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Cover Page Footnote

I am grateful to Fred Fox of the University of San Diego Law School for his valuable help in writing this article.

A LEGAL ANALYSIS OF THE UNITED STATES' ATTEMPTED WITHDRAWAL FROM THE JURISDICTION OF THE WORLD COURT IN THE PROCEEDINGS INITIATED BY NICARAGUA

*Farooq Hassan**

I. INTRODUCTION

On April 8, 1984, the Reagan administration announced that it was withdrawing from the jurisdiction of the International Court of Justice, for a period of two years, any disputes concerning Central America. The announcement included the assertion that the American withdrawal was effective as of April 6, 1984.[1] This step had been undertaken to ward off an anticipated suit by Nicaragua against the United States for various alleged violations of international law. Since the United States had been regarded as one of the main proponents of the sanctity of an international regime of law, depriving the major international legal forum of its ability to hear a complaint against the United States was not unnaturally viewed by many to be a negation of the values for which this nation stands.[2]

It is the purpose of this article to examine the legality of the attempt by the United States to derogate from its initial declaration in which, subject to certain reservations, it accepted the jurisdiction of the International Court of Justice.[3] This examination will show that, while the Reagan administration's action may have created enormous politi-

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1. *See* N.Y. Times, Apr. 9, 1984, at A1, col. 2.

2. *See* Ullman, *World Court Evasion, id.*, Apr. 11, 1984, at A27, col. 1. The factual reporting of events as related in this article are largely based on reports from the *New York Times* and take into account events up to May 10, 1984.

3. The United States procedure for ratifying the declaration is fully discussed at 12 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1296–305 (1971). The formal consent of the Senate came in Resolution 196, dated August 2, 1946. Although a two-thirds majority was required, the reported vote was 60 in favor and two against, with 34 senators not voting.

For a discussion of the United States' failure to participate in the Permanent Court of International Justice, see *id.* at 1155–56. For a discussion of the framing of the optional clause upon which declarations consenting to compulsory jurisdiction are based, see *id.* at 1278. For the proposition that no special language need be used for the consent to be valid, see *id.* at 1259. For a discussion of whether ratification of UN membership might have also constituted ratification of the Statute of the International Court of Justice, see *id.* at 1192. For a historical inquiry of the law of the United States determining in whom the power of consent is to be found, see *id.* at 1266.

cal controversy,[4] the legal effect of the attempted withdrawal cannot be the subject of any serious debate. It will be contended in this article that the United States' withdrawal, assuming it were otherwise valid, will be effective six months after its tender. In other words, in immediate terms, the withdrawal attempt does not legally keep the court from hearing the case filed by Nicaragua. On its face, the terms of the original United States declaration require that any variation of the court's jurisdiction vis-a-vis the United States cannot take effect until the expiry of a six-month period. Under the existing precedents, the court has the power to hear matters of which it has become lawfully seized, despite any later attempt to remove the controversy from the court's jurisdiction. It will be concluded, then, that the Reagan administration's assertion that the World Court was incapable of hearing any case against the United States concerning Central America as of April 6, 1984, produced no legal effect.

This article is divided into five parts. The first part presents a concise statement of the background facts of the subject matter and of the proceedings before the World Court through May 10, 1984. The second part outlines the jurisdiction of the International Court of Justice based on the prior consent of the parties. The third part examines the legality of the United States' attempted withdrawal from the jurisdiction of the World Court by applying relevant principles of international law. The fourth part considers the ability of the ICJ to determine its own competence to hear a particular controversy. The fifth and final part reviews an important constitutional question raised by the Reagan administration's action: the legality of a presidential action which derogates from an international agreement without Senate approval.

II. BACKGROUND FACTS

A. The Reagan Administration and Nicaragua

Since the Sandinista's ascension to power in Nicaragua, the United States government has been seeking to aid the rebel faction's operations against the Sandinista regime both financially and militarily, and to prevent the "export" of Sandinistan-trained rebels to neighboring El Salvador.[5] Just hours before the controversy over the filing of the Nicaraguan case arose, the Senate had approved $61.75 million in emergency military aid for El Salvador and $21 million for the rebels fighting the Sandanista regime.[6] Among the more controversial opera-

4. *See* N.Y. Times, Apr. 9, 1984, at A1, col. 2. For details of the U.S. involvement in the mining of the Nicaraguan harbors, see *id.*, Apr. 8, 1984, at A1, col. 6.

5. For congressional support of these policies, see *id.*, Apr. 6, 1984, at A1, col. 1.

6. *See id.*

tions conducted by the CIA in Central America was the supervision of the mining of the Nicaraguan ports, which resulted in damage to ships from several nations.[7] The obvious aim of aiding the rebels and of cutting off the sea lanes of Nicaragua was to make the Sandanista regime, at the very least, very uncomfortable.

It is now established that by the weekend of April 8, 1984, the news leaked out that Nicaragua had hired a well-known American international lawyer, Abe Chayes, along with Ian Brownlie, a professor of international law at Oxford University, to file proceedings against the United States for attempting to overthrow the lawful government of Nicaragua and for mining the Nicaraguan harbors.[8] These proceedings were apparently about to be filed at The Hague, which is the place of adjudication of the International Court of Justice.[9] In an admitted attempt to thwart the impending Nicaraguan action, the United States announced on April 9, 1984, that it was amending its declaration to suspend for a period of two years the jurisdiction of the World Court with regard to any matters brought against the United States concerning Central America.[10]

The following day, as the United States government had anticipated, Nicaragua filed proceedings against the United States at The Hague, asking the World Court to declare that the U.S. actions had caused great loss of life and property in Nicaragua, had essentially been aimed at destabilizing the lawful government of Nicaragua, and were contrary to international law.[11] In a press conference in Washing-

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7. *See id.*, Apr. 8, 1984, at A1, col. 6, A12, col. 3.

8. *See id.*, Apr. 10, 1984, at A1, col. 6.

9. *Id.*, Apr. 9, 1984, at A1, col. 2.

10. *Id.*

11. *See id.*, Apr. 10, 1984, at A1, col. 6. The Nicaraguan requests of the World Court stated:

> Nicaragua requests the Court to adjudge and declare as follows:
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> A. The United States is recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding and directing military and paramilitary action in and against Nicaragua, has violated and is violating its expressed charter obligations to Nicaragua, and in particular its charter and treaty obligations under Article 2, Paragraph 4 of the United Nations Charter, Article 18 and 20 of the Charter of the Organization of American States, Article 8 of the Convention of Rights and Duties of States, Article 1, third, of the Convention Concerning the Duties and Rights of States in the Event of Civil Strife.
>
> B. The United States, in breach of its obligations under general and customary international law, has violated and is violating the sovereignty of Nicaragua by armed attacks against Nicaragua by air, land and sea, incursions into Nicaraguan territorial waters, aerial trespass into Nicaraguan airspace, and efforts by direct and indirect means to coerce and intimidate the Government of Nicaragua.
>
> C. The United States, in breach of its obligations under general and customary international law, has used and is using force and the threat of force against Nicaragua.
>
> D. The United States, in breach of its obligations under general and customary inter-

ton in which the filing of the Nicaraguan case was announced, the Nicaraguan representatives noted that the United States' attempt to deprive the World Court of its jurisdiction in the Nicaraguan case was of no effect, since by the very terms of the original U.S. declaration a six-month notice of termination or revocation was required for it to be effective.[12]

A storm of controversy assaulted the Reagan administration. The Senate voted 84 to 12 in favor of a nonbinding resolution opposing the use of government funds for the mining of Nicaraguan harbors;[13] the House of Representatives approved an identical measure by a vote of 281 to 111.[14] Congress questioned whether lawmakers had been adequately informed about the Reagan administration's covert mining of the Nicaraguan harbors.[15] And for the first time in its seventy-seven year history, the American Society of International Law issued a resolution condemning an action of the United States. The resolution urged the Reagan administration to rescind its effort to turn aside the ICJ's jurisdiction.[16] Although the U.S. State Department asserted that it had defenses to the action brought by Nicaragua,[17] the Reagan administration, without acknowledging involvement in the mining, confirmed re-

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national law, has intervened and is intervening in the internal affairs of Nicaragua.

E. The United States, in breach of its obligations under general and customary international law, has infringed and is infringing the freedom of the high seas and is interrupting peaceful maritime commerce.

F. The United States, in breach of its obligations under general and customary international law, has killed, wounded, and kidnapped, and is killing, wounding, and kidnapping citizens of Nicaragua.

G. In view of its breaches of the foregoing legal obligations, the United States is under a particular duty to cease and desist immediately from all use of force—direct or indirect, overt or covert—against Nicaragua and all threats of force against Nicaragua.

From all violations of the sovereignty, territorial integrity or political independence of Nicaragua, including all intervention, direct or indirect, into the internal affairs of Nicaragua.

From all support of any kind—including the provision of training, arms or ammunition, financing, supplies, assistance, direction or any other form of support—to any nations, groups, organizations, movements or individuals engaging or planning to engage in military or paramilitary operations in or against Nicaragua.

From all efforts to restrict, block or endanger access to or from Nicaraguan ports.

From all killing, wounding or kidnapping of Nicaraguan citizens.

H. That the United States has an obligation to pay Nicaragua reparations for damages to persons, property and the Nicaraguan economy caused by the foregoing violations of international law as found to be determined by the Court.

Id., Apr. 11, 1984, at A8 (city ed.).

12. *Id.*, Apr. 10, 1984, at A1, col. 6, A8, col. 1.
13. *Id.*, Apr. 11, 1984, at A1, col. 6.
14. *Id.*, Apr. 13, 1984, at A4, col. 3.
15. *Id.*, Apr. 11, 1984, at A1, col. 6.
16. *Id.*, Apr. 13, 1984, at A3, col. 1.
17. *Id.*, Apr. 12, 1984, at A10, col. 1.

ports that the practice had been discontinued in March.[18]

By April 12, Nicaragua reported that it had successfully removed the mines from its three key ports where about a dozen vessels, including ships of the Soviet Union, Japan, and the Netherlands, had been damaged.[19] However, at the urging of the CIA and against the recommendation of Secretary of State Shultz, the Reagan administration rejected Nicaragua's deputy foreign minister as the next ambassador to Washington and announced that a study was underway for a program of economic sanctions against Nicaragua, including an embargo on imports and cancellation of landing rights.[20]

B. The ICJ Proceedings

Nicaragua's charges against the United States were brought before the International Court of Justice during the first week of May, 1984.[21] The court's decision, announced May 10, 1984, did not reach the merits of the case.[22] In the nine times since World War II that a filing for provisional measures had been undertaken before the World Court, the United States for the first time appeared as a defendant to oppose such measures. The United States presented two arguments against the court's jurisdiction. First, the United States invoked its suspension of consent to compulsory jurisdiction with respect to any disputes concerning Central America. Second, the United States claimed that Nicaragua had no right to plead before the World Court because it never filed instruments of ratification to officially accept the court's jurisdiction. The United States lost on both contentions.[23] The court's rulings, under the rubric of "indicators," were as follows: By a vote of fifteen to zero, the court ordered the United States to "immediately cease and refrain from any action restricting, blocking, or endangering access to or from Nicaraguan ports, and, in particular, the laying of mines."[24] By a vote of fourteen to one (with the United States judge, Stephen M. Schwebel, dissenting), the court ruled that the

> right to sovereignty and to political independence possessed by the Republic of Nicaragua, like any other State of the region or of the world, should be fully respected and should not in any way be jeopardized by any military and paramilitary activities which are prohibited by the prin-

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18. *Id.*, Apr. 13, 1984, at A1, col. 1.
19. *Id.*
20. *See id.*, Apr. 20, 1984, at A1, col. 5.
21. *Id.*, May 11, 1984, at A1, col. 5.
22. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.) 1984 I.C.J. 4, *reprinted in* 23 INT'L LEGAL MATERIALS 468 (1984).
23. *Id.* at 11–15, *reprinted in* 23 INT'L LEGAL MATERIALS at 472–74.
24. *Id.* at 22, *reprinted in* 23 INT'L LEGAL MATERIALS at 477.

ciples of international law,' in particular the principle that States should refrain from the threat or the use of force against the territorial integrity or the political independence of any State, and the principle concerning the duty not to intervene in matters within the domestic jurisdiction of a State, principles embodied in the United Nations Charter and the Charter of the Organization of American States.[25]

The ICJ directed that written proceedings should first be addressed to the question of the jurisdiction of the court to entertain the dispute and to the issue of the admissibility of the application, following the direction chosen by the Reagan administration. Judge Schwebel commented that the court's indicators resulted from Nicaragua's having established "the likelihood of a legal basis on which the Court's jurisdiction might be founded."[26] The United States officially stated that it had already stopped mining the Nicaraguan harbors and therefore had no problems with the order other than regret that the ICJ had not dismissed Nicaragua's complaint.[27]

The proceedings before the World Court resulted, therefore, in predictable interim relief without reaching the merits of the dispute. Since the questions of the court's jurisdiction were still to be decided on the merits,[28] to the extent that the ultimate goal of the Reagan administration in attempting to suspend the court's jurisdiction was to preempt the Nicaraguans from any forum whatsoever, the attempt was doomed to failure. If the administration's purpose was to manipulate a delay in a decision on the merits, then one should balance the advantages sought against the very real political losses suffered as a consequence of such action. In any case, the delay in ICJ proceedings is so enormous ordinarily that such a result was inevitable even without the tactics employed.

III. THE JURISDICTION OF THE WORLD COURT BASED ON PRIOR CONSENT

Before evaluating the attempted suspension by the United States of a part of its original declaration, it is first necessary to outline the jurisdiction of the International Court of Justice. We are only concerned here with jurisdiction that is based on the prior consent of the

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25. *Id.*

26. N.Y. Times, May 11, 1984, at A1, col. 5, A8, col. 2. Judge Schwebel is a former legal advisor to the State Department and professor of international law at Johns Hopkins University. His term on the World Court expires in 1988.

27. *Id.*, at A8, col. 1.

28. This article was completed before the November 26, 1984, decision of the World Court in which the court accepted jurisdiction in the case of *Nicaragua v. United States* by a vote of fifteen to one. *Id.*, Nov. 27, 1984, at A1, col. 6.

parties.[29] This particular kind of jurisdiction gives the court, in advance, the power to hear those categories of disputes which the concerned countries have decided to allow it to adjudicate by depositing a communication to that effect pursuant to article 36(2) of the Statute of the International Court of Justice. The consent so given is usually referred to as a "declaration under the optional clause." This clause states:

> The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
>
> a. the interpretation of a treaty;
>
> b. any question of international law;
>
> c. the existence of any fact which, if established, would constitute a breach of an international obligation;
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> d. the nature or extent of the reparation to be made for the breach of an international obligation.[30]

Under this provision, a state can file a "declaration" giving the ICJ the power to hear a dispute concerning that state.[31] But a dispute must fall within the terms of such a declaration for the court to have jurisdiction to hear the case. The states often incorporate various reservations within the terms of such declarations.[32] Accordingly, it is only

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29. This category of consent given *ante hoc* constitutes an important and considerable part of the court's jurisdiction. It must be found to exist in the instruments by which the declarant state initially grants jurisdiction to the court. *See generally* Waldock, *Decline of the Optional Clause*, 32 BRIT. Y.B. INT'L L. 244 (1955–56); Williams, *The Optional Clause*, 11 BRIT. Y.B. INT'L L. 63 (1930).

30. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 36, para. 2.

31. Declarations accepting compulsory jurisdiction made under article 36 of the Statute of the Permanent Court of Justice have been continued in force by article 6(5) of the Statute of the International Court of Justice.

The General Act for the Pacific Settlement of International Disputes, which was adopted by the League of Nations in 1938 (93 L.N.T.S. 345) was adopted with minor changes by the United Nations in 1949 (71 U.N.T.S. 101). Article 39(c) of the original act excluded: "Disputes concerning particular cases or clearly specified subject-matters, such as territorial status, or disputes falling within clearly defined categories." The question then may be raised about whether the Reagan administration's attempted reservation on the basis of geographic region is within the permissible "clearly defined categories." *See infra* text accompanying notes 52–55.

32. For an exhaustive account of the law of reservations under article 36(2) of the Statute of the International Court of Justice, see 1 S. ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT OF JUSTICE 388–98 (1965).

The two principal types of reservations are exclusion of disputes concerning the domestic jurisdiction of the concerned state, and reservations subject to time limitations. The United States is the prime protagonist of the former type of reservation. The U.S. declaration states that its recognition of compulsory jurisdiction shall not apply to "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America . . . ." 61 Stat. 1218, T.I.A.S. No. 1598, *reprinted in* 4 TREATIES

in cases falling outside the purview of such reservations, but within the terms of the declaration, that the ICJ will have jurisdiction.

It is also important to note that these declarations are deposited with the secretary general of the United Nations.[33] Declarations are usually regarded as international agreements and are therefore also registered under article 102 of the UN Charter.[34] It is obvious, then, that once a declaration is made it will be governed by the law of treaties.[35]

The United States made its declaration under the optional clause in 1946. The declaration contains several reservations to the jurisdiction of the World Court, and in addition contains a clause which is crucial to the determination of the present controversy. The declaration states: "*Provided further,* that this declaration shall remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration."[36]

The wording of this clause leaves no doubt that while the United States has the power to terminate, including the power to modify, its original declaration, any such action will be effective on the giving of

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AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776–1949, at 140–41 (C. Bevans ed. 1970) [hereinafter cited as Declaration]. By the words of this declaration, the United States itself, rather than the World Court, will determine if the dispute is a matter of domestic jurisdiction. It is arguable that this aspect of the reservation is contrary to the universal principle of law that every forum usually determines its own jurisdiction. The World Court, however, refused to authoritatively decide this point in Certain Norwegian Loans (France v. Nor.), 1957 I.C.J. 9.

The time limitation reservation has been held to be valid and not in conflict with the Statute of the International Court of Justice. *See* Right of Passage (Port. v. India), 1957 I.C.J. 125.

33. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 36, para. 4.

34. All agreements creating bilateral or multilateral obligations are to be deposited with the UN Secretary General as required by the charter, which expressly provides:

> 1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.
>
> 2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.

U.N. CHARTER art. 102, para. 1, 2.

35. The World Court has examined the matter of possible changes in the various states' declarations and the resultant problems such changes may create for other states who are subject to the jurisdiction of the court. In the *Right of Passage* case the court observed:

> As Declarations, and their alterations, made under Article 36 must be deposited with the Secretary-General, it follows that, when a case is submitted to the Court, it is always possible to ascertain what are, at that moment, the reciprocal obligations of the Parties in accordance with their respective Declarations. Under the existing system, Governments can rely upon being informed of any changes in the Declarations in the same manner as they are informed of total denunciations of the Declarations.

Port. v. India, 1957 I.C.J. 125.

36. Declaration, *supra* note 32, at 141.

six months notice. Because declarations are essentially international agreements, their modification must be in accordance with the applicable law of treaties. In the instant case, since the United States specifically reserved the right to withdraw or terminate its declaration if it so chose, it can certainly do so. But the effect of any termination would be the one envisaged by the very words of the declaration: effective after six months time.

That this is clearly the rule of law on this point is emphatically borne out by the World Court's opinion in the *Right of Passage* case between India and Portugal.[37] In that case, the World Court emphasized that a country's termination or modification of its declaration must be in accordance with the terms of that instrument.[38] However, it should also be noted that once the court becomes lawfully seized of a matter, the subsequent expiry or termination of the court's jurisdiction by a lapse or modification of a state's original declaration does not adversely affect the power of the court to decide that particular controversy.

A celebrated enunciation of this point was presented by the World Court in the *Nottebohm* case.[39] The court, after noting its jurisdiction under the optional clause, focused on the consequences of the expiry of a party's declaration. The court stated:

> The seising of the Court is thus dominated by the Declarations emanating from the parties when recourse is had to the compulsory jurisdiction in accordance with Article 36, paragraph 2. But the seising of the Court is one thing, the administration of justice is another. The latter is governed by the Statute, and by the Rules which the Court has drawn up by virtue of the powers conferred upon it by Article 30 of the Statute. After that, *the expiry of the period fixed for one of the Declarations on which the Application was founded is an event which is unrelated to the exercise of the powers conferred on the Court by the Statute*, which the Court must exercise whenever it has been regularly seised and whenever it has not been shown, on some other ground, that it lacks jurisdiction or that the claim is inadmissible.[40]

In view of this clear statement of the law, the court in *Nottebohm* rejected the contention that expiry of the time mentioned in Guatemala's declaration could affect the court's power to decide the *lis* it had properly become seized of when the declaration was in force. The court stated:

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37. 1957 I.C.J. 125.
38. *Id. See also* Anglo-Iranian Oil Co. (U.K. v. Iran), 1952 I.C.J. 93.
39. (Liech. v. Guat.) (Preliminary Objections), 1953 I.C.J. 111, 122.
40. *Id.* at 122–23 (emphasis added).

> When an application is filed at a time when the law in force between the parties entails the compulsory jurisdiction of the court—which was the case between Guatemala and Liechtenstein on December 17th, 1951—the filing of the Application is merely the condition required to enable the clause of compulsory jurisdiction to produce its effects in respect of the claim advanced in the Application. Once this condition has been satisfied, the Court must deal with the claim; it has jurisdiction to deal with all its aspects, whether they relate to jurisdiction, to admissibility or to the merits. An extrinsic fact such as the subsequent lapse of the Declaration, by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established.[41]

IV. THE VALIDITY OF THE UNITED STATES' WITHDRAWAL

In inquiring into the validity of the Reagan administration's attempted withdrawal from the World Court, it should first be noted that denunciation—which signifies here a country's abrupt cancellation of its declaration under the optional clause—is not in and of itself legally impermissible. Denunciation has taken place in a few cases in the past when a country did not want the court to hear a dispute filed against it.[42] For example, Iran effected a denunciation in the *Anglo Iranian Oil* case[43] in 1951, as did India in 1956 in the *Right of Passage* case.[44] However, in these cases the denunciation was fully covered by and in accordance with the terms of the original declaration. In these types of cases the concerned states had specifically reserved the right to terminate their declarations forthwith by a simple notification before proceedings were commenced. While withdrawing from the jurisdiction of the World Court in the face of pending litigation might appear to be contrary to a commitment to maintain a regime of the international rule of law, it nonetheless meets the formal requirements of the statute of the ICJ, as long as the state's own declaration does not stand in its way.

The first part of this analysis, then, shall proceed on the assumption that the Reagan administration's withdrawal per se is valid and will determine what the effective date of this withdrawal is. After this initial inquiry we shall discuss an issue apparently never analyzed before: whether a reservation which removes disputes concerning a particular geographical region is valid. Unlike the typical reservation, which generally lays down broad, juristically ascertainable grounds of

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41. *Id.*

42. *See generally* 1 S. ROSENNE, *supra* note 32, at 415–25 (discussing denunciation under various circumstances).

43. *U.K. v. Iran*, 1951 I.C.J. 106.

44. *Port. v. India*, 1957 I.C.J. 125.

ouster of jurisdiction, the Reagan administration's reservation directly prevents the court from hearing disputes related to a focused geographical area.

The State Department statement which announced the U.S. withdrawal can be essentially divided into two parts. The first part contains a bare assertion of the proposed U.S. modification of its declaration, while the second part, mostly aimed at domestic and international political objectives, gives the reasons why the United States took such action.

In the first part of its statement, the State Department announced that:

> [T]he United States has notified the Secretary General of the United Nations of a temporary and limited modification of the scope of the U.S. acceptance of the compulsory jurisdiction of the International Court of Justice in The Hague. . . .
>
> The notification, effective April 6, provides that the court's compulsory jurisdiction shall not apply to the United States with respect to disputes with any Central American state or any dispute arising out of, or related to, events in Central America, for a period of two years. . . .[45]

The legal effect of this statement, in light of the above enunciation of the law, is obvious. It is clear that while the United States has the right to terminate or modify its declaration, any such modification or termination will be effective only after the time provided for in the instrument. As such, the Reagan administration's modification becomes effective not on the day it is presented, but six months after it has been submitted. Thus, the State Department's assertion that the U.S. modification removes from the scope of the ICJ's jurisdiction cases concerning Central America as of April 6, 1984, is *prima facie* incorrect.

The legal reality is that while after a lapse of six months the United States will not be subject to the World Court's jurisdiction concerning new matters pertaining to Central America, until that time the court can validly begin to hear disputes against the United States involving Central America. Furthermore, once the court becomes seized of a dispute, then, under the rationale of the *Nottebohm* case, it has the power to decide all claims arising out of that particular controversy.[46] Thus it is submitted that the maintenance of the present Nicaraguan case should not be affected by the United States' attempted withdrawal.

The profferred justifications for the Reagan administration's action contained in the second part of the State Department's statement

45. N.Y. Times, Apr. 9, 1984, at A1, col. 2, A8, col. 3.

46. See supra text accompanying notes 39–41.

seemed to be prompted by political rather than legal considerations. A state denouncing its obligations *qua* the jurisdiction of the World Court is under no legal obligation to give any justification for its action. If it does, then perhaps the state's purpose is to meet possible political opposition to the state's action. Indeed, the State Department statement goes on to say: "This step has been taken to preclude the court's being misused to divert attention from the real issues in the region and to disrupt the ongoing regional peace process by a protracted litigation of claims and counterclaims."[47] How Nicaragua was going to "misuse" the World Court is elaborated on when the statement asserts:

> We do not wish to see the court abused as a forum for furthering a propaganda campaign. . . . The parties to the Contadora process can determine for themselves in what respect they wish to submit regional issues to adjudication or other forms of dispute resolution. . . .
> . . . Nicaragua is regretfully considering action to attempt to divert attention from its failure to address those issues seriously by staging propaganda spectaculars in other fora.
> . . . By our action, we serve notice that we do not intend to cooperate with this plan or permit the court to be misused.[48]

The essence of the above statement seems to be that the real reasons prompting the United States to amend its declaration were to allow a regional solution to the Nicaraguan conflict and to bar the Nicaraguans from a world forum in which it could engage in political vilification of the United States. It is submitted that whatever merit these reasons might have in the political field, such rationales have no validity in international law. The reference to a "regional ongoing peace process" is clearly an allusion to the efforts of the Contadora group of countries to mediate this controversy.[49] However, neither the UN Charter nor the statute of the ICJ contains any provision by which such "ongoing" negotiations can be cited as an absolute bar to the bringing of litigation by a country which feels that its international rights have been violated.[50] Furthermore, the point that a state can further its political goals by bringing legal proceedings is of no consequence in evaluating the legality of the maintenance of such a proceeding. It appears that the United States was not very confident that the rationales it advanced in support of its actions were convincing. Indeed, a State Department official acknowledged that the U.S. action may not

47. N.Y. Times, Apr. 9, 1984, at A1, col. 2, A8, col. 3 (city ed.).
48. *Id.*
49. *Id.* The Contadora countries are Panama, Venezuela, Columbia, and Mexico. *Id.*
50. It is perhaps possible to accomplish this end by having a reservation to this effect in the declaration.

be appreciated by many.[51] In any event, whatever merit the U.S.-advanced rationales may have in the field of domestic or international politics, they are totally unconvincing insofar as international law is concerned.

We may now turn to the examination of whether a reservation of the nature advanced by the United States is jurisprudentially valid. This analysis raises a question which apparently has never been discussed in the legal literature before. A brief general survey of the different types of reservations is necessary to comprehend the significance, if any, of the present quest.

An examination of the different reservations now in force reveals that the reservations of many states to the jurisdiction of the ICJ have more or less become standardized. The five principal "categories" are: (1) exclusion of jurisdiction based on disputes or facts, the origin of which is date or time; (2) disputes which can be settled by recourse to other identified means; (3) disputes which arise out of war or other hostilities; (4) disputes relating to the domestic jurisdiction of the signatory state; and (5) under principles of British constitutional law, the exclusion of disputes between members of the Commonwealth. With these kinds of reservations, the underlying juristic rationale is to lay down disqualifications of certain categories of disputes from the purview of the World Court. There is no attempt here to preclude a particular country or identifiable group of countries from litigating with the declarant state. The question which should be addressed in response to the Reagan administration's reservation is this: Can a state while submitting a declaration accepting the jurisdiction of the court pointedly refuse to litigate against a certain country or countries?

While it is clear that reservations are contemplated by the statute of the ICJ since its jurisdiction is optional, there do exist strong doubts about the juristic validity of at least one particular kind of reservation: the "self-judging" reservation of the United States. Reservation (b) of the U.S. declaration holds that the World Court shall not have jurisdiction over "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America."[52] Commentators have criticized this category as being, *ex facie*, violative of article 36 of the statute of the ICJ which states that the court itself must decide matters relating to its own jurisdiction. It has been pointed out that the power

51. For example, an official at the State Department remarked that "obviously, people will say that this shows you're guilty, or disrespectful to the court." The official continued, then, to say "We're trying to make the point that this is a tactical litigation move, not a sign of disrespect for the court." *Id.*

52. Declaration, *supra* note 32, at 141. *See supra* note 32.

to determine its own jurisdiction has been specifically conferred on the court.[53] Indeed, the United States may have avoided ever testing this reservation for this very reason. But the very existence of this self-judging reservation has been seriously questioned by the American legal community and by Congress.[54]

While the self-judging reservation is not in issue in the present controversy, it does illustrate the contention that perhaps some kind of reservation may be juristically impermissible. Turning to the analysis of the Reagan administration's Central America reservation, it could be argued that precluding a particular state or group of states from bringing charges against the United States before the World Court, not on the basis of general guidelines, but on the basis of their geographic location, is invalid per se as partially negativing the general jurisdiction *ab initio* conferred on the court by the submission of a declaration under article 36. The precise argument would be that while disqualifications of a general kind (i.e., applicable in theory against any state) can be included in a declaration, it would be contrary to the whole scheme and philosophy of article 36 to claim that country *A* or country *B* cannot litigate disputes against the declarant state. In effect, such a reservation is tantamount to preselecting the states that the declarant state might wish in the future to litigate.

One possible response to this argument is that in the existing stock of diverse reservations there does exist one which in effect excludes known and identifiable countries from the court's jurisdiction. The reservation put forth in the several declarations of the Commonwealth states excludes disputes between Commonwealth countries from being litigated in this forum. However, the real basis for this particular reservation lies in the so-called *inter se* doctrine[55] of British constitutional law, and has nothing to do with an ouster of the species attempted by the Reagan administration. Nevertheless, it is worthwhile to note this precedent as being indicative that one might get away with prohibiting litigation involving certain countries.

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53. Article 36(6) of the Statute of the International Court of Justice provides that "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."

54. *See generally* 12 M. WHITEMAN, *supra* note 3, at 1301–09. *See also Strengthening the International Court of Justice: Hearings on S.R. 74, 75, 76, 77, and 78 Before the Senate Comm. on Foreign Relations*, 93d Cong., 1st Sess. 1 (1973). Among the numerous persons who testified before the committee was Stephen M. Schwebel, then professor of international law and now a sitting judge on the ICJ. Schwebel's testimony opens with two remarkable (in light of this analysis) propositions. One is that the U.S. "self-judging" domestic jurisdiction reservation has impeded American appearances before the ICJ, and the second is that a modification of the U.S. declaration would require the supporting vote of two-thirds of the Senate. *Id.* at 181–82.

55. The existence of a common sovereign was initially the juridical justification for this rule.

The matter is of only academic interest at this point, for given the realities of international litigation, it is very unlikely that the World Court would embark upon an adjudication of the validity of the Central America reservation. Moreover, it is not foreseeable that the Nicaraguan counsel will actually raise such a point strenuously, especially since Nicaragua appears to have a good case anyway.

IV. The Law Regarding Competence de la Competence

It has already been observed that the United States' attempt to oust the jurisdiction of the ICJ cannot be legally successful. What remains to be seen is whether under existing precedents and the practice of the court the United States could, by its withdrawal attempt, totally prevent Nicaragua from having any kind of a hearing before the World Court in which it could use this forum to further its perceived grievances.

An answer to this inquiry is important, for according to the State Department statement the major reason prompting the United States to withdraw was to prevent the "misuse" of the World Court by Nicaragua.[56] Obviously, this preventative measure could only succeed if by law such a maneuver was juristically potent enough to restrain the court from proceeding at all with the case. If under existing law the ICJ would in any event proceed to examine the validity of the very instrument on which the alleged ouster of jurisdiction is based, then the strategy of not allowing Nicaragua any hearing at all would fail. An examination of this issue, therefore, will aid in assessing how well-considered the move of the Reagan administration was. But perhaps a more compelling purpose is to evaluate the legal validity of such moves. It is regrettably not impossible to visualize a repetition of this phenomenon in future controversies of this nature.

Historically, the *Alabama* arbitration of 1872[57] has been cited as settling in international litigation the principle of municipal jurisprudence that whether or not a tribunal has jurisdiction is decided by the tribunal itself. Shortly thereafter, the Institut de Droit International in a draft of the rules for international arbitration stated: "If the doubt concerning the jurisdiction depends on the interpretation of a clause in the *compromis*, the parties are presumed to have given the arbitrators power to settle the question, unless otherwise stipulated."[58]

It could thus be justifiably contended that, unless the *compromis*

56. *See supra* text accompanying note 47.

57. The Alabama Claims (U.S. v. Great Brit.), 1 J. Moore, History and Digest of International Arbitrations 495–682 (1898).

58. *See Projet de Reglement pour le Procedure Arbitrale Internationale*, art. 14, 1 Annuaire 126, 129–30 (1877).

or special agreement creating the international tribunal stated otherwise, it will be presumed that an international tribunal has the jurisdiction to decide its own jurisdiction by an examination of the relevant instruments. In other words, it has *competence de la competence.* By the close of the nineteenth century, this principle appears to have received general acceptance, since it appeared in the Pacific Settlement of International Disputes in the first peace conference at The Hague in 1899.[59] Thereafter, the application of this rule has not been seriously challenged. In fact, several permanently constituted international courts have specific provisions in their charters allowing the court to determine its own jurisdiction.[60]

In the case of the World Court, article 36(6) of its statute specifically states: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."[61] In one sense the World Court must affirmatively decide this matter in every case before proceeding to determine the *lis.* There are numerous instances where the ICJ exercised this particular jurisdiction in order to resolve the threshold issue of whether it had *competence de la competence* to proceed with a particular dispute.[62] Perhaps the clearest pronouncement that the court gave on this issue is found in the *Nottebohm* case, in which the court observed:

> Paragraph 6 of Article 36 merely adopted . . . a rule consistently accepted by general international law in the matter of international arbitration. Since the *Alabama* case, it has been generally recognized following earlier precedents, that, in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction. . . .
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> This principle, which is accepted by general international law in the matter of arbitration assumes particular force when the international tri-

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59. Article 48 states that "The Tribunal is authorized to declare its competence in interpreting the compromis as well as the other treaties which may be invoked in the case, and in applying the principles of international law." The Proceedings of The Hague Peace Conferences: The Conference of 1899, *quoted in* I. SHIHATA, THE POWER OF THE INTERNATIONAL COURT TO DETERMINE ITS OWN JURISDICTION 20 (1965).

60. *See* Convention Establishing the Central American Court of Justice, Dec. 20, 1907, art. 22, *reprinted in* 2 FOREIGN REL. 692 (1907); STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE art. 36, para. 4; STATUTE OF THE ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL LABOR ORGANIZATION art. 2, para. 7; STATUTE OF THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS art. 2, para. 3.

61. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 36, para. 6.

62. *See* I. SHIHATA, *supra* note 59, app. 11. Shihata lists 18 cases in which the ICJ had to deal with an objection to its jurisdiction. In some of these cases the examination of the preliminary objection was joined to the merits of the case. The Permanent Court of International Justice had dealt with at least 14 cases in which a preliminary objection had been raised to its jurisdiction. *Id.*

> bunal . . . is an institution which has been pre-established by an international instrument defining its jurisdiction and regulating its operation, and is, in the present case, the principal judicial organ of the United Nations.[63]

Thus, it is patently clear that under existing law the attempt of the United States to remove itself from the jurisdiction of the World Court by modifying its declaration would not prevent the court from proceeding further with the Nicaraguan case in order to decide its *competence de la competence*. As such, if Nicaragua merely wanted a forum for propaganda purposes, as the State Department alleged, Nicaragua would succeed, at least in a limited sense by having an initial hearing on the question of the court's jurisdiction. There is serious question, then, whether the Reagan administration's move was even strategically sound. Keeping in mind the many compelling reasons for having a country like the United States adhere to the regime of the international rule of law, and in light of the slim chances of utterly preventing the adversary its day in court, conservative and prudent lawyering would call for meeting the opponent in court and then raising substantive issues of sufficient merit to be adjudicated by the court. As international litigation proceeds on a pace which, to say the least, is very slow, there was absolutely no danger of the United States losing strategically by virtue of a court decision in the immediate future.[64]

It is not necessary to reiterate here the enormous importance which all peace-loving nations are expected to accord to the premiere international judicial forum. Leading treatises and works of considerable significance have already stressed the necessity of curbing the effect of reservations of the type created by the United States. In view of such considerations, it does not augur well if states, in order to get out of what they perceive to be awkward situations, engage in the practice of responding to the threat of impending litigation with an immediate modification of their declarations under the optional clause. While this phenomenon has undoubtedly occurred before, one can only emphasize that the abdication of such practices would be a change for the better.

V. THE CONSTITUTIONAL QUESTION: DEROGATION FROM INTERNATIONAL AGREEMENTS BY THE PRESIDENT WITHOUT SENATE APPROVAL

The question of whether the executive branch of the U.S. govern-

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63. (Liech. v. Guat.) (Preliminary Objections), 1954 I.C.J. 111, 119.

64. While it is out of the purview of this article, it may be submitted that in light of the type of adjudication called for by the Nicaraguan claims, the U.S. could have easily raised serious and substantial arguments on the question of the justiciability of the subject matter of the controversy.

ment can derogate from what is essentially an international agreement may not be of great importance in the proceedings before the World Court, but it does raise certain interesting constitutional issues.

In the landmark decision of *United States v. Curtiss-Wright Export Corp.*,[65] the United States Supreme Court did not hesitate to grant the president a preeminent position in the domain of international affairs. However, in *Youngstown Sheet & Tube Co. v. Sawyer*,[66] Justice Jackson in his concurrence pointed out that *Curtiss-Wright* did not involve the question of the president's power to act without congressional authority.[67] Instead, Jackson stated, *Curtiss-Wright* intimated that the president could not entirely disregard an act of Congress while executing his powers.[68] Implicit in such a *ratio* is the point that the president cannot act in violation of an act of Congress. In the absence of relevant legislation, however, the question becomes one of Congress's consent to the president's actions. It may be that consent can be implied when Congress has failed to formally and expressly dissent.[69]

With these preliminary observations, let us turn to the facts in issue. The U.S. declaration consenting to compulsory jurisdiction in cases before the World Court was made by President Truman in 1946. The declaration was considered a treaty under the Constitution and received the requisite formal approval of a two-thirds majority vote of the Senate.[70] But in President Reagan's attempt to withdraw from the World Court, the president derogated from a treaty without bothering to get the formal approval of Congress.

The argument that the Reagan administration's attempted withdrawal violates the Constitution has, thus, a *prima facie* force. Despite the decision in *Youngstown Sheet & Tube*—finding presidential powers only in the absence of express denial by Congress—the separation of powers doctrine is still a vital tool for constitutional construction.[71] In this context, decisions of various U.S. courts can be cited for the following propositions: the repeal of treaty provisions by implication is not

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65. 299 U.S. 304 (1936).

66. 343 U.S. 579 (1952).

67. *Id.* at 635 n.2 (Jackson, J., concurring).

68. *See id.* However, it is well to remember that *Youngstown* dealt with the domestic powers of the executive rather than its prerogatives in the domain of foreign affairs.

69. *See* Goldwater v. Carter, 617 F.2d 697, *vacated and remanded*, 444 U.S. 996 (1979).

70. U.S. CONST. art. II, § 2.

71. *See* Immigration & Naturalization Serv. v. Chadha, 103 S. Ct. 2764 (1983). In *Chadha*, the Court held that a provision of the Immigration and Nationality Act which authorized a one-house veto over an executive decision to allow a deportable alien to remain in the country was unconstitutional. *Id.* at 2788. The Court stated that the veto action was essentially legislative and was thus constitutionally impermissible without passage by both houses of Congress and presentation to the president. *Id.* at 2787. The impact of this recent decision is not yet fully known.

favored;[72] Congress can alter or repeal treaty rights and obligations for enforcement in U.S. courts, but courts will not automatically decide war abrogates treaties with hostile powers;[73] the power to revoke or modify laws is a legislative power, and the executive branch may not directly or indirectly modify, repeal, or disregard laws enacted by the legislature;[74] congressional intent to abrogate or alter a treaty should not be lightly imputed;[75] and, finally, when the Senate ratifies a treaty with a clause for termination without conditions and without designation as to who is empowered to terminate it, the termination does not require the president to obtain two-thirds Senate consent if the circumstances of the termination are changed from the circumstances of its ratification.[76]

These cases arise because while the Constitution does provide for the advice and consent of the Senate for final consummation of treaties, it is silent on how treaties should end. It can be argued, then, that the constitutionally required advice and consent is not mandated for terminating treaties on a theory that failure to challenge the change through formal Senate action is deemed consent. Perhaps the most celebrated comment that the procedure for undoing a treaty should be the same as the one required for making it is found in *The Federalist*, in which John Jay said "they who make treaties may alter or cancel them."[77] In an important 19th century case Justice Story said in the same vein, "the obligations of the 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."[78]

This position has found support among various other authorities.[79] On the other hand, at various times the president has in fact claimed the right to terminate treaty obligations without the approval of the Senate. Apparently, it is argued, this power is based on the foreign affairs prerogatives of the president.[80] While this issue can be argued

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72. Arthur v. Homer, 96 U.S. 137, 140 (1877).

73. Clark v. Allen, 331 U.S. 503, 507–16 (1947).

74. Peony Park, Inc. v. O'Malley, 121 F. Supp. 690, 695 (D. Neb. 1954), *cert. denied*, 350 U.S. 845 (1955). While this case does not involve a treaty, it is especially cogent in reviewing the constitutional issues within the separation of powers doctrine.

75. Torres v. Immigration & Naturalization Serv., 602 F.2d 190, 195 (7th Cir. 1979) (quoting Menominee Tribe v. United States, 391 U.S. 404, 412–13 (1968)).

76. *Goldwater*, 617 F.2d at 697.

77. THE FEDERALIST No. 64, at 394 (J. Jay) (C. Rossiter ed. 1961).

78. The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 75 (1821).

79. *See* Riggs, *Termination of Treaties by the Executive without Congressional Approval*, 32 J. AIR L. & COM. 526, 533–34 (1966).

80. President Lincoln was apparently the first president to terminate a treaty without congressional action. *See* 5 J. MOORE, A DIGEST OF INTERNATIONAL LAW 323 (1906). President Roosevelt denounced a treaty with Greece in 1933. *See* 9 ST. DEP'T PRESS RELEASE 257–58

either way, it has undergone little authoritative judicial scrutiny. Although it is unlikely that the constitutionality of President Reagan's action will be challenged, some discussion of the hypothetical outcome is in order.

There is one modern case which illuminates the current issue under consideration. In *Goldwater v. Carter*,[81] Senator Goldwater challenged President Carter's denunciation of various treaties with the Republic of China (Taiwan) when the People's Republic of China was recognized by the United States in December, 1978. Goldwater contended that the Senate had been denied a constitutional opportunity to consent prior to the president's action.[82] This directly raised the issue of rights between the executive and legislative branches in the denunciation of a treaty. On its merits, the District of Columbia Court of Appeals sustained the executive action.[83]

The Supreme Court, without hearing argument, vacated and remanded the judgment with directions that the complaint be dismissed.[84] The justices were unable to agree as to the grounds of dismissal, however. Four justices, Chief Justice Burger, and Justices Rehnquist, Stewart, and Stevens, considered the subject matter nonjusticiable because it was a "political question."[85] Justices Blackmun and White would have heard the case on its merits and given it "the plenary consideration it so obviously deserves."[86] Only Justice Brennan, who dissented, went to the merits, holding that the action of the presi-

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(1933).

One of the foremost supporters of the unbridled foreign affairs power of the president was Woodrow Wilson, who said:

> One of the greatest of the President's powers . . . [is] his control, which is very absolute, of the foreign relations of the nation. The initiative in foreign affairs, which the President possesses without any restriction whatever, is virtually the power to control them absolutely. The President . . . may guide every step of diplomacy, and to guide diplomacy is to determine what treaties must be made, if the faith and prestige of the government are to be maintained. He need disclose no step of negotiation until it is complete, and when in any critical matter it is completed the government is virtually committed. Whatever its disinclination, the Senate may feel itself committed also.

2 W. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 77–78 (1908). At the time Wilson made this observation he was president of Princeton University and thus still an academician. Nonetheless, he did not feel inclined to analyze the many obvious constitutional difficulties one should probably deal with in making such utterances. Be that as it may, Wilson was made aware of at least the vital position of the Senate in the domain of treaties when his laboriously negotiated Treaty of Versailles and the establishment of the League of Nations were rejected by that body.

81. 617 F.2d at 697.
82. *Id.* at 702.
83. *Id.* at 709.
84. Goldwater v. Carter, 444 U.S. 996 (1979).
85. *Id.* at 1002.
86. *Id.* at 1006.

dent came within his well-established foreign affairs powers.[87]

It seems that after *Goldwater*, the president does have the power to terminate a treaty obligation without the explicit advice and actual consent of the Senate. Therefore, the action of President Reagan respecting the attempted modification of the U.S. declaration would not be constitutionally defective. However, closer scrutiny of the *Goldwater* opinions and a rigorous testing of the actual congressional response to the Reagan initiative makes the outcome less certain.

The court of appeals held in *Goldwater v. Carter* that the plaintiffs had standing to bring their claim that the president had acted to deny them a constitutional opportunity to advise and consent to his denunciation of a treaty.[88] The court examined the clause which provided for termination of the agreements with the Taiwanese and found it silent on conditions or designations as to who was empowered to terminate it.[89] On the logical premise that Congress could have imposed such conditions or designations at the time it advised and consented to their formation, the court was unwilling to reform the clause to comply with the claims of a handful of congressmen acting without the express authorization of the Senate.[90]

Nonetheless, the opinion was significantly narrower than this holding, by itself, would seem to suggest. The court left open the opportunity for the Senate or the House of Representatives to act on the question.[91] Since neither chamber mustered sufficient protest to formally challenge the executive action, this dictum was moot, at least with respect to the treaty with Taiwan.

In contrast, in the case of the Reagan initiative, both chambers took formal action to express their disapproval of Reagan's actions in Nicaragua, reflecting what was reported to be a "developing impasse" between Congress and the Reagan administration on the initiative against Nicaragua.[92] Immediately following the attempted withdrawal, the House of Representatives passed by a 281 to 111 vote a nonbinding resolution opposing the further use of federal funds for the mining of Nicaraguan harbors.[93] The Senate adopted an identical resolution with 84 members favoring it and but 12 members opposing it. Included in the majority were 42 Republicans, and among them were the Republi-

87. *Id.* at 1006–07.

88. *Goldwater*, 617 F.2d at 703.

89. *Id.* at 708.

90. The complaint was brought by nine senators and sixteen members of the House of Representatives. *Id.* at 709.

91. *Id.*

92. *See* N.Y. Times, Apr. 12, 1984, at A1, col. 6.

93. *Id.*, Apr. 13, 1984, at A4, col. 3.

can leader, Senator Baker, and the president's reelection campaign chairman, Senator Laxalt, prompting the Democratic leader, Senator Byrd to quip, "the President asked for bipartisanship in foreign policy and he got it."[94] The chambers' failure to vote on a resolution directly on point with the attempted modification of the declaration, leaving the matter genuinely unresolved, is consistent with the history of such questions. Moreover, in terms of immediacy, the Reagan administration had defused some concern by voluntarily promising not to continue the activities, which it declined to admit it had been undertaking.[95]

Before leaving the court of appeal's disposition of the *Goldwater* precedent, there is one other finding that deserves special review. In *Goldwater*, the court of appeals noted the widely held rule that the president can terminate or vary a treaty, in the absence of Senate advice and consent, when there has been a change in circumstances or a breach of the treaty.[96] In a complicated construction, the court decided that the president had the sole power under the Constitution to recognize or withdraw recognition from other countries; Carter withdrew recognition from the Republic of China and recognized the People's Republic of China, thereby creating a sufficient change in circumstances, in that court's opinion, to warrant his exercise of the power to denunciate the treaty.[97] This tautology by the court can be ignored for application of the underlying test: a breach or change in circumstances from the time of congressional consent. However, it is fundamentally troubling to ask whether the party initiating the change in circumstances is also the sole authority to make that determination. Yet, by calling it a political question and shielding the matter from judicial review, precisely that result would be inescapable. Hence, it is to the Supreme Court discussion of the *Goldwater* case that we must now return.

The concurring opinion of Justice Powell merits particular attention. While respecting the political question bar to judicial intervention, Powell articulated the situations that would lead him to bring the matter before the Court:

> The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse. Otherwise, we would encourage small groups or even individual Members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to

94. *Id.*, Apr. 12, 1984, at A12, col. 4.
95. *Id.*, Apr. 13, 1984, at A1, col. 1.
96. *Goldwater*, 617 F.2d at 706.
97. *Id.* at 707–08.

resolve the conflict.

In this case, a few Members of Congress claim that the President's action in terminating the treaty with Taiwan has deprived them of their constitutional role with respect to a change in the supreme law of the land. Congress has taken no official action. In the present posture of this case, we do not know whether there ever will be an actual confrontation between the Legislative and Executive Branches. . . .

It cannot be said that either the Senate or the House has rejected the President's claim. If the Congress chooses not to confront the President, it is not our task to do so. I therefore concur in the dismissal of this case. . . .

If the Congress, by appropriate formal action, had challenged the President's authority to terminate the treaty with Taiwan, the resulting uncertainty could have serious consequences for our country. In that situation, it would be the duty of this Court to resolve the issue.[98]

While it cannot be said with certainty that Congress has met the test laid down in Powell's opinion regarding the declaration to the World Court, the actions of Congress with respect to the underlying situations between the Reagan administration and Nicaragua constitute a far more difficult question than the situation the Court faced in *Goldwater*. Moreover, the Powell opinion reserves as an open question the powers of the president to terminate treaties without congressional approval:

No constitutional provision explicitly confers upon the President the power to terminate treaties. Further, Article II, § 2 of the Constitution authorizes the President to make treaties with the advice and consent of the Senate. Article VI provides that treaties shall be a part of the supreme law of the land. These provisions add support to the view that the text of the Constitution does not unquestionably commit the power to terminate treaties to the President alone.[99]

Thus, although there is no precedent for concluding that President Reagan's modification of the declaration violated a well-established constitutional principle, valid arguments may still be raised as to the constitutionality of his action.

VII. CONCLUSION

The clear thrust of this discussion is that the United States' action, admittedly a tactical move, is not supported by international law and cannot succeed in allowing the United States to avoid the inconvenience of being called before the World Court to answer the Nicara-

98. *Goldwater*, 444 U.S. at 997–1002.
99. *Id.* at 999.

guan charges. The one justification publicly provided by the Reagan administration—that the six month termination period applies only to a denunciation of the whole declaration, and not to a partial modification—is really without any legal merit.[100] Where a period for termination of an instrument is mentioned, *ex hypothesi*, it applies to a change of any part of the instrument. Any other interpretation would lead to absurd results, for a country could conceivably have a fixed period for termination with no reservations, but whenever it pleased could simply add reservations, effective immediately, without triggering the period for terminations. It is submitted that such a course of action, and accordingly the administration's profferred justification, should be summarily rejected.

It may also be mentioned that there exists a Treaty of Friendship, Commerce and Navigation, signed in 1956, between the United States and Nicaragua.[101] Under clause 24(2) of that instrument, the World Court was given jurisdiction to hear any disputes arising out of this treaty.[102]

It is ironic that a nation that only recently was the recipient of most-favored nation status by virtue of a Friendship, Commerce and Navigation treaty is now accusing the United States of harming its people, damaging its property, and undermining its government through actions internationally recognized as unlawful.

President Reagan's attempt to withdraw the Nicaraguan dispute from the World Court, in light of the substance of the Nicaraguan allegations, may not have been completely unforeseeable. Nonetheless, the president's action, while it may have been constitutionally valid, was quite certainly politically damaging as well as being wholly inadequate to produce the desired legal consequences.

100. N.Y. Times, Apr. 10, 1984, at A1, col. 6, A8, col. 2.

101. Treaty of Friendship, Commerce and Navigation, Jan. 21, 1956, United States-Nicaragua, 9 U.S.T. 449, T.I.A.S. No. 4024.

102. *Id.* art. 24, para. 2.