissed Goldwater's case, but "without prejudice on the ground that the plaintiffs lacked standing."[52]

> At the time of the Court's June 6 decision, at least three resolutions dealing with the treaty termination power and the notice of termination given with respect to the 1954 Mutual Defense Treaty were pending before, and apparently being actively considered by the U.S. Senate. The court was especially concerned that a premature judicial declaration might circumvent legislative action directed at either approving or rejecting the President's notice of termination.[53]

Although District Court Judge Gasch wanted to allow the Senate to play its role without interference from the court, the Senate's action on the pending legislation had no *direct* bearing on the constitutional issue. The Senate might have wholeheartedly applauded the action of the President and the validity of Goldwater's legal challenge would remain undiminished. The issue was *not* one of Senate concurrence with the President's instant decision, rather it was the process whereby a President may decide to terminate a treaty unilaterally without consulting the Senate. Theoretically, even if the President had sought and received Senate consent prior to announcing the termination by the U.S. of the MDT, his action could have been challenged on constitutional grounds.

Not only does the Constitution neglect to assign the power to terminate treaties to one or another branch, it simply does not provide a process for terminating treaties. Thus, the President has no more authority to terminate treaties with senatorial consent than he does without it. Were a President to seek and receive senatorial consent it would effectively assure that the legislative branch had participated in the decision, would have a stake in it, and would not contest the action.

On June 6, 1979, hours after the court initially dismissed the case because of the plaintiff's lack of standing, the Senate voted on a sense of the Senate resolution by Senator Harry Byrd, endorsing the principle of senatorial consent to treaty termination.[54] Although no final vote was taken on the amendment, when the plaintiffs filed a motion for alteration

52. 481 F. Supp. 950 (D.D.C. 1979).

53. 481 F. Supp. at 953.

54. The resolution 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." See 18 I.L.M. 1492 (1979).

of the June 6 dismissal, the court decided that the Senate's action on the amendment was sufficient to create a justiciable controversy.

> On October 17, 1979, the District Court granted this motion, ruling that the plaintiffs had suffered the requisite injury in fact because of the denial of their right to vote on treaty termination. The court also ruled that the case did not present a non-justiciable political question.[55]

The court commented on the varied historical practice writing:

> Taken as a whole, the historical precedents support rather than detract from the position that the power to terminate treaties is a power shared by the political branches of this government.[56]

The court also rejected the defendants' attempt to justify the President's unilateral treaty termination power as analogous to the President's capacity to dismiss executive officers who are also appointed with congressional consent.[57] The court said:

> The power to remove executive personnel cannot be compared with the power to terminate an important international treaty. The removal power is restricted in its exercise to "purely executive officers" charged with a duty unrelated to the legislative or judicial power. It concerns the President's Administrative control over his subordinates and flows from the President's obligations to see that the laws are faithfully executed.[58]

The court argued that the Senate does have a role to play vis-à-vis treaty termination. Judge Gasch wrote that it is wrong to view

> . . . the President's status as the nation's spokesman and representative in foreign affairs as the basis for exclusive power over the entire process of treaty termination. While the President may be the sole organ of communication with foreign governments, he is clearly not the sole maker of foreign policy.[59]

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55. 18 I.L.M. at 1493.
56. 481 F. Supp. at 960; See also 481 F. Supp. at 964 n. 66.
57. Article II, sec. 2, paragraph 2 also states that the President "shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the U.S."
58. 481 F. Supp. at 960. See also Myers v. United States, 272 U.S. 52 (1926); Though the court's rationale makes sense, note that it is not basing it on constitutional grounds — but is interpreting the general sense of the document instead.
59. 481 F. Supp. at 961.

Thus, by adopting a view similar to that of Professor Reisman, Judge Gasch sees the process of conducting foreign policy as multifaceted and involving different combinations of power at different stages of the process.

He continued by rejecting the most frequently proposed defense of the President's authority, the link between the third section of the Constitution's Article II and the treaty termination power. Section 3 states that the President, "shall receive ambassadors and other public ministers." This has always been interpreted to mean that the President has the exclusive authority to recognize (or de-recognize) foreign governments, a view not contested by Carter's opponents. One often-repeated justification for the President's authority to act unilaterally with regard to treaty termination is a section of Justice Douglas' opinion about the President's power to recognize in *United States v. Pink* wherein he writes:

> Power to remove such obstacles to full recognition as settlement of claims of our nationals . . . certainly is a modest implied power of the President who is the "sole organ of the Federal Government in the field of international relations" . . . Unless such a power exists, the power of recognition might be thwarted or seriously diluted.[60]

Gasch commented:

> The argument that any exclusive action becomes constitutional if it is ancillary to an act of recognition is without merit. If limitations imposed by other constitutional provisions exist, the recognition power cannot be used as a "boot strap" to support the President's unilateral action in terminating the Mutual Defense Treaty with Taiwan.[61]

Gasch accepted the plaintiff's claim that a treaty is a "Supreme Law of the Land" and, therefore, that unilateral action by the President is unjustified because he has an obligation to faithfully execute those laws. Gasch wrote that the President:

> alone cannot effect the repeal of a law of the land which was formed by joint action of the executive and legislative branches, whether that law be a statute or a treaty.[62]

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60. 315 U.S. 229, 230 (1942).
61. 481 F. Supp. at 961-62. Note that Gasch does not write *why* the defendants' supposition is without merit, just that it is. Likewise, he never fully answers the question "if limitations exist . . ."
62. 481 F. Supp. at 963.

Gasch also agreed with the Goldwater reasoning that Article X of the MDT which refers to "either party" being able to terminate the treaty means the United States, not the President alone.

Gasch concluded by indicating that either the approval of both houses of Congress or the consent of two-thirds of the Senate should be required to terminate a treaty. He did not cite any statute or constitutional provision which mandates this process. Instead, he wrote:

> When faced with an apparent gap in the constitutional allocation of powers, the court must refer to the fundamental design of the entire document and determine how its purposes would be best served in the gap area.[63]

While the soundness of Judge Gasch's rationale for Senate and/or congressional participation in the process is not disputed, it must be recognized that it rested on no legal foundation. Such persuasive and reasonable opinions by well-meaning jurists obfuscate the need for a sound legal base. We must be wary of allowing courts to issue legislation.

This point was made in the rather circuitous reasoning of the decision of the Court of Appeals. On November 30, 1979, the eight judge court commented initially that the two questions before it were:

> First, whether the District Court was without jurisdiction because appellees lacked standing and, second, whether it should in any event have declined to exercise jurisdiction by reason of the political nature of the question it was called upon to decide.[64]

But:

> Since a majority of the court does not exist to dispose of the appeal on either of these bases, we reach the merits and reverse.[65]

In reversing the District Court decision, the Appeals Court commented about the dilemma of allocating the power to terminate treaties to the branches of government. The court accepted the theory that:

> The Senate has a constitutional right to vote on the President's proposed treaty termination and to block such termination with a one-third plus one vote.[66]

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63. 481 F. Supp. at 965.
64. 18 I.L.M. at 1489.
65. Ibid.
66. Ibid., p. 1493.

It is the theory alone which the court accepted and that, primarily, to recognize the suffering of injury in fact by the Senators. In actuality, the court notes:

> there is no conceivable senatorial action that could likely prevent termination of the Treaty. A congressional resolution or statute might at most have persuasive effect with the President; it could not block termination if he persisted in his present interpretation of the Constitution giving him unilateral power to terminate.[67]

The court was disturbed by this fact and underscored its uneasiness by pointing out that action by one-third plus one of the Senate cannot "even force a resolution to the floor, let alone pass it."[68] The court further stated that even if a majority were mustered, there is nothing they can do to prevent the President from carrying out his will to terminate.

The court criticized Judge Gasch's ruling as unwarranted judicial interference, writing:

> it is not abstract logic or sterile symmetry that controls, but a sensible and realistic ascertainment of the meaning of the Constitution in the context of the specific action taken.[69]

Furthermore, regarding Judge Gasch's specific construction of the termination process:

> Certainly the Constitution is silent on the matter of treaty termination. And the fact that it speaks to the common characteristics of supremacy over state law does not provide any basis for concluding that a treaty must be unmade either by (1) the same process by which it was made, or (2) the alternative means by which a statute is made or terminated.[70]

So, although it agreed with the Goldwater assertion, the Appeals Court sternly rebuked the District Court for reading too much power into the court's own capacity to make logical extensions from one constitutional provision to an analogous provision.

> Such an extension by implication is not proper unless that implication is unmistakably clear. The District Court's absolutist

67. Ibid., p. 1494.
68. Ibid.
69. Ibid., p. 1496.
70. Ibid.

> extension of this limitation (requiring the advice and consent of the Senate) to termination of treaties . . . is not sound.[71]

Here the Appeals Court justly disapproved of courts legislating rather than adjudicating. The Court reiterated that it was not competent to make political decisions. In a sideswipe at the whole process initiated by Goldwater, the Court said, "History shows us that there are too many variables to lay down any hard and fast constitutional rules."[72]

With that, the court veered dangerously close to applying the political question doctrine, but returned from the brink of that morass by concluding that for a court to make a decision in foreign policy

> would create insuperable problems of evidenciary proof. This is beyond the acceptable judicial role. All we decide today is that two-thirds Senate consent or majority consent in both houses is not necessary to terminate this treaty in the circumstances before us now.[73]

Because of the specificity about the termination process in the District Court judgement, a reversal on appeal was probably warranted. It is unfortunate for advocates of senatorial consent that the court did not consider the question, "Does the President's interpretation of his Constitutional authority conform with the Constitution?"

On December 13, 1979, nearly a year after President Carter's announcement, a Supreme Court decision was handed down which thoroughly rejected the efforts of the two lower courts to deal with this unwieldy issue. The court granted *certiorari* and then vacated the Appeals Court decision and instructed that the case be remanded to the District Court and dismissed. Although the sum of the Justices' individual opinions was to vacate and dismiss the complaint by Senator Goldwater, the court was fractured in its rationale.[74] It is extremely difficult to derive from the spectrum of differing opinions any confidence that the prevailing view is a satisfactory solution to this conundrum.

Justice Powell wrote that the issue was not ripe for judicial review, "unless and until each branch has taken action asserting its constitutional authority."[75] In saying this, he ignored the relevance of the 1978 International

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71. Ibid., p. 1497.
72. Ibid., p. 1501.
73. Ibid.
74. The decision was written by Justice Powell, concurred in by Marshall; Justices Rehnquist, Burger, Stewart and Stevens concurred but with radically different reasons; Justices White and Blackmun dissented and called for oral arguments; and Justice Brennan dissented favoring an affirmation of the Appeals Court decision.
75. 444 U.S. 996 (1979).

Security Assistance Act. He rejected the political question doctrine as "inconsistent with our precedents,"[76] but did say that Congress had taken no action to reject the President's claim. As explained earlier, a Congressional rejection seems irrelevant to the validity of the claim, as the issue is whether the President had the authority to do what he did, not whether the Senate has the power to stop him. In reviewing his objection to the political question doctrine, Powell suggested that he agreed with Goldwater's premise, and did not consider the issue to "lack judicially discoverable and manageable standards"[77] by which the case may be resolved.

Powell summarized, saying that if the case were ripe for review, which it was not:

> the Court would interpret the Constitution to decide whether Congressional approval is necessary to give a Presidential decision on the validity of a treaty the force of law. Such an inquiry demands no special competence or information beyond the reach of the judiciary.[78]

In rejecting the case for unripeness, Powell offered only one remedy. The only course the Senate had left was to pass a law prohibiting the President from doing what he had done (which would probably necessitate overriding a Presidential veto) and then wait for a President to violate the law. That is an awful extreme towards which to push the government.

Rehnquist, Burger, Stewart and Stevens advanced the "nonjusticiable political question" doctrine. They, too, sought to dismiss the case. However, they rejected the Court's role in making a decision in a controversy between the other branches of government in a question that "involves the authority of the President in the conduct of our country's foreign relations."[79]

This opinion expressed a view which unfortunately was an abdication of the judiciary's responsibility. The issue at hand was not whether President Carter might terminate the MDT — a political question — but whether he could terminate it according to the process he sought to employ — a procedural question. By construing the question as political, rather than procedural, the four justices did no service to the other two branches in whose affairs the justices did not wish to meddle. The question remains a constitutional land mine, triggered to explode when the conflict next arises.

Prudently, Justices Blackmun and White dissented, writing that they could not determine the justiciability of the case without further study.

76. 444 U.S. at 997-1002 (Powell, J., concurring).
77. Baker v. Carr, 369 U.S. at 217.
78. 444 U.S. at 997-1002.
79. 444 U.S. at 1002 (Rehnquist, J., concurring).

Lonely Justice Brennan rejected the political question doctrine, and thus agreed in part with Powell and Marshall. But he viewed the case in its narrowest sense and affirmed the Appeals Court decision to reject Judge Gasch's ruling because the construction which Gasch proposed was his own, not the Constitution's. The court's intriguing lack of agreement about this issue can be taken to indicate the volatility of this matter. There is some wisdom in the court's unwillingness to codify what is the appropriate process needed to terminate a treaty. Flexibility is generally better than rigid codification provided both parties view the available options responsibly. Besides, the absence of constitutional directives on this issue would require the court to legislate; an activity for which they are not legally competent. What emerges from this frustrating venture in the courts is the notion that consultation between the branches as the basis for terminating a treaty would, at least, avoid legal controversy.

VI. Attempt at Redress: The Legislative Challenge

Between December 15, 1978, and the announcement of the Supreme Court decision on December 13, 1979, efforts to delimit the powers of the President to terminate treaties were initiated by the Senate. Senate Resolution 15 was introduced by Harry F. Byrd on the opening day of the new session of Congress, January 15, 1979. The bill, co-sponsored by Senators Thurmond, Warner, Helms, Hayakawa, Garn, and Proxmire resolved

> that it is the sense of the Senate that approval of the U.S. Senate is required to terminate any mutual defense treaty between the U.S. and another nation.[80]

Senator Goldwater introduced his own legislation, Senate Concurrent Resolution 2, with twenty-one co-sponsors. His proposal, much more detailed, was:

> Resolved, by the Senate (the House of Representatives concurring), that, in accordance with the separation of powers under the Constitution, the President should not unilaterally abrogate, denounce, or otherwise terminate, give notice of intention to terminate, alter, or suspend any of the Security treaties comprising the post World War II complex of treaties, including mutual defense treaties, without the advice and consent of the Senate, which was involved in their initial ratification, or the approval of both Houses of Congress.[81]

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80. *Congressional Digest*, p. 164.
81. Ibid.

In addition, on January 26, 1979, the President sent to Congress the "Taiwan Relations Act" (S. 245) which was:

> A Bill to promote the foreign policy of the United States through the maintenance of commercial, cultural, and other relations with the people on Taiwan on an unofficial basis, and for other purposes.[82]

The Senate Committee on Foreign Relations conducted hearings for five days during February on the Taiwan Relations Act. The bill, which was eventually modified and approved, re-established through legislation almost every strand of the relationship the United States had had with Taiwan prior to recognition of the PRC. The major changes in our relations were military (the U.S. no longer stations troops on Taiwan and somewhat restricts Taiwan's access to sophisticated weaponry) and official (rather than an embassy with an ambassador and staff, we are represented by a "non-governmental, private" organization, the American Institute in Taiwan, a director, and staff; the personnel are State Department officials "separated" from the government). This legislation, while not directly bearing on the question of treaty termination, may have had a significant effect on the legislative history of the other bills which did directly address the constitutional issue.

On April 9, 10, and 11, 1979, the Committee on Foreign Relations held hearings on S. 15. The resolution was drastically rewritten and reported out of Committee on May 1, with a written report (96-119) favoring its adoption. The bill never came to a vote.

Senator Goldwater has reintroduced similar legislation in each subsequent session, but to no avail. There is good reason to assume that if the resolution was not approved during the heat of the controversy with the Carter Administration, the momentum for codification has been lost.

Elements of the committee hearing records are, however, well worth considering. The testimony addressed two basic issues. It is clear that some of the witnesses and, indeed, some of the legislators, did not perceive a demarcation between these two issues and allowed themselves to wander back and forth from one to the other. The first issue is whether the Constitution can be interpreted as mandating (or sanctioning) a specific delegation of authority for the purpose of terminating treaties. Absent a constitutional mandate, the second question is what process would most appropriately suit our form of constitutional democracy consistent with the tenets of balanced power articulated by our nation's founding statesmen?

The spectrum of beliefs and ideas expounded by the legislators, jurists,

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82. U.S. Congress, Senate, S. 245., 96th Cong., 1st Sess. (1979).

and administrators before the committee is no less valid than the spectrum of thought which initially produced the Constitution. If no treaty termination process is mandated or sanctioned by the Constitution, those who spoke to the question in 1979 are, collectively, just as qualified to resolve the matter as were our founding statesmen in 1787.

Many personalities on and before the committee displayed a disheartening shallowness of comprehension. The attempts by Carter Administration officials to justify the President's behavior often seemed contrived. In particular, Assistant Secretary of State Richard Holbrooke attempted to disarm the President's critics who claim Carter violated the 1978 International Security Assistance Act by not seeking the advice and consent of the Senate. Holbrooke said that between 1977 and 1978, State Department officials engaged in discussions about normalization with "at least 150 members of Congress" prior to the President's announcement.[83] He continued, saying:

> The issue of the mutual defense treaty with the R.O.C. was a very frequent item of discussion. Executive department officials made clear in these discussions that recognition of the P.R.C. would entail de-recognition of the R.O.C. and the termination of the Mutual Defense Treaty. These topics were discussed as problems of American foreign policy and not as points in a specific negotiation with Beijing. Nevertheless, it was clear in these discussions that views were being sought and would be taken into account in the conduct of the U.S. policy on these issues.[84]

It is disturbing that the administration hoped to mollify the Senate by claiming, through Mr. Holbrooke, that the "advice and consent" of the Congress had been sought in discussions with "at least 150 members of Congress."

Considerable time was spent discussing past practices of treaty termination and views of a constitutional mandate of authority to one branch of government or the other. Assertions by both camps that the Constitution supports their view of a mandate of authority for one branch or the other led nowhere. Evidently, the President does have the power (internationally) to terminate treaties although he may lack the authority (domestically) to use that power. If his power to act in terminating treaties did not exist, Congress would be questioning the validity of Carter's action, not its propriety.[85] Taiwan, too, would have sought clarification or international

83. *Treaty Termination Hearings,* pp. 85-86.
84. Ibid.
85. Actually, Goldwater's court challenge was phrased in terms of validity, but none of the Senators in the Committee Hearings expressed this view.

legal redress if it felt that the termination was invalid because Carter lacked the power to invoke the termination clause. The issue, then, is not one of power but authorization to use the power. The Senate may have the authority to terminate a treaty but lacks the power to give effect to its decision absent Presidential concurrence. In practice, the President's power to terminate a treaty, even if unauthorized, may prevail over the wishes of the Congress if other States view our President's capacity to make and implement foreign affairs as unimpeded and behave accordingly.

What emerges from the three days of hearings is a realization that no agreement exists about a specific mandate of power or authority to terminate treaties. This was later echoed by members of the Supreme Court. Laurence Tribe, in a comment reminiscent of one made by Abraham Baldwin in 1796, concludes:

> the very fact that the Constitution does not prescribe a mode of treaty termination suggests the framers did not think any one mode appropriate in all cases, and therefore, left the matter to be resolved in light of particular circumstances of each situation.[86]

In 1978 the President tried to act independently of the Senate, thinking himself constitutionally free of their bond. But, as Professor Abram Chayes pointed out:

> Congress has been able to devise and force the President to accept a stronger and much more public commitment to the Security of Taiwan than he seemed at first to be willing to make.[87]

Congressional action, in the form of the Taiwan Relations Act, does not entirely negate the President's unilateral termination of the MDT, but it provides Taiwan far greater security and access to "defensive" weapons than Carter was originally willing to grant. The all-but-official relations we now conduct with Taiwan and our continued sale of arms to the Nationalist government has greatly irritated the PRC and detracts from the climate of trust and friendship Carter sought to establish with China.

VII. Conclusion

This episode should, but probably will not, guide future presidents to forego arrogant assertions of constitutional authority in situations where they have the power to act but no authorization to do so. In that the

86. Laurence Tribe, "A Constitutional Red Herring: Goldwater v. Carter." *New Republic,* 180:14 (March 17, 1979), p. 16.

87. *Treaty Termination Hearings,* p. 308.

Constitution absolutely does not make mention of the power to terminate treaties, it would be judicial folly for a court to posit a constitutional decision about the matter.

Treaty termination seems to be a constitutional issue because it deals with powers that devolve from more general constitutional divisions of authority. Although the issue falls in the constitutional realm, there are no grounds for a strictly legal resolution declaring the power to be in one branch or the other. Any court decision would need to rest on a combination of precedent and the stature of the court, not the words of the Constitution. While we may ultimately decide to accept such a combination as sufficient, we would need to be aware that such a decision would be a constitutional construction of our own making, not one found in the document. For this reason, and not because of the "political question doctrine" clung to by members of the court, no definitive court decision should be expected.

Perhaps the issue is "aconstitutional" in the same way other issues are amoral. Problems may fall within the range of constitutionality but exist in gapping interstices between what is and what is not constitutional. They are questions that cannot be answered using standards derived from the Constitution itself. This is distinct from the "political question" doctrine which removes constitutional issues from the courts purview for political expediency. A court which struggles to resolve an "aconstitutional" issue may couch its views in terms of constitutionality, thus legislating, not adjudicating. According to the Constitution this is unacceptable because the process for amendment is clearly specified.

Absent a formal amendment detailing the mode by which the termination of treaties may be brought about, assertions of a constitutional method are only rationalizations. One may look to previous courts' utterances but they are as unfounded as would be a court decision today based on an assertion of a constitutionally mandated process. One may examine the writings of learned jurists and scholars but will discover only carefully concocted schemes by which the individual has justified, using logical machinations, a program that tastes constitutional but is made without constitutional ingredients. One may even highlight statements written by members of the Constitutional Convention and their contemporaries as supportive of one interpretation or another. Although their archaic terminology tends to impart an air of unshakable credibility, even they cannot, by force of their recorded interpretations, do now what they failed to do in 1787.

An unyieldingly positivist attitude would accept only what was written and agreed to as constitutional, rejecting other assertions as unconstitutional. This proposition, though analytically unassailable for its simplicity, is not a satisfactory terminus. Such rigid positivism, practical statesmanship

doth not make. We must deal, today and in the future, with many issues our forebears did not anticipate. In deciding how best to sustain our federal republic in the spirit of our Constitution, credence must be given to the weight of scholarly opinion, court decisions, and to a lesser degree, historic precedent. Our founding statesmen were, as we are, human and we are now suffering the consequences of their fallibility.

Fortunately, our system is flexible enough to permit a bit of play in the joints. We may review the thoughts of our legal and historical pundits and decide how to deal with treaty termination. We may propose and adopt laws. We may even ignore the issue and allow the situation to remain as ambiguous as it is now. We may choose any of these courses as long as we are aware that we have not resolved the question of constitutionality. Unless we amend the Constitution, any solution we devise would circumvent the Constitution because, for the time being, those concerned would tolerate the solution they created.

Later, critics may encounter a situation in which the construction designed to solve our problems does not suit their needs or their interpretation of the balance of power established in the Constitution. At that time, and in their own way, they will be free to find a solution which may be equally "aconstitutional" and, yet, more consistent with their views.

By leaving unassaulted the fabric of the Constitution, a solution is born of compromise and reason which may, in our view, seem just as defensible as any constitutionally mandated procedure. In this way, if our solution is ever abused, critics are free to condemn the abuse and reject the logic upon which the abuse is based without discarding or sacrificing the Constitution itself. It is this capacity that gives our constitutional system the great vitality it has proven to possess. Great caution should be exercised in altering the Constitution itself, for in it lies the strength of continuity and the parameters for change.