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Nancy J. Murray

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# TREATY TERMINATION BY THE PRESIDENT WITHOUT SENATE OR CONGRESSIONAL APPROVAL: THE CASE OF THE TAIWAN TREATY\*

by *Nancy J. Murray*

In an address to the American public on December 15, 1978, President Carter announced that full diplomatic relations would be established with Communist China. In normalizing relations with Peking, the President signed a joint communique that acknowledged the Communist Chinese position that there is only one China, The Peoples Republic of China, which includes Taiwan. Subsequently, the President, acting without prior consultation with Congress or, in particular, the Senate, gave notice to Taiwan that the United States intended to terminate the Mutual Defense Treaty of 1954.<sup>1</sup> Such notice was pursuant to article X of the treaty, which provided that either party could terminate the treaty following one year's notice to the other party.<sup>2</sup> On December 22, 1978, Senator Barry Goldwater, joined by eight fellow Senators,<sup>3</sup> a former Senator,<sup>4</sup> and seventeen members of the House of Representatives,<sup>5</sup> filed suit in the United States District Court for the District of Columbia against President Carter and Secretary of State Cyrus Vance.<sup>6</sup> The suit alleged that President Carter did not have constitutional authority to terminate the treaty with Taiwan without the advice and consent of the Senate or the approval of both Houses of Congress.<sup>7</sup> The issue of whether the power to terminate treaties belongs to the President alone, the President and the Senate, or the President and Congress has provoked much conflicting commentary.<sup>8</sup> No judi-

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\* On Oct. 17, 1979, after this Comment went to print, U.S. District Judge Oliver Gasch ruled that President Carter acted improperly in terminating the Mutual Defense Treaty with Taiwan without approval of two-thirds of the Senate or the approval of a majority of the full Congress. President Carter has filed an immediate appeal in the D.C. Circuit Court of Appeals.

1. Mutual Defense Treaty with the Republic of China, Dec. 2, 1954, United States-Republic of China on Taiwan, 6 U.S.T. 433, T.I.A.S. No. 3178.

2. 6 U.S.T. at 437. Article X of the treaty provides: "This Treaty shall remain in force indefinitely. Either Party may terminate it one year after notice has been given to the other Party."

3. Members of the Senate joining Senator Goldwater (R) include Senators Jake Garn (R), Orrin Hatch (R), Jesse A. Helms (R), Gordon Humphrey (R), Paul Laxalt (R), James A. McClure (R), and Strom Thurmond (R).

4. Former Senator Carl Curtis (R) joined in the action.

5. Members of the House of Representatives joining the suit include Congressmen John Ashbrook (R), Robert Bauman (R), Clair W. Burgener (R), James M. Collins (R), Robert Daniel, Jr. (R), Robert K. Dornan (R), Mickey Edwards (R), Newt Gingrich (R), George Hansen (R), Ken Kramer (R), Larry McDonald (D), J. Danforth Quayle (R), Eldon Rudd (R), John Harbin Rousselot (R), Bob Stump (D), Steve Symms (R), and Don Young (R).

6. *Goldwater v. Carter*, No. 78-2412 (D.D.C., filed Dec. 22, 1978).

7. Complaint for Declaratory and Injunctive Relief at 3.

8. Opinions of constitutional law scholars diverge. Some scholars argue that past practices of Presidents in effectively terminating treaties are conclusive evidence that the President has that power. The answer is thought to rest more heavily on precedent than on constitutional law. Note that this view is espoused by Senator Edward Kennedy as evi-

cial decision, however, has directly addressed this question. With a judicial challenge to the President's actions now pending, the issue may finally be resolved. This Comment discusses the nature of treaties, the treaty-making process, and the history of treaty-termination practices. Special emphasis is given to issues that arise in *Goldwater v. Carter*,<sup>9</sup> including who has standing to challenge the President's independent termination of a treaty and, more importantly, whether such a challenge presents a justiciable controversy.

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denced by his article *Normal Relations with China: Good Law, Good Policy*, 65 A.B.A.J. 194 (1979). Other scholars contend that the silence in the Constitution concerning the location of the treaty-termination power indicates that the President alone has the power to terminate a treaty as an international obligation, although perhaps not as binding municipal law. 1 W. WILLOUGHBY, PRINCIPLES OF THE CONSTITUTIONAL LAW OF THE UNITED STATES §§ 584-585 (2d ed. 1930). Still other scholars reason that the termination of a treaty is an exercise of power similar to that involved in the making of a treaty; therefore, since senatorial concurrence is necessary to make a treaty, similar senatorial concurrence is required to terminate that treaty. See Riesenfeld, *The Power of Congress and the President in International Relations: Three Recent Supreme Court Decisions*, 25 CALIF. L. REV. 643, 660-62 (1937); Taft, *The Boundaries between the Executive, the Legislative and the Judicial Branches of the Government*, 25 YALE L.J. 599, 610 (1916). A fourth view suggests that if the treaty provides for unilateral termination, policy considerations and special circumstances may make it necessary to obtain congressional or senatorial concurrence either before or after the President terminates the treaty. 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 461-62 (1970); see Reisman & McDougal, *Can the President Unilaterally End Treaties?*, NAT'L L.J., May 28, 1979, at 17 ("Ordinarily . . . a joint resolution would be required to terminate a treaty . . . [although] there could be constitutional justifications . . . [in light of exigent circumstances] for consultations only after the fact."). Another viewpoint, expressed by Irwin S. Rhodes, author-editor of *THE PAPERS OF JOHN MARSHALL* (1969), holds that:

Just as the power to legislate implies the power to repeal in the same manner and the power to judge implies the power to revoke or overrule in the same manner, so that same principle applies to treaties. If such be the case, as I firmly believe, the revocation of a treaty by the President without the advice and consent of the Senate is unconstitutional and notice by him of intended termination is a nullity.

125 CONG. REC. S7046 (daily ed. June 6, 1979). Professor Edward Gaffney, Jr., assistant director of the Center for Constitutional Studies at Notre Dame Law School, has a similar belief. Professor Gaffney has observed:

If the President is under the duty, in Article II, to take care, to see that the laws are faithfully executed, and if then Article VI defines law to include and to embrace treaties, then it seems to me that the normal route would be to go back to the House and Senate for a majority vote, just the normal way that you unmake an act.

125 CONG. REC. S7046 (daily ed. June 6, 1979). Professor Thomas S. Franck, director, Center for International Studies of the New York University School of Law, reasons that "treaties are the supreme law of the land, that laws and treaties, in the words of the Supreme Court in *Whitney v. Robertson* are on the same footing as laws and must be terminated as if they were laws, either by a legislative resolution or by inconsistent subsequent law." 125 CONG. REC. S7046 (daily ed. June 6, 1979). A well-known scholar, Professor Eugene V. Rostow, summed up his position by stating:

It cannot be constitutional to allow the President to abrogate treaties by a stroke of his pen. Can the President alone nullify our solemn national commitment to NATO? The President's duty is to see that treaties and statutes are "faithfully executed." He has no power to repeal them. Such a doctrine would make nonsense of the separation of powers, and indeed establish an Imperial Presidency.

125 CONG. REC. S7047 (daily ed. June 6, 1979).

9. No. 78-2412 (D.D.C., filed Dec. 22, 1978). See notes 186-94 *infra* and accompanying text for discussion of the initial ruling by the court.

## I. TREATIES IN GENERAL

Agreements between nations assume many forms and are referred to by various descriptive terms, including treaties, conventions, acts, protocols, and agreements.<sup>10</sup> The term "treaty" usually designates a formal agreement of a political or quasi-political nature, such as treaties of peace, commerce, and mutual defense; the term, however, is not limited to such instruments.<sup>11</sup> Treaties existed in ancient<sup>12</sup> and medieval times,<sup>13</sup> but did not become prominent until the seventeenth century.<sup>14</sup> During this period it became the custom among European nations to conclude wars with a treaty that purported to resolve all disputes.<sup>15</sup> The right of sovereign powers to negotiate and complete treaties subsequently evolved into an established principle of international law.<sup>16</sup> Countries have continued to exercise this right and have acknowledged that an essentially legal obliga-

10. 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 1 (1943).

11. *Id.*; see *Edye v. Robertson*, 112 U.S. 580, 598 (1884) (treaty may be defined as compact between independent nations depending on enforcement through interest and honor of parties to it); *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 571 (1840) (treaty is an instrument written and executed with formalities customary among nations); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 271-72 (1796) (treaty is solemn promise by whole nation that terms will be observed). See also C. FENWICK, INTERNATIONAL LAW 94-95 (4th ed. 1965) (treaties are compacts between sovereign states to create new rights and duties or to clarify existing ones); G. WILSON, HANDBOOK OF INTERNATIONAL LAW § 76 (3d ed. 1939) ("treaty" may be loosely used as a general term to designate any form of international agreement); Research in International Law, *Draft Convention on the Law of Treaties* (Harvard Law School) art. 1(a), 29 A.J.I.L. SUPP. 653, 686 (1935) (treaties are formal instruments of agreement under international law whereby States establish relations between themselves). Note that the international juridical effect of a treaty is not dependent upon the name given to the instrument. 5 G. HACKWORTH, *supra* note 8, at 2.

12. The Bible refers to the existence of treaties, such as the one in which Israel agreed to allow the Gibeonites to live with them in the Promised Land. 9 *Joshua* 3:27. Both Roman and Grecian civilizations made use of treaties. See 1 T. WALKER, A HISTORY OF THE LAW OF NATIONS § 22, at 34, §§ 30-39, at 47-61, § 46, at 79 (1899). See generally 1 C. BUTLER, THE TREATY-MAKING POWER OF THE UNITED STATES § 110, at 191-92 (1902).

13. T. WOOLSEY, INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW 158-59 (6th ed. 1897).

14. The Peace of Westphalia of 1648, evidenced by a treaty between the principal nations of Europe, is thought by many scholars to mark the beginning of the history of modern international law and the progress of European civilization. See 1 C. BUTLER, *supra* note 12, at 203. See generally H. WHEATON, HISTORY OF THE LAW OF NATIONS IN EUROPE AND AMERICA; FROM THE EARLIEST TIMES TO THE TREATY OF WASHINGTON, 1842, at 69 (New York 1845); T. WALKER, *supra* note 12, at 147-48.

15. See 1 C. BUTLER, *supra* note 12, at 203-04. See also 1 G. CHALMERS, A COLLECTION OF TREATIES 340-90 (London 1790) (Treaty of Utrecht between France and Great Britain upon termination of War of Spanish Succession); *id.* at 424-42 (Treaty of Aix-la-Chapelle between England, France, Netherlands, and other powers upon termination of War of Austrian Succession); *id.* at 467-83 (Treaty of Paris between England, France, Spain, and Portugal upon termination of Seven Years' War).

16. Cases reflecting this principle include *Steward Mach. Co. v. Davis*, 301 U.S. 548, 597 (1937) ("sovereigns may contract without derogating from their sovereignty"); *Perry v. United States*, 294 U.S. 330, 353 (1935) ("the right to make binding obligations is a competence attaching to sovereignty"). See 1 C. BUTLER, *supra* note 12, at 204-05. See also H. WHEATON, ELEMENTS OF INTERNATIONAL LAW § 252, at 328 (8th ed. Boston 1866), reprinted in 19 CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, THE CLASSICS OF INTERNATIONAL LAW 274 (1936) (power to negotiate and conclude treaties exists in "every sovereign state which has not parted with this portion of its sovereignty, or agreed to modify its exercise by compact with other states").

tion, similar to that which the law attaches to contracting parties, is impressed upon treaty-making parties.<sup>17</sup>

## II. THE TREATY-MAKING PROCESS

The formation of treaties is governed by the constitution or the fundamental law of each nation; consequently, each nation is restrained only by self-imposed limitations or by the recognition of such limitations in other nations.<sup>18</sup> In the United States, the treaty-making power is an important aspect of the federal government's function in foreign affairs.<sup>19</sup> Both the scope and structure of this power, however, are vague.<sup>20</sup> History reveals

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17. See 2 C. HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* § 489, at 1369 (2d rev. ed. 1947). "Recognition of legal restraints arising from treaty has thus been a natural consequence of an experience characterized by an acknowledgment of the legal nature of obligations not recorded in definite agreements, and for which, nevertheless, the society of nations has united in demanding observance." *Id.* at 1370 (footnote omitted). See also Address of Premiers Millerand and Lloyd-George to the United States in relation to the Fiume Controversy (Feb. 17, 1920), reprinted in 59 CONG. REC. 3550-51 (1920), in which they state that World War I began in an effort to force Germany to respect the treaty made eighty years earlier involving the neutrality of Belgium. See generally North Atlantic Coast Fisheries Arbitration (United States v. Great Britain), Hague Ct. Rep. 104 (Perm. Ct. Arb. 1910), reprinted in G. WILSON, *THE HAGUE ARBITRATION CASES* 145, 166 (1915) (every state must execute treaty obligations or be subject to ordinary sanctions of international law for failure to do so; such sanctions include appeal to public opinion, publication of correspondence, break in relations, and public reprisal). But see S. DOC. NO. 106, 66th Cong., 1st Sess. 502, 509, 515 (1919), in which President Wilson stated in a conference with the Senate Committee on Foreign Relations that ratification of a treaty with Germany would involve a solemn moral obligation binding in conscience only and not in law, because no sanction existed in the treaty.

18. 1 C. BUTLER, *supra* note 12, § 113, at 196 (views of Dr. Henry Wheaton); see H. WHEATON, *supra* note 14, at 135.

19. See S. CRANDALL, *TREATIES: THEIR MAKING AND ENFORCEMENT* 1 (2d ed. 1916).

20. Although certain foreign affairs powers are granted by the Constitution, there is no constitutional delegation of a general power to conduct foreign affairs to any of the federal branches of government. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 317-18 (1936), in which Justice Sutherland, writing for the majority of the court, stated that prior to the Constitution, the power over foreign affairs vested solely in the federal government as a necessary concomitant of nationality. Justice Sutherland reasoned that this power, including the power to make treaties, remains in force in modern times since it was not dependent upon an affirmative grant in the Constitution initially and was subsequently limited only by express terms in the Constitution. See Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 479 (1946). For cases prior to *Curtiss-Wright* that hold that sovereignty is a source of foreign affairs power, see *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 604-06 (1889). One problem arising from the limited grant of foreign affairs powers in the Constitution is the lack of direction as to how such powers are to be distributed among the federal branches. See generally Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903, 913, 915 n.26 (1956). But see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), in which the Court stated that the executive power was readily distinguishable from legislative power. A second problem stems from the fact that many foreign affairs powers are neither implied in the Constitution nor designated as a power belonging to the President or to Congress. For example, does the power to proclaim neutrality towards involvement in foreign conflicts belong to Congress by virtue of its authority to declare war and to regulate foreign commerce, or to the President by virtue of his authority in the area of relations with other nations and as Commander-in-Chief? The sources of such powers are, therefore, difficult to determine. L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 27-28 (1972). See also Riesenfeld, *supra* note 8, at 643. For special studies on treaties, see E.

that this power was of special concern to the constitutional framers.<sup>21</sup> They were anxious to abandon the treaty-making process delineated in the Articles of Confederation, whereby the Senate appointed and then monitored negotiators, rejecting or approving their final product.<sup>22</sup> The prevailing attitude at the Constitutional Convention was that treaties should be difficult to make in order to ensure that they would not be lightly completed.<sup>23</sup> Moreover, the framers wanted to assure that treaties made by the United States would be honored by the individual states.<sup>24</sup> To accomplish these goals, the framers (1) vested the treaty-making power in the President, but only with the advice and consent of two-thirds of the Senators present,<sup>25</sup> (2) forbade treaty-making by the states,<sup>26</sup> and (3) declared that treaties entered into by the United States shall be the supreme law of the land.<sup>27</sup>

In theory, the President and the Senate are associated throughout the process of making treaties. In practice, however, the treaty-making process is generally divided into three separate parts: negotiation by the President

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CORWIN, *THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS* (1917); Comment, *Treaties and the Supreme Court*, 1 U. CHI. L. REV. 602 (1933).

21. THE FEDERALIST No. 64, at 483 (J. Jay) (J. Hamilton ed. 1880). John Jay wrote:

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.

See S. CRANDALL, *supra* note 19, at 19.

22. Under the Articles of Confederation, the entire treaty-making process was vested in the Senate. L. HENKIN, *supra* note 20, at 129.

23. See 2 J. ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 507 (1901) (both the President and Senate are necessary to complete a treaty in order to ensure a check upon the branches and to ensure security to the people) (remarks of Mr. Wilson during the Constitutional Convention); 11 THE WRITINGS OF THOMAS JEFFERSON 38-39 (A. Lipscomb ed. 1907) ("[O]n the subject of treaties, our system is to have none with any nation, as far as can be avoided.").

24. L. HENKIN, *supra* note 20, at 373 n.3 (failure of states to observe treaties made by Congress was major factor giving rise to Constitutional Convention). See also THE FEDERALIST No. 15, at 138 (A. Hamilton) (J. Hamilton ed. 1880); *id.* No. 22, at 184 (A. Hamilton); *id.* No. 42, at 329 (J. Madison). See generally 2 J. MADISON, *JOURNAL OF THE CONSTITUTIONAL CONVENTION OF 1787*, at 327 (1908).

25. U.S. CONST. art. II, § 2 provides: "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 . . ."

26. U.S. CONST. art I, § 10 provides: "No State shall enter into any Treaty, Alliance, or Confederation . . . No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power . . ." For cases discussing these constitutional restrictions on the states as to treaty-making, see *Virginia v. Tennessee*, 148 U.S. 503, 519-20 (1893); *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 574 (1840); *Poole v. Fleeger*, 36 U.S. (11 Pet.) 185 (1837). See also 5 G. HACKWORTH, *supra* note 10, at 24. See generally *The Constitution of the United States of America*, S. DOC. No. 232, 74th Cong., 2d Sess. 366, 368 (1936); 2 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1403, at 276 (5th ed. 1891).

27. U.S. CONST. art. VI, § 2, cl. 2 provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

alone, consent to ratification by the Senate, followed by final ratification by the President.<sup>28</sup> Thus, what was intended to be one authority consisting of two closely collaborating organs has split into "two, usually rival . . . authorities, performing sharply differentiated functions."<sup>29</sup>

#### A. *The President's Role*

Since the power to make treaties is given to the President by article II of the Constitution, which grants executive powers,<sup>30</sup> treaty-making has often been labeled an executive function.<sup>31</sup> Many constitutional scholars, however, have distinguished the making of treaties from other exercises of Presidential power, principally because of the Senate's role in the process, and because treaties have particular legal and political qualities and consequences.<sup>32</sup> Treaty-making has even been viewed as a function of a fourth branch of government, the President-and-Senate.<sup>33</sup> Despite the debate over whether the treaty-making power is legislative, executive, or a blend of both, the President's role is largely clear. In modern times, the actual initiation and negotiation of treaties is, by the weight of both practice and opinion, a power of the President alone.<sup>34</sup> Nonetheless, many Presidents remain in touch with senatorial sentiment as to pending negotiations through the Senate Committee on Foreign Relations.<sup>35</sup> After negotiations are completed by the President, he then ratifies the treaty provided the Senate has consented to such ratification.<sup>36</sup> Should the Senate condition its consent upon acceptance by the President of an amendment or reservation,<sup>37</sup> the President, as well as the other party or parties to the treaty, has

28. The Senate gives consent to ratification while the President ratifies treaties. Several Supreme Court decisions, however, erroneously refer to the Senate's action as ratification. *Wilson v. Girard*, 354 U.S. 524, 526 (1957); *B. Altman & Co. v. United States*, 224 U.S. 583, 600-01 (1912). See E. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 168 (14th ed. 1978). See also L. HENKIN, *supra* note 20, at 130.

29. See E. CORWIN, *supra* note 28, at 129.

30. See note 5 *supra*.

31. See L. HENKIN, *supra* note 20, at 42-43, 130. But see 6 J. MADISON, *WRITINGS* 138 (1910) ("[t]here are sufficient indications that the power . . . [to make] treaties is regarded by the Constitution as materially different from mere executive power, and as having more affinity to the legislative than to the executive character").

32. L. HENKIN, *supra* note 20, at 130.

33. The treaty-making power appears to be a distinct power that belongs to neither the legislative nor the executive branch. Qualities of the President that are indispensable in the management of foreign negotiations favor the executive as the most fit agent for those transactions. Yet, the operation of treaties as law strongly indicates the need for the participation of the whole or a portion of the legislative body in making treaties. *THE FEDERALIST* No. 75, at 557-58 (A. Hamilton) (J. Hamilton ed. 1880). See generally C. HYDE, *supra* note 17, at 1388-90; J. LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT*, reprinted in J. LOCKE, *TWO TREATISES OF GOVERNMENT* §§ 143-148 (P. Laslett ed. 1967).

34. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

35. See E. CORWIN, *THE CONSTITUTION AND WORLD ORGANIZATION* 34 (1944). The Senate created the Committee on Foreign Relations as a standing committee in 1816 in an attempt to reconcile the two rival and often antagonistic branches. See text accompanying note 43 *infra*.

36. See text accompanying notes 45-48 *infra*.

37. An amendment, if accepted by the President and other party or parties to the treaty, changes the treaty for all parties. A reservation, on the other hand, merely limits the obligations of the United States. Amendments appear most frequently in bilateral treaties, while

the power to refuse to proceed with that treaty.<sup>38</sup>

### B. *The Senate's Role*

Although as originally conceived, the Senate was to act as an advisory council to the President throughout the treaty-making process,<sup>39</sup> this format was soon discarded.<sup>40</sup> Few Presidents other than George Washington have talked to the Senate about a forthcoming treaty,<sup>41</sup> nor has advice often been sought or given through the exchange of messages.<sup>42</sup> Thus, the full Senate does not formally advise the President on treaties before or during negotiations. The Senate Foreign Relations Committee, however, does serve as an informal liaison between the President and the Senate, alerting the President to potential Senate reaction to treaties later presented for the Senate's consent.<sup>43</sup> In addition, individual Senators occasionally assist in treaty negotiations by sharing with the President and his negotiators their sense of what the Senate will be willing to accept. These Senators are then in a better position to discuss and defend the treaty when the treaty later appears before the Senate for consent to ratification.<sup>44</sup>

After a treaty has been submitted to the Senate, the Senate must consent

reservations often appear in general international treaties such as the United Nations Charter. See E. CORWIN, *supra* note 28, at 130. See also L. HENKIN, *supra* note 20, at 133-36.

38. The treaty must contain the whole contract between the parties, and the Senate may consent to only those terms agreed upon by the parties. Although the Senate does have power to refuse to consent or to condition its consent upon adoption of amendments, the Senate has no power to introduce new terms obligatory upon the other party. Fourteen *Diamond Rings v. United States*, 183 U.S. 176, 83 (1901) (concurring opinion).

39. See THE FEDERALIST No. 64, at 483, (J. Jay) (J. Hamilton ed. 1880). See also E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1957, at 207-10 (4th ed. 1957) [hereinafter cited to as E. CORWIN, THE PRESIDENT].

40. The language of the Constitution envisions treaty-making as one continuing process performed by a single authority: the President acting with the advice and consent of the Senate. In practice, however, the President and Senate bifurcated into separate functions: a Presidential function of formulation and negotiation followed by a senatorial function of criticism and amendment or rejection. See E. CORWIN, THE CONSTITUTION AND WORLD ORGANIZATION, *supra* note 35, at 36. Compare *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936), in which the Court stated that the President, as the constitutional representative of the United States, manages relationships with foreign nations and, therefore, is the most competent to determine when negotiations will be most successful. The Senate interferes with this Presidential responsibility and, thus, impairs the national security.

41. See E. CORWIN, THE PRESIDENT, *supra* note 39, at 209-10. President Washington once sought from the Senate immediate answers to questions raised by an Indian treaty then under negotiation. The Senate, however, immersed itself in prolonged debate and parliamentary wrangling, causing much delay and frustration to Washington. See R. HAYDEN, THE SENATE AND TREATIES, 1789-1817, at 16-29 (1920).

42. The possibility of early leaks concerning treaty negotiations by the Senate to a foreign government is a major reason why the President does not confide in the Senate until negotiations are concluded. For examples of Senate leaks despite self-imposed commitments to secrecy, see W. HOLT, TREATIES DEFEATED BY THE SENATE 16, 93 n.32, 95, 138 n.66, 139 n.67, 167-68, 183, 193, 217 (1933). See also S. CRANDALL, *supra* note 19, at 68-75; L. HENKIN, *supra* note 20, at 131.

43. See note 35 *supra*.

44. *Id.*; see L. HENKIN, *supra* note 20, at 131-32.

before the treaty can be ratified by the President.<sup>45</sup> The Senate has the power to condition this consent by requiring the addition of an amendment or reservation,<sup>46</sup> which often forces the President to renegotiate the treaty.<sup>47</sup> Should the President or the other party to the treaty reject such conditions, however, the Senate is powerless to interfere with the President's decision not to complete the treaty. The Senate, therefore, has power only over those treaties actually presented to it. It cannot create a new treaty and force the President to ratify its terms. Once the Senate has given, withheld, or conditioned its consent, its role in the treaty-making process is concluded.<sup>48</sup> The final power to complete the treaty once the Senate has consented, or to accept the conditions once the Senate has modified the treaty, lies in the President.

### III. THE HISTORY OF TREATY-TERMINATION PRACTICES IN THE UNITED STATES

A treaty is essentially a contract between two nations, and as such it may be terminated under various circumstances.<sup>49</sup> The instance of termination

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45. The requirement of Senate consent before a treaty is ratified by the President is an important check on Presidential power to make foreign policy by treaty. See L. HENKIN, *supra* note 20, at 132-33. See also text accompanying note 28 *supra*.

46. See text accompanying note 37 *supra*. The power of the Senate to condition its consent has been upheld by the Supreme Court. *Fourteen Diamond Rings v. United States*, 183 U.S. 176, 182 (1901) (Brown, J., concurring). The legal effect of a Senate reservation was seriously challenged in *Power Auth. v. Federal Power Comm'n*, 247 F.2d 538 (D.C. Cir.), *vacated and remanded with directions to dismiss as moot sub nom. American Pub. Power Ass'n v. Power Auth.*, 355 U.S. 64 (1957). The court of appeals refused to give effect to a Senate reservation to a treaty with Canada concerning the Niagara River. The Supreme Court vacated that judgment, deciding that the issue was mooted by congressional adoption of the legislation called for in the reservation by the Senate.

47. See L. HENKIN, *supra* note 20, at 131-32.

48. See *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901) (Senate resolution explaining its understanding of treaty to which it had previously consented without reservation is without legal effect). See also L. HENKIN, *supra* note 20, at 136 (once treaty is ratified, attempts by Senate to withdraw, modify, or interpret its consent have no legal effect).

49. International law recognizes the following circumstances as grounds for terminating treaties: (1) fulfillment of the obligations of the treaty, (2) expiration of the time period covered by the treaty, (3) extinguishment of one of the parties to the treaty or of the subject matter of the treaty, (4) mutual agreement between the parties to end the treaty, (5) conclusion of a new treaty concerning the same subject matter or one wholly inconsistent with an earlier treaty, (6) denunciation of the treaty by one party with acquiescence by the other, (7) outbreak of war between the parties, and (8) notice by one of the parties pursuant to the terms of the treaty. 5 G. HACKWORTH, *supra* note 10, at 297; see Nelson, *The Termination of Treaties and Executive Agreements by the United States: Theory and Practice*, 42 MINN. L. REV. 879 (1958). See generally C. BUTLER, *supra* note 12, at 129-37. See also *Karnuth v. United States*, 279 U.S. 231 (1928); *Techt v. Hughes*, 229 N.Y. 222, 128 N.E. 185 (1920) (cases holding treaty expires upon threat of war). A further basis for termination occasionally suggested is the doctrine of *rebus sic stantibus*, defined as "a tacit condition, said to attach to all treaties, that they shall cease to be obligatory so soon as the state of facts and conditions upon which they were founded has substantially changed." BLACK'S LAW DICTIONARY 1432 (4th ed. rev. 1968); see 5 J. MOORE, A DIGEST OF INTERNATIONAL LAW 335-41 (1906). The United States State Department has formulated certain circumstances in addition to those already discussed: (1) where there has been a severance of diplomatic or consular relations and such relations are indispensable for the application of the treaty; (2) where a new preemptory norm of international law emerges that is in conflict with the

focused upon in this discussion is the issuance of notice by one of the parties pursuant to the terms of the treaty. In the United States authority to terminate a treaty through notice is grounded in the Constitution rather than international law.<sup>50</sup> The Constitution, however, fails to state in which branch of government the treaty-terminating power lies.<sup>51</sup> Confusion arises because the Constitution apportions certain powers related to foreign affairs among the President, the Senate, and the full Congress.<sup>52</sup> Thus, with the President granted the power to make treaties,<sup>53</sup> the Senate granted the power to consent before the treaty becomes binding,<sup>54</sup> and the Congress granted the power to enact all legislation,<sup>55</sup> to pay the national debts,<sup>56</sup> and to regulate commerce with foreign nations,<sup>57</sup> there exists language in the Constitution capable of being construed as placing the power to terminate treaties in all three branches.<sup>58</sup> Authorities disagree as to which branch should prevail,<sup>59</sup> some argue that the President acting alone may terminate a treaty in toto,<sup>60</sup> while others contend that effective termination requires congressional or senatorial concurrence.<sup>61</sup> Gene Hackworth, while acting as legal advisor of the Department of State, summarized:

The question as to the authority of the Executive to terminate treaties independently of the Congress or of the Senate is in a somewhat confused state. . . . In some cases treaties have been terminated by the President pursuant to action by Congress. In other cases action has been taken by the President pursuant to resolutions of the Senate alone. In still others, the initiative has been taken by the President. In some cases his action was afterwards notified to the Senate or to both Houses of Congress and approved, in other cases it was not referred to

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treaty; (3) where a state has been induced to conclude a treaty by the fraudulent conduct of another state; and (4) where a state's consent to be bound has been procured by the corruption or coercion of its representatives or by the threat or use of force. 125 CONG. REC. S7028 (daily ed. June 6, 1979). For cases holding that treaties cease to operate when there is a change in essential circumstances, see *The Brig William*, 23 Ct. Cl. 201 (1888); *Hooper v. United States*, 22 Ct. Cl. 408 (1887). See generally S. CRANDALL, *supra* note 19, at 180.

50. Riesenfeld, *supra* note 8, at 656-58.

51. See Comment, *Presidential Amendment and Termination of Treaties: The Case of the Warsaw Convention*, 34 U. CHI. L. REV. 580, 589 (1967). In other countries, the question of which organ of government has the power to terminate treaties is rarely asked, as the power is assumed to be vested in the branch that makes the treaties. See Riesenfeld, *supra* note 8, at 658 n.62.

52. *Id.* at 589; see note 20 *supra*.

53. U.S. CONST. art. II, § 2, cl. 2.

54. *Id.* art. II, § 2.

55. *Id.* art. I, § 1.

56. *Id.* art. I, § 8, cl. 1.

57. *Id.* art. I, § 8, cl. 3.

58. Comment, *supra* note 51, at 589; see E. CORWIN, *THE PRESIDENT*, *supra* note 39, at 171. See also E. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY*, *supra* note 28, at 135 & n.59.

59. Authorities cited in note 58 *supra*; see note 8 *supra* and accompanying text.

60. See 5 G. HACKWORTH, *supra* note 10, at 328.

61. See Riggs, *Termination of Treaties by the Executive Without Congressional Approval: The Case of the Warsaw Convention*, 32 J. AIR L. & COM. 526, 527 (1966). See also S. CRANDALL, *supra* note 19, at 460, 465; W. WILLOUGHBY, *supra* note 8.

either House. No settled rule or procedure has been followed.<sup>62</sup>

### A. *Presidential-Congressional Terminations*

The first instance of terminating a treaty by notice occurred in 1846 when Congress passed a joint resolution that authorized President Polk to annul the convention with Great Britain regarding the joint occupation of the Oregon Territory.<sup>63</sup> The Senate Committee on Foreign Relations later stated that although the advice of the Senate alone was sufficient to enable the President to give notice, the joint assent by both the Senate and House of Representatives would be an appropriate means of authorizing the President to act. The Committee did not envision the treaty termination power as resting in the President alone.<sup>64</sup> The first challenge to this view occurred when President Lincoln attempted to terminate a treaty without congressional approval.<sup>65</sup> Congress responded with a joint resolution declaring the termination invalid unless ratified and confirmed by Congress.<sup>66</sup> Congress reasoned that as a treaty is part of the law of the land, it can only be set aside by an act of Congress.<sup>67</sup> The right to terminate treaties, therefore, can be viewed as a legislative prerogative, with only the power to deliver the congressional decision to foreign governments vested in the President.<sup>68</sup> Congress has found judicial support for this view in *Ropes v. Clinch*,<sup>69</sup> in which the court stated, albeit in a dictum, that Congress may destroy the operative effect of any treaty by giving notice of termination when the treaty provides for such termination by notice.<sup>70</sup>

Several scholars also support the view that Congress should participate in the treaty termination process. Professor Edward Gaffney, Jr., assistant

62. 5 G. HACKWORTH, *supra* note 10, at 330. The quotation is from a letter to President Roosevelt discussing whether the President, acting alone, could give notice to Italy of the proposed termination of the Treaty of Commerce and Navigation of 1871. Mr. Hackworth advised that the President could give notice without the advice and consent of the Senate or the approval of Congress. President Roosevelt adopted this course of action and independently gave notice to terminate the treaty. *Id.* at 331; see Riggs, *supra* note 61, at 528-29 & n.13.

63. 125 CONG. REC. S7025 (daily ed. June 6, 1979).

64. S. REP. NO. 97, 34th Cong., 1st Sess. (1856).

65. B. GOLDWATER, CHINA AND THE ABROGATION OF TREATIES 17 (1978); see Riesenfeld, *supra* note 8, at 662.

66. The prevailing attitude of the Congress at this time was that termination of the Rush-Bagot Convention with Great Britain must stem from congressional action and not from action taken by the President. CONG. GLOBE, 38th Cong., 2d Sess. 313 (1865) (remarks of Sen. Davis); see B. GOLDWATER, *supra* note 65, at 17-18.

67. Senator Sumner stated that since a treaty is part of the law of the land, it is to be "repealed or set aside only as other law is repealed or set aside: that is by act of Congress." CONG. GLOBE, 38th Cong., 2d Sess. 312 (1865).

68. See Comment, *supra* note 51, at 599. See also 5 G. HACKWORTH, *supra* note 10, at 320-22.

69. 20 F. Cas. 1171 (C.C.S.D.N.Y. 1871) (No. 12,041).

70. *Id.*; see Riesenfeld, *supra* note 8, at 659. See also E. CORWIN, THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS 15 (1917) (it appears that legislative precedent, which is generally supported by the Executive, sanctions the proposition that the power of terminating treaties belongs, as a prerogative of sovereignty, to Congress alone and flows naturally from the power of Congress over treaty provisions in their quality as law of the land).

director of the Center for Constitutional Studies at Notre Dame Law School, has stated:

If the President is under the duty, in Article II, to take care, to see that the laws are faithfully executed, and if then Article VI defines law to include and to embrace treaties, then it seems to me that the normal route would be to go back to the House and Senate for a majority vote, just the normal way that you unmake an act.<sup>71</sup>

Professor Thomas S. Franck, director of the Center for International Studies of the New York University School of Law, is of the opinion that "treaties are the supreme law of the land, that laws and treaties, in the words of the Supreme Court in *Whitney v. Robertson* are on the same footing as laws and must be terminated as if they were laws, either by a legislative resolution or by inconsistent subsequent law."<sup>72</sup>

Furthermore, Congress has found precedential support in instances in which the President has received permission from Congress to terminate, thus implying Presidential recognition of the need for congressional authority to regulate the termination of treaties.<sup>73</sup> The value of this precedent, however, must be weighed against the precedent of treaty-termination by the President alone—or in conjunction with the Senate. The congressional claim to an exclusive power either to terminate treaties or to consent to termination, therefore, is weakened by the many terminations deemed effective despite the absence of congressional approval.

#### B. *Presidential-Senatorial Terminations*

The method of termination that accords most closely with the language of the Constitution is termination by the President acting in conjunction with the Senate, so that the powers exercised in the termination of a treaty would be the same as those invoked in the making of a treaty.<sup>74</sup> In *Techt v. Hughes*<sup>75</sup> a court of appeals upheld the validity of a treaty with Austria-Hungary against a challenge that the outbreak of war between the United States and Austria-Hungary rendered the treaty invalid. The court gave utmost deference to the treaty, stating in a dictum that the power to denounce a treaty was vested in the President and the Senate, not in the

71. 125 CONG. REC. S7026 (daily ed. June 6, 1979).

72. *Id.*

73. In 1789, Congress passed a resolution abrogating the treaties with France because of treaty violations by the Government of France. In 1846, a House Joint Resolution was passed concerning the termination of the Convention on Boundaries with Great Britain. The Treaty of Commerce with Denmark was terminated by President Pierce in 1864 while acting pursuant to a joint resolution of Congress. In 1874, a joint resolution was enacted concerning a treaty with Belgium. In 1883, Congress passed a joint resolution directing President Arthur to give notice of termination of several sections of an 1871 treaty with Great Britain. A joint resolution was passed in 1911 authorizing termination of a treaty with Russia. See B. GOLDWATER, *supra* note 65, at 19; 5 J. MOORE, *supra* note 49, at 322; 2 T. NORTON, CONSTITUTION OF THE UNITED STATES: ITS SOURCES AND ITS APPLICATION 115 (1922); 125 CONG. REC. S7042 (daily ed. June 6, 1979).

74. Riesenfeld, *supra* note 8, at 660; see Taft, *supra* note 8, at 610 ("the abrogation of the treaty involves the exercise of the same kind of power as the making of it"). See also S. CRANDALL, *supra* note 19, at 461; W. WILLOUGHBY, *supra* note 8, at 561.

75. 229 N.Y. 222, 128 N.E. 185 (1920) (Cardozo, J.).

judiciary.<sup>76</sup> In *The Amiable Isabella*<sup>77</sup> the Supreme Court also accepted the theory that a treaty could be terminated only by the President acting in concert with the Senate. The Court determined that "the obligations of a treaty could not be changed or varied, but 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."<sup>78</sup>

Arguments in support of the Senate's partnership role in termination compare the making of treaties to the enactment of legislation.<sup>79</sup> Just as the power to legislate implies the power to repeal that legislation, so the Senate's role in the creation of a treaty implies a corresponding role in the termination of that treaty. This analysis concludes that since a treaty cannot be made without action by both the President and the Senate,<sup>80</sup> a treaty cannot be terminated without action by the same parties.

Past instances of treaty-termination by the President in conjunction with the Senate tend to support the view that treaty-termination requires Senate consent.<sup>81</sup> The fact remains, however, that there are instances in which the President has acted alone in terminating treaties.<sup>82</sup> Thus, the Senate's claim of a role in the treaty-termination process, like the congressional claim, is weakened when considered against past terminations given effect despite the absence of senatorial consent.

### C. Presidential Terminations

Since 1927, there have been nine instances in which Presidents have given notice of the termination of treaties without receiving accompanying congressional authority or seeking ratification from the Senate. The notice of termination of two of these treaties was voluntarily withdrawn by the President.<sup>83</sup> Two other treaties were abrogated because they were incon-

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76. 128 N.E. at 192.

77. 19 U.S. (6 Wheat.) 1 (1821) (Story, J.).

78. *Id.* at 75.

79. Comment, *supra* note 51, at 598-99. This view is shared by Professor Edward Gaffney, Jr. of Notre Dame Law School and Professor Thomas S. Franck of the New York University School of Law. 125 CONG. REC. S7046 (daily ed. June 6, 1979). See text accompanying notes 71-72 *supra*.

80. U.S. CONST. art. III, § 2; see text accompanying note 25 *supra*.

81. In 1855, the Senate unanimously resolved to authorize President Pierce to give notice pursuant to his request that an 1826 treaty with Denmark be terminated. See B. GOLDWATER, *supra* note 65, at 16; 5 J. MOORE, *supra* note 49, at 322. In 1920, the United States withdrew from the International Sanitary Convention of 1903 only after the Senate had consented to denunciation after being consulted by President Wilson. B. GOLDWATER, *supra* note 65, at 22.

82. See text accompanying notes 83-86 *infra*.

83. In 1933, President Franklin Roosevelt gave notice of termination of an extradition treaty with Greece due to refusal by that country to extradite an individual accused of fraud. Following an understanding between Greece and the United States as to future interpretations of the treaty, the notice was withdrawn. President Roosevelt relied on the Supreme Court's decision in *Charlton v. Kelly*, 299 U.S. 447 (1913), in which the Court recognized the President's right to terminate or extend a treaty violated by another party. See also 5 G. HACKWORTH, *supra* note 10, at 315-16. The second instance occurred in Nov. 1965 when President Johnson announced that the United States planned to withdraw from the Warsaw Convention, which dealt with recovery of damages by international air passengers who suf-

sistent with more recent legislation of Congress,<sup>84</sup> and one treaty was superseded by obligations of the United States under a later treaty.<sup>85</sup> The remaining four treaties were annulled or suspended after it became impossible to carry them out effectively.<sup>86</sup>

Such independent Presidential terminations are justified on many grounds. The strongest argument in support of independent Presidential terminations states that the President has power to terminate treaties based on an analogy to his power to remove United States officers.<sup>87</sup> The power of the President to make treaties, like his power to make appointments of United States officers, is expressly limited in the Constitution by the provision requiring that he first obtain the advice and consent of the Senate. These are express limitations upon what otherwise appear to be unlimited executive powers. In the absence of express limitations upon the power to remove these officers and the power to terminate a treaty, there is a strong presumption that no such restrictions were intended by the constitutional framers.<sup>88</sup> This argument places great emphasis on the Supreme Court's

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fer death or injuries. One day before the effective date of the withdrawal, the President withdrew the notice. See Comment, *supra* note 51, at 592-93. See also Riggs, *supra* note 61, at 526.

84. In 1933, President Franklin Roosevelt terminated the 1927 Tariff Convention because it had a restrictive effect on the National Industrial Recovery Act of 1933. In 1936, President Roosevelt terminated the 1871 Treaty of Commerce with Italy because its provisions limited the President's ability to carry out the Trade Agreements Act of June 1934. See Comment, *supra* note 51, at 592-93. See also Nelson, *supra* note 49, at 882.

85. In 1939, President Franklin Roosevelt independently terminated the Commercial Treaty of 1911 with Japan. The President's authority stemmed from acts of war by Japan toward allied nations. 5 G. HACKWORTH, *supra* note 10, at 331. Further, a later treaty, the Nine Powers Agreement, committed the United States to respect the territorial integrity of China; therefore, following the Japanese invasion of China, the President was compelled to terminate the treaty with Japan. See CONG. REC., 76th Cong., 1st Sess. 10750-87 (1939) (remarks of Senator Schwollenbach).

86. In 1927, President Coolidge gave notice that the 1925 Convention for Prevention of Smuggling with Mexico was terminated. At the time, alleged religious persecution and confiscation of American-owned private property and oil lands in Mexico were the subject of emotional debate in Congress. The disruptive climate made it impossible to implement the convention. See 5 G. HACKWORTH, *supra* note 10, at 329. See also B. GOLDWATER, *supra* note 65, at 23. In 1939, the State Department gave notice of President Franklin Roosevelt's intention to terminate the London Naval Treaty of 1936. The treaty was terminated because of the withdrawal of several other parties to the treaty and the state of war in Europe, both of which made it impossible to limit naval armaments. See B. GOLDWATER, *supra* note 65, at 24. In 1941, President Franklin Roosevelt suspended until the end of World War II the International Load Line Convention governing ocean shipping. The President relied on Acting Attorney General Biddle's opinion that fundamental changes in circumstances created an impossibility of performance. Mr. Biddle stated that as the treaty was not being abrogated, action by the Senate or Congress was not required. See 5 G. HACKWORTH, *supra* note 10, at 338-39, 355-56. Finally, in 1955, President Eisenhower gave notice of termination of the 1923 Convention on Uniformity of Nomenclature for the Classification of Merchandise. The notice observed that the convention had been "rendered inapplicable" since a fundamental component, the Brussels Nomenclature of 1913, had "become outdated." B. GOLDWATER, *supra* note 65, at 25.

87. For a discussion by the Supreme Court of the President's power to remove government officers and employees, see *Arnett v. Kennedy*, 416 U.S. 134, 181-82 (1974) (White, J., concurring in part and dissenting in part).

88. Nelson, *supra* note 49, at 883-87; see Comment, *supra* note 51, at 594-95. *But see* Riggs, *supra* note 61, at 533.

holding in *Parsons v. United States*<sup>89</sup> that the President has the power to remove a United States officer without congressional or senatorial approval.<sup>90</sup> The Court further held in *Myers v. United States*<sup>91</sup> that a statute passed by Congress that required the advice and consent of the Senate before the President could remove a United States postmaster was an unconstitutional limitation on the removal power of the President. This analysis concludes that since the President has exclusive power to remove certain United States officers,<sup>92</sup> he also has exclusive power to terminate treaties. A counter-argument to this theory emphasizes that the supremacy clause of the Constitution<sup>93</sup> declares treaties to be the supreme law of the land.<sup>94</sup> The decision to terminate a treaty, therefore, is arguably a power of the Legislature and not of the President, even though the interests of the executive branch in the conduct of foreign relations may be indirectly involved.

A second theory in favor of independent Presidential terminations states that since the President has emerged with superior authority in the making of treaties through his exclusive role in treaty negotiation, he has exclusive authority in the termination of such treaties.<sup>95</sup> This argument is enhanced by the fact that Senate participation in the entire treaty-making process is rare.<sup>96</sup> In *United States v. Curtiss-Wright Export Corp.*<sup>97</sup> the Supreme Court supported the President's superior power to make treaties by stating, in a dictum, that the President "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."<sup>98</sup> Another related power conceded to the President that also appears to support independent Presidential terminations is that of communication with foreign governments. The Supreme Court has asserted that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."<sup>99</sup> Scholars criticize this theory, however, because although the President is the nation's mediator in foreign relations, it

89. 167 U.S. 324 (1897).

90. *Id.* at 343. The removal power of the President was upheld despite the fact that a statute provided for tenure.

91. 272 U.S. 52 (1926).

92. In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Court restricted the President's independent power of removal to purely executive as opposed to legislative or judicial officers.

93. U.S. CONST. art. VI provides: "[A]ll Treaties made . . . under the Authority of the United States, shall be the Supreme Law of the Land . . . ."

94. See *Riggs*, *supra* note 61, at 533. See also *Nelson*, *supra* note 49, at 887-88.

95. See *Comment*, *supra* note 51, at 590.

96. See text accompanying notes 39-44 *supra*.

97. 299 U.S. 304 (1936).

98. *Id.* at 319 (dictum).

99. 299 U.S. at 319. This principle was first declared by John Marshall in the House of Representatives in 1800. 10 ANNALS OF CONGRESS 613 (1800). This principle has been repeated often by the Supreme Court. *Charlton v. Kelly*, 229 U.S. 447 (1913); *Jones v. United States*, 137 U.S. 202, 212 (1890); *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1830); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829); see *Levitan, Executive Agreements: A Study of the Executive in the Control of the Foreign Relations of the United States*, 35 ILL. L. REV. 365, 372-73 (1940).

does not automatically follow that he alone is responsible for determining those policies later conveyed to foreign parties; the President may be simply conveying a decision previously made by Congress.<sup>100</sup>

The President's claim to the power to terminate a treaty independently also derives support from the constitutional mandate that the President faithfully execute the laws of the United States.<sup>101</sup> If a treaty is in conflict with a federal law, the one enacted last in time controls the other.<sup>102</sup> Accordingly, the President may actually be required to terminate a treaty in order to uphold his constitutional duty. One could question, however, whether the President is in fact acting alone in terminating a treaty when a treaty and legislation conflict. Congress may be deemed to have implicitly consented to the termination by subsequently passing the conflicting legislation. A further consequence of the President's duty to faithfully execute the laws of the United States is the need to evaluate the continuing vitality of existing treaties.<sup>103</sup> If, therefore, the President discovers that a treaty has been breached by another party, or has expired because the terms have been fulfilled, or has become impossible to perform, the President arguably has the authority as well as the duty to terminate such a treaty independently. The right of the President either to terminate or to extend a treaty violated by another party was recognized in *Charlton v. Kelly*,<sup>104</sup> in which the Supreme Court upheld the President's right to terminate the 1884 Extradition Treaty with Greece after that country refused to extradite a citizen.

A final argument in support of the President's power to terminate a treaty independently is that the President is endowed with certain plenary and exclusive powers to act unrestrained in the area of foreign affairs unless expressly forbidden by the Constitution.<sup>105</sup> The basis for this proposition is the Supreme Court's decision in *United States v. Curtiss-Wright Export Corp.*,<sup>106</sup> in which the Court stated, albeit in a dictum, that all foreign affairs powers available to King George III by way of the royal

100. See E. CORWIN, *THE PRESIDENT*, *supra* note 39, at 178 ("while the President alone may address foreign governments and be addressed by them, . . . in fulfilling these functions he is, or at least may be, the mouthpiece of a power of decision that resides elsewhere").

101. U.S. CONST. art. II, § 3; see Comment, *supra* note 51, at 593.

102. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); see *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 600 (1889) ("the last expression of the sovereign will must control"). See also *Baker v. Carr*, 369 U.S. 186, 212 (1962) ("a court will not undertake to construe a treaty in a manner inconsistent with a subsequent federal statute"). This issue only arises if self-executing treaties that are law of their own accord are involved. Non-self-executing treaties require congressional legislation before they will be given effect and, therefore, any inconsistency between such a treaty and federal legislation is regarded as an inconsistency between two acts of Congress. There is less difficulty, therefore, in concluding the later legislation repeals the earlier. L. HENKIN, *supra* note 8, at 163.

103. See Comment, *supra* note 51, at 593.

104. 229 U.S. 447 (1913). The President, however, chose to waive the right to terminate the treaty upon agreement with Italy as to future interpretation. See text accompanying note 83 *supra*.

105. Comment, *supra* note 51, at 595-96; see *Riesefeld*, *supra* note 8, at 665-69. See also *Riggs*, *supra* note 61, at 530.

106. 299 U.S. at 304.

prerogative devolved directly upon the federal government and, therefore, could be exercised by the President as attributes of sovereignty.<sup>107</sup> Subsequent cases, however, have not been so receptive to this "inherent Presidential powers" theory. In *Youngstown Sheet & Tube Co. v. Sawyer*<sup>108</sup> the Supreme Court held that the President could not order the Secretary of Commerce to seize steel mills during the Korean conflict without specific authority from Congress or the Constitution. In a well-known concurring opinion, Justice Jackson rejected the view that the grant of executive power in article II of the Constitution is a grant of all conceivable power. He, instead, viewed article II as an allocation to the President of only the generic powers enumerated.<sup>109</sup> As to a reservoir of implied, extraconstitutional powers vested in the President, Justice Jackson stated: "The claim of inherent and unrestricted presidential powers has long been a persuasive dialectical weapon in political controversy. . . . [But] a judge cannot accept self-serving press statements of the attorney for one of the interested parties as authority in answering a constitutional question."<sup>110</sup> Although *Youngstown* concerned Presidential powers in a domestic setting, the Supreme Court in *Reid v. Covert*<sup>111</sup> devoted a passage to foreign affairs powers and extended *Youngstown* by rejecting the existence of a reservoir of undefined powers not directly traceable to the Constitution for any branch of government.<sup>112</sup> The Court declared that "the United States is entirely a creature of the Constitution. Its powers and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution."<sup>113</sup>

The arguments both for and against independent Presidential terminations are persuasive, yet no conclusive judicial or historical precedent exists that resolves the issue. *Goldwater v. Carter*, therefore, presents the court with an opportunity to decide this issue of which branch possesses the treaty-termination power.

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107. *Id.* at 315-19.

108. 343 U.S. 579 (1952) (Court was reviewing power of President in domestic setting, not in foreign affairs).

109. *Id.* at 641.

110. *Id.* at 646-47. Justice Jackson's comments are especially interesting in light of his statements while acting as Attorney General for President Roosevelt. Then Attorney General Jackson justified the President's seizure of the North American Aviation Co. largely on the basis of "inherent" powers granted by art. II of the Constitution. See 89 CONG. REC. 3992 (1943).

111. 354 U.S. 1 (1954).

112. *Id.*

113. *Id.* at 5-6. The Court has implicitly overruled the *Curtiss-Wright* dictum in *Ex parte Quirin*, 317 U.S. 1, 25-26 (1942) ("Congress and the President, like the courts, possess no power not derived from the Constitution.") Thus, the Court has returned to the position taken in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) ("This government is acknowledged by all to be one of enumerated powers."). See *United States v. Floyd Acceptance*, 74 U.S. (7 Wall.) 666, 676-77 (1868).

IV. POSSIBLE RESOLUTION OF THE TREATY-TERMINATION POWER  
DISPUTE: GOLDWATER V. CARTER

To understand better the issues raised in *Goldwater v. Carter*,<sup>114</sup> a closer look at recent action in the Congress is necessary. On January 15, 1979, Senator Harry F. Byrd, Jr. introduced a sense of the Senate resolution,<sup>115</sup> Senate Resolution 15,<sup>116</sup> which stated: "Resolved, 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."<sup>117</sup> This resolution was defeated by the Senate on March 9, 1979,<sup>118</sup> and sent to the Senate Committee on Foreign Relations.<sup>119</sup> On May 1, 1979, the Committee reported back Senate Resolution 15, which, as amended, read:

[Resolved,] [t]hat it is the sense of the Senate that treaties or treaty provisions to which the United States is a party should not be terminated or suspended by the President without the concurrence of the Congress except where—

(1) the treaty provisions in question have been superseded by a subsequent, inconsistent statute or treaty; or

(2) material breach, changed circumstances, or other factors recognized by international law, or provisions of the treaty itself, give rise to a right of termination or suspension on the part of the United States but in no event where such termination or suspension would—

(A) result in the imminent involvement of United States Armed Forces in hostilities or otherwise seriously and directly endanger the security of the United States Armed Forces in hostilities or otherwise seriously and directly endanger the security of the United States; or

(B) be inconsistent with the provisions of—

(i) a condition set forth in the resolution of ratification to a particular treaty; or

(ii) a joint resolution; specifying a procedure for the termination or suspension of such treaty.<sup>120</sup>

The resolution as amended was brought before the Senate on June 6, 1979, for consideration.<sup>121</sup> During the deliberation by the Senate, Senator Byrd proposed an amendment to strike out the Committee substitute and re-

114. No. 78-2412 (D.D.C., filed Dec. 22, 1978).

115. A sense of the Senate resolution is not legally binding on the President. If the President chooses to ignore it, there is no legal recourse that can be had. 125 CONG. REC. S7048 (daily ed. June 6, 1979) (remarks of Senator Harry F. Byrd, Jr.).

116. S. RES. 15, 96th Cong., 1st Sess., 125 CONG. REC. S7044 (daily ed. June 6, 1979).

117. 125 CONG. REC. S7044 (daily ed. June 6, 1979).

118. See *id.* at S7022.

119. The Senate Committee on Foreign Relations best summed up the task at hand by stating, "[t]he complexity of the question [of which branch of government has the treaty termination power] is considerable: the specific intent of the Framers is unclear, the historical precedents inconclusive, the legal precedents inapposite, and the task of formulating a reasoned and responsible Senate position correspondingly complex." 125 CONG. REC. S7036 (daily ed. June 6, 1979).

120. *Id.* at S7014.

121. *Id.* at S7014-53.

place in lieu thereof his original language.<sup>122</sup> After lengthy debate by both the opponents<sup>123</sup> and proponents<sup>124</sup> of the Byrd amendment, a vote was taken resulting in fifty-nine votes in favor of the Byrd amendment,<sup>125</sup> thirty-five votes against,<sup>126</sup> with six members not voting.<sup>127</sup> Questions then arose as to the effective date of the resolution and the impact the resolution would have on President Carter's independent resolution of the Taiwan Treaty.<sup>128</sup> Senator Frank Church proposed an amendment to Senate Resolution 15<sup>129</sup> so that the resolution would read: "*Resolved, that it is the sense of the Senate that, from and after the date of adoption of this resolution, the approval of the United States Senate is required to terminate any mutual defense treaty between the United States and another nation.*"<sup>130</sup> At the request of Senator Church, however, no vote was taken on this amendment.<sup>131</sup> Thus, the sense of the Senate as of June 6, 1979, is that fifty-nine of the ninety-four Senators voting on the treaty-termination issue feel that this power is one shared by both the President and the Senate.

Similar action in the House of Representatives is evidenced by three House Concurrent Resolutions. Representative George Hansen has introduced House Concurrent Resolution 12,<sup>132</sup> which provides for full approval by Congress prior to termination of any post-World War II security treaties that include mutual defense treaties. The other two resolutions, House Concurrent Resolution 25,<sup>133</sup> sponsored by Representative Bob

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122. *Id.* at S7015.

123. Major opponents of the amendment by Senator Harry Byrd who spoke during the Senate debate were Senators Church, Kennedy, and Robert Byrd.

124. Major proponents of the Byrd amendment who expressed their views during the Senate debate were Senators Harry Byrd, Dole, Goldwater, Helms, Huddleston, Humphrey, Thurmond, and Warner.

125. 125 CONG. REC. S7038-39 (daily ed. June 6, 1979).

126. *Id.* at S7039.

127. *Id.*

128. *Id.* at S7048-49.

129. *Id.* at S7049, S7052.

130. *Id.* at S7052 (emphasis added). Senator Church proposed an amendment to the original version of Senate Resolution 15 rather than the Byrd amendment since procedural technicalities prohibited the Committee substitute as amended by the Byrd amendment to be changed. All subsequent amendments, therefore, had to be addressed to the original resolution. *Id.* at S7047.

131. *Id.* at S7053. Senator Church requested that no action be taken on his amendment because of the absence of Senator Javits to whom Senator Church had promised not to proceed with any action prior to Senator Javits's return to the Senate Chamber following his attendance at a funeral.

132. H.R. Con. Res. 12, 96th Cong., 1st Sess. (1979) provides that:

[I]n 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, without the full and explicit approval of the Congress.

133. H.R. Con. Res. 25, 96th Cong., 1st Sess. (1979) provides that:

[I]n accordance with the separation of powers under the Constitution, the President shall 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.

Stump, and House Concurrent Resolution 43,<sup>134</sup> sponsored by Representatives John Ashbrook and Robert Bauman, provide for Senate participation in the treaty-termination process or the approval of both Houses of Congress. Both resolutions are limited to post-World War II security treaties. All three resolutions have been referred to committees for deliberation.<sup>135</sup> These actions in the House of Representatives indicate that the issue of treaty termination is as alive in that chamber as it is in the Senate. In addition to the continuing concerns of the Senate and the House of Representatives, the judiciary also has a potential role in resolving the dispute via the case of *Goldwater v. Carter*. Underlying this suit is a sense of growing congressional recognition of the possibility of the federal judiciary's resolving disputes between the legislative and executive branches of government.<sup>136</sup> Individual Congressmen have increasingly chosen the courts, rather than political processes, as an avenue to challenge the validity of executive action and policies.<sup>137</sup> There are a number of congressional suits, however, that have been dismissed on the ground that the plaintiff-Congressmen lacked standing to sue since they did not prove injury in fact.<sup>138</sup> Following this trend, the district court in *Goldwater v. Carter* has issued a memorandum opinion dismissing the suit without prejudice pending the outcome of the several resolutions on the termination issue now pending in the Senate.<sup>139</sup> The court held that due to failure of the plaintiffs to show injury to the Senate as a whole, the plaintiff-Congressmen

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134. H.R. Con. Res. 43, 96th Cong., 1st Sess. (1979) provides for the same participation by the Senate and Congress in the treaty termination process as does H.R. Con. Res. 25, *supra* note 133.

135. H.R. Con. Res. 12 and H.R. Con. Res. 25 have been referred to the House Committee on International Relations. H.R. Con. Res. 43 has been referred to the House Committee on Foreign Affairs. As of this printing, no action has been taken on any of the bills.

136. Recent Senate approval of a bill establishing the office of Congressional Legal Counsel to represent Congress in the courts reflects this attitude. S. 495, tit. II, 94th Cong., 2d Sess., 122 CONG. REC. 12122 (1975); see S. RES. NO. 823, 94th Cong., 2d Sess. 23 (1976). See also Note, *Congressional Access to the Federal Courts*, 90 HARV. L. REV. 1632, 1632 n.4 (1977).

137. *Reuss v. Balles*, 584 F.2d 461 (D.C. Cir.), *cert. denied*, 99 S. Ct. 598, 58 L.Ed. 2d 670 (1978); *Edwards v. Carter*, 580 F.2d 1055 (D.C. Cir.), *cert. denied*, 436 U.S. 907 (1978); *Dole v. Carter*, 444 F. Supp. 1065 (D. Kan. 1977). See Note, *supra* note 136, at 1633. Jurisdiction is usually based on 28 U.S.C. § 1331(a) (1976), which provides: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." A potential barrier to congressional suits was removed by Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721, which eliminated the jurisdictional amount requirement of § 1331 for suits brought against the United States or any agency, officer, or employee thereof in his official capacity.

138. *Reuss v. Balles*, 584 F.2d 461 (D.C. Cir.), *cert. denied*, 99 S. Ct. 598, 58 L. Ed. 2d 670 (1978); *Harrington v. Schlesinger*, 528 F.2d 455, 459 (4th Cir. 1975); *Metcalf v. National Petroleum Council*, 407 F. Supp. 257, 260 (D.D.C. 1976), *aff'd on other grounds*, 553 F.2d 176 (D.C. Cir. 1977).

139. Senate Resolution 10, sponsored by Senator Dole, was introduced to the Senate on Jan. 15, 1979, and resolves: "That the Senate disapproves of the action of the President of the United States in sending notice of termination of the Mutual Defense Treaty with the Republic of China." S. Res. 10, 96th Cong., 1st Sess., 125 CONG. REC. S209 (daily ed. Jan. 15, 1979). Dole's resolution has been referred to the Senate Foreign Relations Committee. A second resolution introduced was Senate Resolution 15 by Senator Harry Byrd, discussed in detail at notes 114-31 *supra* and accompanying text. A third resolution now pending is

lack standing.<sup>140</sup> The plaintiffs in *Goldwater v. Carter*, therefore, must establish that there has been injury to the entire Senate before they will be granted standing to bring a claim of derivative injury and thus clear the way for the court to proceed to the merits of the case. To understand better this important procedural hurdle facing the plaintiffs, some background on the issue of standing is necessary.

### A. Standing

The purpose of the standing requirement is to determine whether the plaintiff is the proper person to raise the issues in a suit<sup>141</sup> in order to ensure that those issues are presented in an adversary context that brings the legal questions sharply into focus.<sup>142</sup> To attain this purpose, the Supreme Court has developed several requirements for standing.<sup>143</sup> First, the plaintiff must allege injury in fact,<sup>144</sup> which is defined as a "specific present objective harm or a threat of future specific harm."<sup>145</sup> Secondly, the plaintiff must show that the interest asserted is within the zone of interests protected or regulated by the Constitution or a statute.<sup>146</sup> Thirdly, the plaintiff must demonstrate that a causal link exists between the action of the defendant and the harm suffered.<sup>147</sup> Finally, the injury must be capable of redress by a favorable decision.<sup>148</sup> These four requirements were reiterated by the district court in *Goldwater v. Carter*.<sup>149</sup>

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Senate Concurrent Resolution 2, sponsored by Senator Goldwater and 21 other co-sponsors, which provides:

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.

125 CONG. REC. S7044 (daily ed. June 6, 1979). Senate Concurrent Resolution 2 has been referred to the Senate Committee on Foreign Relations.

140. 125 CONG. REC. S7050-52 (daily ed. June 6, 1979).

141. *See* *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968).

142. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

143. Standing requirements apply equally to Congressmen and private plaintiffs. *See* *Harrington v. Bush*, 553 F.2d 190, 204 (D.C. Cir. 1977). The argument that the official position of a Congressman entitles him to access to the federal courts has been rejected. *See* *Harrington v. Schlesinger*, 528 F.2d 455, 459 (4th Cir. 1975); *Pressler v. Simon*, 428 F. Supp. 302, 304 (D.D.C. 1976); *Brown v. Ruckelshaus*, 364 F. Supp. 258, 264 (C.D. Cal. 1973).

144. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38-39 (1976); *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152 (1970).

145. *Laird v. Tatum*, 408 U.S. 1, 14 (1972).

146. *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970). The "zone of interests" test has been sharply criticized and is thought to have lost its validity. K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* § 22.02-.11 (1976).

147. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617-18 (1973).

148. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976). The requirements of causation and likelihood of redress have been viewed as merely two expressions of the rule that the proper defendant be before the court. *See* *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 209-10 (1976).

149. For detailed discussion of the district court's initial ruling in *Goldwater v. Carter*, see notes 139-40 *supra*, 186-94 *infra* and accompanying text.

The requirement of injury in fact is the most difficult requirement for a congressional plaintiff to satisfy in demonstrating standing to sue. Most Congressmen bringing suits against the executive allege injury in fact to participatory rights, claiming that the executive has interfered with an interest that belongs to Congress, thereby causing the individual Congressmen to suffer a derivative injury insofar as they share in the impaired institutional interest.<sup>150</sup> Although participatory suits are novel, the Supreme Court has accepted, in other contexts, allegations of an indirect or derivative injury as a sufficient statement of injury in fact.<sup>151</sup> In *Warth v. Seldin*<sup>152</sup> the Supreme Court held that standing was not precluded solely by indirectness of harm.<sup>153</sup> The Court further held in *United States v. Students Challenging Regulatory Agency Procedures*<sup>154</sup> that the cases and controversy requirement in the Constitution<sup>155</sup> is not violated when the plaintiff is merely one of a group of injured persons.<sup>156</sup> Practically speaking, the imputation of injury to each individual Congressman when Congress is harmed is sensible. When the powers or privileges of Congress are curtailed, each individual member loses his proportionate share of those powers and privileges. Following this reasoning, the Supreme Court held, in *Coleman v. Miller*,<sup>157</sup> that state senators protesting the procedure used to ratify a constitutional amendment had a "plain, direct and adequate interest in maintaining effectiveness of their votes."<sup>158</sup>

Once participatory interests are recognized as valid, the second problem faced by plaintiff-Congressmen in alleging injury in fact arises in stating with particularity the injury they have suffered. One decision that has attempted to define what allegations are required is the strongly criticized opinion of *Mitchell v. Laird*.<sup>159</sup> In *Mitchell* several Members of Congress sued for declaratory relief against United States involvement in the Vietnam War. The District of Columbia Circuit held that a statement of injury in fact was sufficient whenever the relief granted would affect a Congressman's constitutional duties as a Member of Congress.<sup>160</sup> Other courts

150. *Reuss v. Balles*, 584 F.2d 461, 467 (D.C. Cir.), *cert. denied*, 99 S. Ct. 598, 58 L. Ed. 2d 670 (1978); *Edwards v. Carter*, 580 F.2d 1055, 1056-57 (D.C. Cir.), *cert. denied*, 436 U.S. 907 (1978); *Harrington v. Schlesinger*, 528 F.2d 455 (4th Cir. 1975); *McClure v. Linowitz*, No. 77-436 (D.D.C., filed May 11, 1977).

151. *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 260 (1977) (interest in making suitable low-cost housing available in areas where such housing is scarce is sufficient interest for standing).

152. 422 U.S. 490 (1975).

153. *Id.* at 504-05. *See also* *Harrington v. Bush*, 553 F.2d 190, 199 n.41 (D.C. Cir. 1977).

154. 412 U.S. 669 (1973).

155. U.S. CONST. art. III.

156. 412 U.S. at 686; *see* *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972).

157. 307 U.S. 433 (1939).

158. *Id.* at 438; *see* *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974) (upholding an individual Senator's right not to have his vote nullified).

159. 488 F.2d 611 (D.C. Cir. 1973).

160. *Id.* at 614; *see* *Reuss v. Balles*, 584 F.2d 461, 466 & n.15 (D.C. Cir.), *cert. denied*, 99 S. Ct. 598, 58 L. Ed. 2d 670 (1978), in which the court stated that its statement in *Mitchell* as to standing was a mere dictum since the complaint was, instead, dismissed on the grounds that a political question was presented. *See also* U.S. CONST. art. I (constitutional grant of power to Congress).

have strongly criticized this test because it failed to establish the requisite nexus between the action claimed to be illegal and the injury suffered by the plaintiff.<sup>161</sup> Additional criticism emphasized that the *Mitchell* test would permit advisory opinions in violation of the Constitution by focusing solely on the utility of a judgment.<sup>162</sup> Following this reasoning, two other circuits rejected the *Mitchell* decision,<sup>163</sup> as did a different panel of the District of Columbia Circuit.<sup>164</sup>

The District of Columbia Circuit attempted to clarify the allegations necessary to establish injury in fact in *Harrington v. Bush*.<sup>165</sup> Congressman Harrington sought injunctive relief against use of the secret funding and reporting provisions of the Central Intelligence Agency Act of 1949,<sup>166</sup> alleging that he had been injured in fact because his overall effectiveness as a legislator had been impaired since he could not vote intelligently on appropriations legislation without knowing whether funds were being used by the CIA for illegal activities.<sup>167</sup> The court rejected this claim as too subjective and concluded that such a standard would establish the courts as a forum to determine the quality of legislation.<sup>168</sup> Accordingly, the court found that Harrington had not established injury in fact and, therefore, lacked standing. The court further attempted to articulate the necessary requirements for congressional standing. It stated that although the Constitution grants Congress the responsibility for enacting laws, the responsibility for enforcing those laws is given to the executive.<sup>169</sup> The court reasoned, therefore, that plaintiff-Congressmen have an interest only in legislation and, thus, have standing only when the power to enact legislation has been undermined.<sup>170</sup> This rationale is more restrictive than the District of Columbia Circuit's earlier decision in *Kennedy v. Sampson*,<sup>171</sup> in which a Congressman alleged a violation of his right to vote on legisla-

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161. *Harrington v. Bush*, 553 F.2d 190, 209 n.99 (D.C. Cir. 1977); *Metcalf v. National Petroleum Council*, 553 F.2d 176, 185 (D.C. Cir. 1977); *Harrington v. Schlesinger*, 528 F.2d 455, 459 (4th Cir. 1975); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1315 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

162. The Supreme Court has consistently refused to issue declaratory judgments in the absence of concrete injury, holding that federal courts are precluded from giving advisory opinions under U.S. CONST. art. III, § 2. See *Golden v. Zwickler*, 394 U.S. 103, 108-10 (1969).

163. *Harrington v. Schlesinger*, 528 F.2d 455, 459 (4th Cir. 1975); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1315 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

164. *Harrington v. Bush*, 553 F.2d 190, 209 n.99 (D.C. Cir. 1977); see Note, *supra* note 136, at 1638.

165. 553 F.2d 190 (D.C. Cir. 1977).

166. 50 U.S.C. § 403(f)(a) (1976). Under the Act, CIA funds may be included in the budgets of other federal agencies without being designated as CIA funds. See Elliot, *Cloak and Ledger: Is CIA Funding Constitutional?*, 2 HASTINGS CONST. L.Q. 717, 724-38 (1975).

167. 553 F.2d at 202-03, 211-13.

168. *Id.* at 212-15; see *Metcalf v. National Petroleum Council*, 553 F.2d 176, 188 (D.C. Cir. 1977).

169. U.S. CONST. art. I, §§ 1, 8, art. II, § 3.

170. 553 F.2d at 212-14. See also *McRae v. Mathews*, 421 F. Supp. 533, 540 (E.D.N.Y. 1976), *appeal dismissed sub nom.* *Buckley v. McRae*, 429 U.S. 935 (1977).

171. 511 F.2d 430 (D.C. Cir. 1974).

tion.<sup>172</sup> The court in *Kennedy* focused on whether the Constitution recognized the right allegedly injured, not on whether the plaintiff-Congressman's power to enact legislation had been impaired.<sup>173</sup> Although *Kennedy* recognizes that other enumerated rights of Congress in the Constitution, in addition to the right to enact legislation, may constitute a basis for standing if injured in fact, the recent case of *Reuss v. Balles*<sup>174</sup> indicates that *Kennedy* will be narrowly interpreted. The court in *Reuss* stressed that *Kennedy* by its own language was limited to situations where the vindication of the Senator's vote was his most "essential" interest, and such interest was asserted "in the context of a particular dispute about specific legislation."<sup>175</sup>

A final problem faced by plaintiff-Congressmen in alleging injury in fact is that Congress has the opportunity to pursue political remedies to ensure that the executive complies with the law. Several courts have declared that the availability of such alternative remedies means that there can be no injury in fact to congressional rights or powers and, therefore, have denied standing.<sup>176</sup> Such reasoning, however, is inconsistent with *Kennedy*, in which the ability of Congress to circumvent a pocket veto did not alter the fact that the veto had been used to interfere with the will of Congress.<sup>177</sup> Under the *Kennedy* rationale, when there is actual injury to a protected right, the ability of Congress to pursue an alternative remedy is irrelevant.

Once the plaintiff demonstrates he has been injured in fact, *Association of Data Processing Service Organizations, Inc. v. Camp*<sup>178</sup> mandates that the interest sought to be protected must arguably be within the zone of interests contemplated by either a statute or a constitutional guarantee.<sup>179</sup> The zone of interests test has been broadly construed so that injury to aesthetic, conversational, and recreational, as well as economic, interests may be sufficient for standing.<sup>180</sup> If a plaintiff's interest is shown to have been contemplated by a statute or the Constitution, this second test is met.

Should the first two requirements be met, the analysis for standing turns to the question of causation. The plaintiff must allege "some threatened or actual injury resulting from the putatively illegal action."<sup>181</sup> In *Simon v. Eastern Kentucky Welfare Rights Organization*<sup>182</sup> the Court summarized

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172. In *Kennedy*, Senator Kennedy challenged the legality of an attempted pocket veto of a bill for which he had voted.

173. 511 F.2d at 434.

174. 584 F.2d 461, 467 (D.C. Cir.), cert. denied, 99 S. Ct. 598, 58 L. Ed. 2d 670 (1978).

175. *Reuss v. Balles*, 584 F.2d at 467 (citing *Kennedy v. Sampson*, 511 F.2d at 436).

176. The court in *Goldwater* applied this theory in finding the plaintiffs had no standing. See notes 186-94 *infra* and accompanying text. See also *Harrington v. Schlesinger*, 528 F.2d 455, 459 (4th Cir. 1975); *Metcalf v. National Petroleum Council*, 407 F. Supp. 257, 260 (D.D.C. 1976), *aff'd on other grounds*, 553 F.2d 176 (D.C. Cir. 1977).

177. 511 F.2d at 435 n.17.

178. 397 U.S. 150 (1970) (data processors challenged ruling permitting national banks to offer data processing services as incident to their banking services).

179. *Id.* at 153.

180. *Id.* at 154.

181. *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973).

182. 426 U.S. 26 (1976).

the causation requirement by stating that the injury must be traceable to the challenged action of the defendant, and not merely to the independent action of a third party not before the court. If this requirement of causation is not met, the plaintiff's claim fails for want of a proper defendant.

The final standing requirement relates to relief. The plaintiff must show "an injury . . . that is likely to be redressed by a favorable decision."<sup>183</sup> This requirement of a redressable injury ensures that the framing of relief will be no broader than that which is required by the precise facts before the court.<sup>184</sup> Moreover, the test supports the general rule that the plaintiff must present facts sufficient to show that his individual need requires the remedy for which he asks.<sup>185</sup>

Applying the above analysis to *Goldwater v. Carter*, the district court has held that Goldwater and his fellow Congressmen must meet the above four-part standing test before the court can proceed to the merits of their case.<sup>186</sup> In relation to the injury in fact requirement, all of the plaintiffs, except former Senator Curtis, claim injury to their constitutional right to vote and otherwise give advice and consent in terminating the treaty with Taiwan.<sup>187</sup> Despite the fact that the Supreme Court has held that derivative injury, similar to that which is present where participatory rights are involved, is sufficient to satisfy the injury in fact requirement,<sup>188</sup> the district court in *Goldwater v. Carter* held that the availability of alternative political remedies to redress the allegedly unconstitutional action is evidence that there has been no injury in fact to congressional rights or powers.<sup>189</sup> The court stated that "[a] suit such as this by a group of individual legislators seeking to vindicate derivative constitutional rights bypasses the political arena which should be the primary and usual forum in which such views are expressed."<sup>190</sup> The court continued, however, and stated that,

[a]lthough the Court is inclined to agree with plaintiffs' assertion that the power to terminate the 1954 Mutual Defense Treaty is a *shared* power to be exercised by the action of both political branches, at the present time there is no indication that the Congress as a whole intends to assert its prerogative to act. Under these circumstances, the President's notice of termination does not constitute injury. In the absence of any injury to the institution as a whole, the individual legislators here cannot claim a derivative injury.<sup>191</sup>

The first part of the four-part standing test therefore could be met if the plaintiffs can establish injury to the entire Congress. The question arises as

183. *Id.* at 26.

184. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974).

185. *McCabe v. Atchison, T. & S.F. Ry.*, 235 U.S. 151, 164 (1914).

186. No. 78-2412, slip op. at 6 (D.D.C., filed June 8, 1979).

187. *Goldwater v. Carter*, No. 78-2412, at 3-5 (D.C. Cir., filed Dec. 22, 1978).

188. *See* text accompanying notes 150-58 *supra*.

189. No. 78-2412, slip op. at 8, (D.D.C., filed June 8, 1979); *see Reuss v. Balles*, 584 F.2d 461, 468 (D.C. Cir.), *cert. denied*, 99 S. Ct. 598, 58 L.Ed.2d 670 (1978); *Public Citizen v. Sampson*, 379 F. Supp. 662 (D.D.C. 1974), *aff'd mem.*, 515 F.2d 1018 (D.C. Cir. 1975).

190. No. 78-2412, slip op. at 8 (D.D.C., filed June 8, 1979).

191. *Id.* at 10 (emphasis added).

to whether the vote on Senate Resolution 15, which was subsequent to the court's decision, is a sufficient expression of the Senate's intention to assert its prerogative to act.<sup>192</sup> It is arguable that since fifty-nine of the ninety-four voting Senators support the resolution that includes the Senate in the treaty termination process,<sup>193</sup> the Senate is utilizing the legislative process to assert its right that it does possess a shared power with the President to terminate treaties. Thus, the passage of the Byrd amendment could be evidence of injury to the Senate as a whole since the Senate has been denied the exercise of a congressional power. If such is the case, the individual plaintiffs, or at least the individual Senators, in *Goldwater v. Carter* would have standing to claim a derivative injury. As the court states at the close of its opinion: "If the Senate or the Congress takes action, the result of which falls short of approving the President's termination effort, then the controversy will be ripe for a judicial declaration respecting the President's authority to act unilaterally."<sup>194</sup>

Once the plaintiffs have established injury in fact, the other three requirements are easily met. As to the second requirement of whether the interest asserted by *Goldwater v. Carter* is within the zone of interests protected by the Constitution, the court need not simultaneously decide the central issue of whether the Constitution mandates Senate consent or congressional approval in treaty terminations in order to be able to grant standing. "The fundamental aspect of standing is that it focuses on the party . . . and not on the issues . . . [to be] adjudicated."<sup>195</sup> The court, therefore, need only focus on whether the plaintiffs are the proper persons to request an adjudication of the issue. If the court determines in the first test that denial of a congressional right to vote and advise the President as to the termination of the treaty is injury in fact, it follows that the only proper party to assert that denial of a congressional privilege and power properly within the zone of interests protected by the Constitution would be a Congressman. As the interest the plaintiffs seek to protect is properly within the zone of interests, the second test is met. The additional requirement of a causal link between the defendant's action and the injury suffered is satisfied since there would be no alleged denial of the right to vote or advise but for President Carter's independent termination of the treaty. The final requirement mandating that the injury be capable of redress by a favorable decision is also met, since a judicial declaration that the termination notice is unconstitutional would render the notice invalid, thereby causing the treaty to remain in force. The President would also be enjoined from impairing the right of the plaintiff-Congressmen to participate

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192. It is important to note that Senator Goldwater read pertinent parts of the district court's opinion, which stressed the court's need to know how the Senate viewed its role in the treaty termination process, before the vote on the Byrd amendment was taken. 125 CONG. REC. S7033-34 (daily ed. June 6, 1979). Thus, when the 59 Senators voted for the Byrd amendment, they were aware of the impact their voice would have as a strong indication of how the Senate felt.

193. See notes 114-31 *supra* and accompanying text.

194. No. 78-2412, slip op. at 10-11 (D.D.C., filed June 8, 1979).

195. *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968).

in the decision to terminate the treaty, thereby redressing the alleged injury.

Based on the four-part standing test, it appears that the congressional plaintiffs in *Goldwater v. Carter* can sufficiently demonstrate that they have standing to sue provided they establish injury to the entire Congress. As the standing requirement is merely designed to assure that the plaintiff has a personal stake in the litigation so that he is the proper party to raise and present the issues in an adversary context, the wisest course for the court to follow is to grant the plaintiffs standing and then consider the peculiar problems and institutional concerns implicated by congressional suits in terms of the political question doctrine.<sup>196</sup>

### B. *Nonjusticiability and the Political Question Doctrine*

The United States governmental structure of separate powers allocates the power to decide certain issues to either the executive or legislative branch of government rather than to the judiciary.<sup>197</sup> This principle is honored by the judiciary and referred to as the political question doctrine. Should a political question be brought before the courts, this doctrine requires that the suit be dismissed as nonjusticiable.<sup>198</sup> Traditionally, political questions are defined as those issues that are textually committed by the Constitution, either explicitly or by reasonable inference, to the autonomous control of a coordinate branch of government.<sup>199</sup> The textual commitment test envisions two situations in which a court must dismiss a suit as involving nonjusticiable issues:

- (1) when the court finds that the executive or legislature has been granted sole responsibility for the resolution of the issues in the suit by virtue of a constitutional provision, or
- (2) when the suit challenges an action of the executive or legislature and the court determines that the coordinate branch has not exceeded the scope of a power textually committed to it.<sup>200</sup>

Theoretically, therefore, a court must dismiss a case as nonjusticiable in that it raises a political question only if the Constitution provides for resolution of the issue by another branch or if the challenged governmental action is *ultra vires*.

196. Note, *supra* note 136, at 1643. For cases that have considered the interrelationship between standing to sue and the political question doctrine and decided that the standing issue should be resolved first, see *Reuss v. Balles*, 584 F.2d 461, 465 n.14 (D.C. Cir.), *cert. denied*, 99 S. Ct. 598, 58 L. Ed. 2d 670 (1978); *American Jewish Congress v. Vance*, 575 F.2d 939, 943-44 (D.C. Cir. 1978).

197. Note, *supra* note 136, at 1643.

198. *Baker v. Carr*, 369 U.S. 186 (1962); see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803), in which the Court stated: "Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." See also Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7-9 (1959).

199. *Baker v. Carr*, 369 U.S. 186, 211 (1962); see Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966).

200. Note, *supra* note 136, at 1643.

The Supreme Court in *Baker v. Carr*<sup>201</sup> recognized that "prominent on the surface of any case held to involve a political question is . . . a textually demonstrable constitutional commitment of the issue to a coordinate political department."<sup>202</sup> The Court also recognized two other restraints on judicial power in addition to the textual commitment test. Where the issue involves judicially unmanageable standards or delicate policy choices outside the competency of the judiciary, the court should dismiss the suit as nonjusticiable.<sup>203</sup> This restraint evidences functional concerns of the Court as to the capabilities of the judiciary. The third restraint centers on prudential concerns. Both the impossibility of a court's independently resolving certain issues without expressing lack of respect due the coordinate branches of government, as well as the need to promote consistency in the form of subsequent judicial support of a political decision, have been sufficient to convince the Court that issues involving these concerns should also be nonjusticiable.<sup>204</sup> Recently, however, the Court has expressed a willingness to hear claims that would previously have been barred by these functional and prudential considerations.<sup>205</sup> In both *Powell v. McCormack*<sup>206</sup> and *United States v. Nixon*<sup>207</sup> the Court emphasized that its duty as the ultimate interpreter of the Constitution could not be avoided because of a potential conflict with a coordinate branch.<sup>208</sup> Thus, *Powell* and *Nixon* suggest that the present Court might be willing to expand the scope of issues it will decide by recognizing only the textual commitment test as a bar to justiciability.

The political question doctrine as applied to congressional suits involving participatory rights such as those asserted in *Goldwater v. Carter* raises three unique problems. First, there is the argument that congressional suits by their very nature raise nonjusticiable political questions since they call for judicial resolution of disputes between the political branches, which, as mentioned, raises prudential concerns in the mind of the

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201. 369 U.S. 186 (1962); see Bonfield, *Baker v. Carr: New Light on the Constitutional Guarantee of Republican Government*, 50 CALIF. L. REV. 245 (1962). See also McCloskey, *The Supreme Court, 1962 Term—Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54 (1962); Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUP. CT. REV. 252.

202. 369 U.S. at 217.

203. *Id.* at 211-12, 217.

204. *Id.* at 217, 226; see Bickell, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961). But see Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

205. Note, *supra* note 136, at 1644; see *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 58 n.44 (1974).

206. 395 U.S. 486 (1969). The Court stated: "The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." *Id.* at 548-49 (footnote omitted).

207. 418 U.S. 683 (1974).

208. *Id.* at 703-05; see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), in which the Court stated: "It is emphatically the province and duty of the judicial department to say what the law is." But see Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process*, 22 U.C.L.A. L. REV. 30, 34 (1974) (the rationale in *United States v. Nixon* was unnecessarily broad).

Court.<sup>209</sup> This rationale was explicitly rejected, however, in *Senate Select Committee on Presidential Campaign Activities v. Nixon*,<sup>210</sup> in which the appellate court held that the mere fact of a conflict between the legislative and executive branches over a congressional subpoena does not preclude judicial resolution of the conflict. Thus, the Supreme Court has occasionally acted as the umpire of the federal system by deciding the "reciprocal rights and duties" of the Congress and the executive.<sup>211</sup>

A second problem is that congressional participatory suits ask the court to resolve the dispute irrespective of the plaintiff's recourse to available political remedies. The concern here is functional since the courts want to avoid excessive reliance on the courts by not tempting legislators to bypass the political process.<sup>212</sup> Moreover, by ignoring political remedies in favor of judicial intervention, the development of a stronger working relationship between Congress and the executive would be impeded as there would be less incentive to work out compromises if it were known that the courts would intervene and settle the dispute.<sup>213</sup> The district court in *Goldwater v. Carter* shared these same concerns, as evidenced by the court's statement that "[a] suit such as [*Goldwater v. Carter*] by a group of individual legislators seeking to vindicate derivative constitutional rights bypasses the political arena which should be the primary and usual forum in which such views are expressed."<sup>214</sup> The court, however, indicated in a dictum that if the Senate or Congress would take action that "[fell] short of approving the President's termination effort, then the controversy [would] be ripe for a judicial declaration respecting the President's authority to act unilaterally."<sup>215</sup>

Finally, congressional participatory suits may also serve ulterior political motives. Congressmen could seize upon such suits and their attendant publicity to demonstrate zealotry on behalf of their constituency.<sup>216</sup> Threats to bring suit could become a powerful weapon, enabling Congressmen to exchange acquiescence on the issue in question for concessions on other matters.<sup>217</sup> The courts, therefore, are justified in being wary of participatory suits since there is potential for abuse and manipulation for par-

209. See *United States v. Richardson*, 418 U.S. 166, 188-92 (1974) (Powell, J., concurring); *Harrington v. Bush*, 553 F.2d 190, 214-15 (D.C. Cir. 1977).

210. 498 F.2d 725 (D.C. Cir. 1976); see *United States v. Nixon*, 418 U.S. 683 (1974), in which the Supreme Court resolved a similar conflict between the executive and judicial branches, thereby establishing justiciability of such conflicts.

211. See *The Pocket Veto Case*, 279 U.S. 655, 676 (1929) (veto power of President cannot be narrowed by Congress); *Myers v. United States*, 272 U.S. 52 (1926) (Congress may not interfere with President's power of removal of United States postmaster). See also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 660 (1952) (Burton, J., concurring) (President invaded jurisdiction of Congress by ordering Secretary of Commerce to seize nation's steel mills).

212. See *Levi, Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 387 (1976).

213. Freund, *The Supreme Court, 1973 Term—Foreword: On Presidential Privilege*, 88 HARV. L. REV. 13, 38 (1974).

214. No. 78-2412, slip op. at 8 (D.D.C., filed June 8, 1979).

215. *Id.*

216. Note, *supra* note 136, at 1649.

217. *Id.* at 1649-50.

tisan purposes.<sup>218</sup>

The above problems with congressional participatory suits suggest, as a solution, a per se rule against hearing such suits. An alternative might be to assess the justiciability of such suits on a case-by-case basis by balancing the need to enforce the constitutionally protected rights of individual Congressmen against the danger of interfering with or preempting a political solution.<sup>219</sup> Such an alternative, however, would place great demands on the judiciary since it would require the courts to be constantly aware of pending political action and, at times, to anticipate congressional reaction.<sup>220</sup> The courts, therefore, should hesitate to decide participatory suits brought by individual Congressmen when the full Congress has yet to express its will; otherwise, the court would be allowing a single Congressman to usurp the role of Congress.

The political question doctrine presents a possible barrier in *Goldwater v. Carter* to resolution of the controversy over where the treaty-termination power lies, although the district court has indicated in a dictum that, should the Senate or Congress manifest its disapproval of the President's termination, the controversy would be "ripe for a judicial declaration respecting the President's authority to act unilaterally."<sup>221</sup> By applying only the textual commitment test as expressed in *Powell v. McCormack*<sup>222</sup> and *United States v. Nixon*,<sup>223</sup> the issue should be declared justiciable because the Constitution does not place the power to resolve this issue in either the executive or legislative branch. Assuming, therefore, that the court does proceed to the merits in *Goldwater v. Carter*, it must decide the validity of the three major arguments presented by the plaintiffs in their challenge of the President's power to terminate the Taiwan treaty independently.<sup>224</sup>

### C. Arguments Raised in *Goldwater v. Carter* Against Independent Presidential Terminations

The first argument is based on the language of the Mutual Defense Treaty, which provides that either party may give notice of termination.<sup>225</sup> The plaintiffs argue that the term "party" does not refer to the President

218. *Id.* at 1650.

219. *Id.* at 1651. The courts have frequently been sensitive to congressional activity and have been guided by the recognition of possible legislative action with respect to an issue or refusal of the legislature to overrule a judicial decision by statute. See *Frontiero v. Richardson*, 411 U.S. 677, 692 (1973) (Powell, J., concurring) (Court should not decide whether gender-based classifications deserve strict scrutiny under fourteenth amendment equal protection analysis in view of proposed equal rights amendment to Constitution); *Flood v. Kuhn*, 407 U.S. 258, 283 (1972) (refusal of Congress to alter the exemption of baseball from antitrust laws).

220. "It is rather like the old commerce clause question of whether Congress is silently silent or silently speaking." Note, *supra* note 136, at 1651.

221. 125 CONG. REC. S7051 (daily ed. June 6, 1979).

222. 395 U.S. 486 (1969).

223. 418 U.S. 683 (1974).

224. All statements by the district court in *Goldwater* as to the existence of a shared power are dicta and, therefore, are of no binding effect. The actual holding of the court was only that the plaintiffs lacked standing for failure to establish injury in fact.

225. See note 2 *supra*.

alone but rather refers to the President acting in conjunction with the Senate or both Houses of Congress.<sup>226</sup> Plaintiffs contend that there is no evidence in the negotiations leading to the signing of the treaty nor in the Senate proceedings prior to consent indicating that the term "party" meant the President acting alone.<sup>227</sup> Moreover, the plaintiffs emphasize that article 2 of the Vienna Convention on the Law of Treaties<sup>228</sup> defines "party" as "a State which has consented to be bound by the treaty and for which the treaty is in force."<sup>229</sup> Thus, the plaintiffs conclude that "party," as used in the treaty, refers to the State, and this presumably includes the Senate or the full Congress rather than the President alone. This argument is not persuasive, however, because even if "party" is defined in the treaty to include the Senate or the full Congress, it does not follow that the treaty-termination power is constitutionally vested in the Senate or Congress. The authority to terminate a treaty must be found in the Constitution rather than in the terms of the treaty itself.<sup>230</sup>

The plaintiffs' second argument is based on the Dole-Stone amendment to the International Security Assistance Act of 1978,<sup>231</sup> which provides 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."<sup>232</sup> This amendment was adopted by Congress and the entire Act was subsequently signed into law by President Carter on September 26, 1978, three months prior to the termination of the treaty with Taiwan. The Dole-Stone amendment obviously gives the court a clear expression of congressional intent to require congressional consultation prior to termination. The court in *Goldwater v. Carter*, however, rejected the plaintiffs' argument of a violation of their statutory right, inferred by this Act, to be consulted by the President as to policy changes concerning the Taiwan Treaty. The court found the final language of the amendment to be too general in nature to allow the court to resolve effectively the question of how much consultation would meet its terms if the amendment was in fact binding. The court did not, however, rule on the question of whether the amendment was outside the authority of Congress. In *Myers v. United States*<sup>233</sup> the Supreme Court declared unconstitutional a joint resolution that provided for congressional approval of any removal of a United States postmaster by the President because it usurped the removal power of the President.<sup>234</sup> If the court proceeds to the merits of the case and determines

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226. Petition by Plaintiffs, *Goldwater v. Carter*, No. 78-2412 (D.D.C., filed Dec. 22, 1978).

227. *Id.*

228. Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF.39/27.

229. *Id.*

230. See Riesenfeld, *supra* note 8.

231. Act of Sept. 26, 1978, Pub. L. No. 95-384, 92 Stat. 746 (to be codified in 22 U.S.C. § 2151).

232. *Id.*

233. 272 U.S. 52 (1926).

234. See text accompanying notes 87-92 *supra*.

that the President does have the power to terminate treaties independently, the Dole-Stone amendment could be found to be an unconstitutional restriction by Congress on the treaty-termination power of the President.

Finally, the plaintiffs contend that since a treaty is the supreme law of the land,<sup>235</sup> and since the Constitution assigns the President the duty to faithfully execute the laws of the land,<sup>236</sup> any attempt by the President to terminate the Defense Treaty is in direct violation of his sworn duty and obligation to uphold the laws.<sup>237</sup> This argument, however, may be questioned. Since recognition of a foreign government and establishment of diplomatic relations with that government are clearly executive functions,<sup>238</sup> it was within the President's authority to recognize Communist China as the official government of China and to cease recognition of Taiwan. If the United States no longer recognizes Taiwan independently of Communist China, it is arguable that no government exists with which to continue diplomatic relations. Since the President's duty to faithfully execute the laws requires him to evaluate the continuing vitality of existing laws,<sup>239</sup> this duty may actually compel him to terminate the treaty because of impossibility of performance.

The strongest argument by the plaintiffs in *Goldwater v. Carter* lies in precedential support. Consideration by the court of testimony presented to the Senate Committee on Foreign Relations as to the history of treaty terminations by the United States<sup>240</sup> led the court to state, albeit in a dictum, that although some treaties have been terminated by the President acting alone, "these Presidential terminations have been in situations in which it might be inferred that the Congress had no reason to question Presidential action."<sup>241</sup> The court continued by stating: "Based on the Court's consideration of these historical precedents, the Court believes the power to terminate treaties is a power shared by the political branches of this government, namely, the President and the Congress."<sup>242</sup>

The above discussion of the arguments raised in *Goldwater v. Carter* reveals a classic battle between the two political branches of the federal government. Congress, through passage of the Dole-Stone amendment and the vote on the Byrd amendment in the Senate, has stated its position that the President must consult with Congress, or at least the Senate, before terminating a treaty. President Carter, by independently giving notice to terminate the treaty, has expressed his position that the President

235. U.S. CONST. art. IV; see note 27 *supra*.

236. U.S. CONST. art. II, § 3 provides: "[The President] shall take Care that the Laws be faithfully executed . . ."

237. See Petition by Plaintiffs, *supra* note 7, at 3.

238. See J. HERVEY, *THE LEGAL EFFECTS OF RECOGNITION IN INTERNATIONAL LAW AS INTERPRETED BY THE COURTS OF THE UNITED STATES* (1928), reprinted in 9 *INTERNATIONAL LAW AND HISTORY REPRINT SERIES* 19-20 (I. Kavass and A. Sprudz eds. 1974) (recognition is placed in the hands of the executive where it logically belongs).

239. See text accompanying notes 103-04 *supra*.

240. *Resolution Concerning Mutual Defense Treaties: Hearing on S. Res. 15 Before the Comm. on Foreign Relations*, 96th Cong., 1st Sess. 157 (1979).

241. 125 CONG. REC. S7051 (daily ed. June 6, 1979).

242. *Id.*

has the exclusive power to terminate a treaty. Attention, therefore, turns to the judiciary for a possible solution to this stalemate. As previously discussed, the major barriers to resolution of this issue are standing to sue and the political question doctrine. Should the plaintiffs establish that there is injury to the Congress as a whole, the court will likely grant standing. Focus would then be on whether the issue is justiciable.<sup>243</sup> Since the Constitution does not commit resolution of this issue to the legislative or executive branch, the court would have to rely on the prudential and functional concerns to dismiss the suit as nonjusticiable.<sup>244</sup> Should the court determine that the issue is nonjusticiable, it is arguable that the court would be implicitly agreeing that the President does have the power to terminate the treaty independently, even though a dismissal of the suit would have no precedential value for that proposition. As the situation now stands, the President has sent notice to terminate the treaty. Should the court not interfere, the treaty will be terminated, and, more importantly, the President will have increased support for his view that the President does have the power to terminate treaties without interference from the Senate, the full Congress, or the judiciary. *Goldwater v. Carter*, therefore, presents two options to the court. If the suit is decided on the merits, the court will make a major statement as to the role of the judiciary when the executive and legislative branches are stalemated. If the suit is dismissed as nonjusticiable, however, dismissal will be an implicit affirmation that an important part of the President's role in foreign affairs is beyond judicial scrutiny and, instead, is to be decided by a political confrontation between the Congress and the executive, or ultimately by citizens at the ballot box. As the Supreme Court stated in *United States v. Richardson*,<sup>245</sup> although the traditional electoral process may be "[s]low, cumbersome, and unresponsive . . . at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them."<sup>246</sup>

## V. CONCLUSION

The issue of whether the power to terminate treaties belongs to the President alone, the President and the Senate, or the President and Congress has been a source of controversy for many years. With a direct challenge to the President's power to terminate a treaty independently now pending in *Goldwater v. Carter*, this issue finally may be resolved. Should the court grant standing and proceed to the merits of the case, the court will be making an important statement as to the role of the judiciary in resolving disputes between the legislative and executive branches. Should the court,

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243. See generally *Taiwan Suit Hits Snag, But Backers Encouraged*, 65 A.B.A.J. 1031 (1979).

244. See text accompanying notes 197-208 *supra*.

245. 418 U.S. 166 (1974).

246. *Id.* at 179.

however, deny standing or invoke the political question doctrine and, thereby, dismiss the suit as raising a nonjusticiable issue, the court will be implicitly indicating that the issue of which branch of government has the treaty-termination power is left to be resolved by the political processes available in our system of government.

