GOLDWATER v. CARTER: THE CONSTITUTIONAL ALLOCATION OF POWER IN TREATY TERMINATION

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INTRODUCTION

On December 15, 1979, President Carter announced his intention to recognize and establish diplomatic relations with the People's Republic of China (PRC).[1] In a separate statement, the President indicated that on January 1, 1979, the United States would notify Taiwan that it would terminate diplomatic relations with the Republic of China (ROC) and would terminate the Mutual Defense Treaty between the United States and the ROC which had entered into force March 3, 1955.[2] One week after his public announcements, the President wrote the following letter to the Secretary of State: "Please deliver to the Republic of China a notice under Article X of the U.S.-ROC Mutual Defense Treaty of 1954 to effect termination of the treaty one year after January 1, 1979."[3]

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1. 14 Weekly Comp. of Pres. Doc. 2264 (Dec. 18, 1978). The texts of President Carter's statement and of other relevant documents are reprinted in Senate Comm. on Foreign Relations, 95th Cong., 2d Sess., Termination of Treaties 320-28 (Comm. Print 1978). For a concise statement of the events leading up to the normalization of United States relations with the People's Republic of China, see Scheffer, *The Law of Treaty Termination as Applied to the United States De-Recognition of the Republic of China,* 19 Harv. Int'l L.J. 931-44 (1978).

2. 6 U.S.T. 433, T.I.A.S. No. 3178, 238 U.N.T.S. 213.

3. Defendant's Answers to Plaintiff's Interrogatories, Goldwater v. Carter, 481 F. Supp. 949 (D.D.C. 1979). Pursuant to President Carter's instruction, Acting Secretary of State Warren Christopher signed the notice of termination on December 23, 1978. The notice was transmitted to the Ministry of Foreign Affairs in Taipei and to the Embassy of the ROC in Washington on the same day.

On the same day the President acted to set in motion the termination of the Mutual Defense Treaty with the ROC, United States Senator Barry Goldwater, joined by six other Senators and eight members of the House of Representatives,[4] filed suit in the U.S. District Court for the District of Columbia, naming the President and the Secretary of State as defendants. The relief sought by the plaintiffs was a declaration that the President's attempt to terminate unilaterally the treaty with the ROC was "unconstitutional, illegal, null and void,"[5] and that "any decision of the United States to terminate the [Mutual] Defense Treaty must be made by and with the full consultation of the entire Congress, and with the advice and consent of the Senate, or with the approval of both Houses of Congress."[6] The plaintiffs sought an injunction preventing the President and the Secretary of State "from taking any further action or making any statements which will have the effect of terminating, or creating any expectations that the [Mutual] Defense Treaty has been or will be terminated,"[7] at least until such time as the President might secure the advice and consent of the Senate or the approval of both Houses of Congress concerning the termination of this treaty.

When the 96th Congress convened, several Senators introduced resolutions concerning the appropriate role of the Senate and the Congress in treaty termination generally or concerning the termination of the Mutual Defense Treaty with Taiwan in particular.[8] On the opening day of the new Congress, January 15, 1979, Senator Harry F. Byrd proposed the following resolution:

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4. Complaint for Declaratory and Injunctive Relief at 1-2, Goldwater v. Carter, 481 F. Supp. 949 (D.D.C. 1979)[hereinafter cited as Complaint]. The co-plaintiff Senators were Strom Thurmond, Carl Curtis, Jake Garn, Orrin Hatch, Jesse A. Helms, and Gordon Humphrey. The co-plaintiff Members of the House were Robert Bauman, Steve Symms, Larry McDonald, Robert Daniel, Jr., Bob Stump, Eldon Rudd, John Ashbrook, and George Hansen. Goldwater was later joined in this action by Senators Paul Laxalt and James McClure and by Congressmen John Rousselot, Robert Dornan, Don Young, Newt Gingrich, James Collins, Mickey Edwards, Dan Quayle, Clair Burgener, and Ken B. Kramer. Amended Complaint, Goldwater v. Carter, 481 F. Supp. 949 (D.D.C. 1979).

5. Complaint, *supra* note 4, at 14.

6. *Id.* at 15.

7. *Id.* at 14.

8. Goldwater v. Carter, (D.D.C., June 6, 1979) [hereinafter cited as Opinion of June 6, 1979], *reprinted in* 125 Cong. Rec. S7050-52 and 7062-64 (daily ed. June 6, 1979).

> It is the sense of the Senate that approval by the Senate of the United States is required to terminate any mutual defense treaty between the United States and another nation.[9]

Senator Byrd presented his resolution as an amendment to the Taiwan Relations Act,[10] and this resolution, known as the "Byrd Amendment," was debated in the Senate on March 7 and 8, 1979.[11] In the course of this debate, Senator Byrd agreed to withdraw the resolution as an amendment to the Taiwan Act on the strength of an unusual unanimous consent agreement to refer the resolution to the Senate Foreign Relations Committee with instructions to report to the Senate on the matter no later than May 1, 1979.[12]

On April 9, 10, and 12, 1979, the Senate Foreign Relations Committee conducted hearings on the Byrd resolution and on other matters related to treaty termination.[13] The Committee hired Professor Louis Henkin of Columbia University School of Law to serve as a consultant for its hearings and to assist in the preparation of its report.[14] The Committee heard from sixteen witnesses, including Senators Byrd and Goldwater. Most of the other witnesses either currently serve or had previously served in the State Department or in the Department of Justice. The Committee also received

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9. S. Res. 15, 96th Cong., 1st Sess., 125 Cong. Rec. S220 (daily ed. Jan. 18, 1979).

10. Unprinted amendment No. 30 to S. 245, subsequently numbered amendment No. 93, 96th Cong., 1st Sess., 125 Cong. Rec. S2147 (daily ed. Mar. 7, 1979). This bill, without the Byrd amendment, was enacted into law on April 10, 1979. 22 U.S.C. §§ 3301-16 (1979).

11. 125 Cong. Rec. S2147-63 (daily ed. Mar. 7, 1979) and S2297-305 (daily ed. Mar. 8, 1979).

12. 125 Cong. Rec. S2302-04 (daily ed. Mar. 8, 1979).

13. *Treaty Termination: Hearings Before the Senate Comm. on Foreign Relations on S. Res. 15*, 96th Cong., 1st Sess. (1979) [hereinafter cited as *Treaty Termination*].

14. Although Professor Henkin participated in the selection of the witnesses who appeared before the Committee and in the May 1, 1979 committee meeting to markup S. Res. 15 (*see* Treaty Termination Resolution, S. Rep. No. 119, 96th Cong., 1st Sess. 32-33, 35-36, 38, 40-41, 46-47 (1979)), Professor Henkin has modestly stated that he can "claim neither credit nor responsibility for that report or for the resolution it proposed." Henkin, *Litigating the President's Power to Terminate Treaties*, 73 Am. J. Int'l L. 647, 654 n. 35 (1979).

statements from four other professors of law or history.[15]

On May 1, 1979, the Committee met to mark up the Byrd resolution, and on May 7 it issued its report on treaty termination.[16] In this report the Committee unanimously rejected the position "advanced by Administration witnesses that the President possesses an 'implied' power to terminate any treaty, with any country, under any circumstances, irrespective of what action may have been taken by the Congress by law or by the Senate in a reservation to that treaty."[17] The Committee did not, however, agree with Senator Byrd's approach to treaty termination.[18] Instead it recommended that the Senate adopt the following resolution:

> That 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 --

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15. These witnesses included the Hon. Herbert Brownell, former Attorney General; the Hon. Dean Rusk, former Secretary of State; the Hon. William D. Rogers, former Assistant Secretary of State for Inter-American Affairs; the Hon. Herbert J. Hansell, Legal Advisor, Department of State; Professor Abram Chayes, former Legal Advisor, Department of State: Professor Andreas F. Lowenfeld, former Deputy Legal Advisor, Department of State; Professor John Norton Moore, former Counselor on International Law, Department of State; Lawrence A. Hammond, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice; the present author, who served in the Justice Department under Attorneys General Levi and Bell; Professor Charles E. Rice, Notre Dame Law School; Professor Arthur Bestor, Professor Emeritus of History, University of Washington; and Professor Irwin S. Rhodes, editor of the papers of John Marshall.

16. S. Rep. No. 119, *supra* note 14.

17. *Id.* at 6.

18. *Id.* at 7-8.

> 1. the treaty provisions in question have been superseded by a subsequent, inconsistent statute or treaty, or
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> 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 ---
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> (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; or
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> (B) be inconsistent with the provisions of--
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> (i) a condition set forth in the resolution of ratification of a particular treaty; or
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> (ii) a joint resolution, specifying a procedure for the termination or suspension of such treaty.[19]

While the Byrd, Goldwater, and Committee resolutions were pending--indeed on the very day when these resolutions were being debated in the Senate, June 6, 1979--Judge Gasch entered an order in *Goldwater v. Carter*, dismissing the lawsuit without prejudice on the jurisdictional ground that the case was not yet ripe for judicial resolution:

> The Court believes that the extraordinary remedy of injunction or the related power of a declaration should be exercised sparingly and only when the legislative branch has been given the opportunity of acting. At least three resolutions are presently pending in the Senate. For these reasons the Court believes that the resolution of

19. *Id.* at 1.

> the ultimate issue in this case should in the first instance be in the legislative forum. If the Congress approves the President's action, the issue presently before the Court would be moot. 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. Until then, the complaint is dismissed without prejudice.[20]

Within hours of this initial ruling, which was incorporated into the Senate debate both by Senator Goldwater[21] and by Senator Church,[22] the Senate adopted the Byrd resolution by a vote of 59 to 35.

On the strength of this action in the Senate, the plaintiffs in the *Goldwater* litigation filed a motion on June 12, 1979, to alter or amend the judgment.[23] On June 29 the Justice Department lawyers recorded their opposition to this motion on the grounds that the plaintiffs still "lack[ed] standing to sue under the terms of the Court's June 6 ruling and that even if they did have standing, they would not be entitled to judgment in their favor since this case presents a non-justiciable political treaty with Taiwan and was a valid exercise of [the President's] constitutional authority."[24]

It became plain in the weeks following the Senate vote on June 6 that Senator Goldwater was clearly

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20. Opinion of June 6, 1979, *supra* note 8, 125 Cong. Rec. at S7051 (daily ed. June 6, 1979).

21. 125 Cong. Rec. S7050-52 (daily ed. June 6, 1979).

22. *Id.* at S7062-64.

23. Plaintiffs' Motion to Alter or Amend the Judgment of June 6, 1979, Goldwater v. Carter, 481 F. Supp. 949 (D.D.C. 1979).

24. Defendants' Opposition to Plaintiffs' Motion to Alter or Amend the Judgment of June 6, 1979, Goldwater v. Carter, 481 F. Supp. 949 (D.D.C. 1979) [hereinafter cited as Defendants' Opposition].

opposed to delay tactics,[25] while the leadership of the Senate, including the Majority Leader, Senator Robert C. Byrd,[26] the Chairman of the Senate Foreign

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25. For example, on June 18, 1979, Senator Goldwater stated:

> Now, I do not know what the pleasure of the majority leader will be, but I ... have been ready, and am ready to submit this matter to a vote ... this afternoon. I would rather do it right now, but if that is not the pleasure of my friend from West Virginia, and he is the bossman around here, I just want to make it perfectly clear that this is not being held up by dilatory tactics from my group that represents my feelings.

125 Cong. Rec. S7861 (daily ed. June 18, 1979).

26. For example, on June 6, the majority leader postponed consideration of the amendment offered by Senators Church and Javits, although Senator Goldwater argued that he did "not see one bit of good in putting it off another day, two days, or a week" and that the Senate was "ready to vote right now." 125 Cong. Rec. S7059 (daily ed. June 6, 1979).

On June 18, 1979, when the Senate resumed consideration of the treaty termination issue, the majority leader did not press for a vote either on the Church-Javits amendment or on the substitute amendment offered by Senator Goldwater. *Id.* at S7862. Similarly, when the Goldwater substitute amendment became the pending business of the Senate on June 21, the majority leader did not seek a vote. *Id.* at S8189-95. Indeed, on that day, without consulting the author of the amendment, the majority leader took the whole issue of treaty termination indefinitely out of pending business by returning the matter to the Senate calendar. *See Senate Pulls Back Treaties Resolution,* Wash. Post, June 22, 1979, at A13, col. 1.

Judge Gasch had instructed the parties to keep him apprised of the progress (or lack of progress) in the Senate developments. The President's attorneys did so by submitting to the court an affidavit by the Senate Parliamentarian, Murray Zweben, to the effect that the vote of June 6 was not "the final action of the Senate" and that "it is also possible that the Senate will not take final action on S. Res. 15; or, if it is acted upon, it could be defeated, or tabled, or postponed indefinitely, any of which would kill the resolution." Declaration of Murray Zweben at 4, submitted on June 29 with Defendants' Opposition, *supra* note 23.

On October 17, 1979, Judge Gasch ruled in favor of the plaintiffs. Relying on an account of this decision in The Washington Post, the majority leader suggested that the Judge was "misinformed" and in "absolute error" for construing the action on June 6 and the subsequent inaction of the Senate on the treaty termination issue as

Relations Committee, Senator Frank Church,[27] and the

26. (Continued)
an intimation of the Senate's "view that the Taiwan Treaty could not be terminated." 125 Cong. Rec. S14769 (daily ed. October 18, 1979).

Actually, Judge Gasch was well aware of the state of affairs on Capitol Hill. In his October 17 order, he noted that after the initial vote on the Byrd amendment, "additional amendments were proposed by Senator Church ... and by Senator Goldwater ...." In mild understatement, the Judge continued:

> Neither amendment came up for a vote, and Senate Resolution 15 as amended by Senator Harry F. Byrd's language has been returned to the Senate calendar without further action. The vote in favor of the Byrd amendment does not constitute final action by the Senate, although it stands as the last expression of Senate position on its constitutional role in the treaty termination process. By that vote, the Senate rejected a Committee substitute that would have expressly approved of the action taken by the President in terminating this treaty. No further steps have been taken by the Senate with respect to treaty termination powers.
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> The action taken by the Senate has admittedly not been decisive. It does, however, evidence at least some congressional determination to participate in the process whereby a mutual defense treaty is terminated, and clearly falls short of approving the President's termination effort.

Goldwater v. Carter, 481 F. Supp. 949, 954 (D.D.C. 1979) (footnote omitted).

On October 20, 1979, the majority leader called a news conference at which he announced his opinion that the Senate ought to vote 'expeditiously' to end the mutual defense treaty with Taiwan, and at the same time should outline its role in terminating future treaties. *See Byrd Urges Senate to Vote an End to Taiwan Treaty,* The Wash. Post, October 21, 1979, at A30, col. 1. Senator Goldwater immediately informed the majority leader that he welcomed his development, that he was prepared to keep an open mind on the merits of terminating the Taiwan treaty, and that he would not filibuster or otherwise delay an up or down vote on the matter. Perhaps because of the rapid pace of events after October 20, the majority leader never took any action to effectuate the concerns he had voiced in his October 20 news conference.

27. On June 18, 1979, Senator Church spoke against voting that day on the Goldwater substitute amendment to the Church-Javits amendment: "I think we would all be well served to give the Senate an opportunity to reflect upon this before pressing it to a vote."

ranking minority member of that committee, Senator Jacob Javits,[28] appeared to be opposed to allowing a definitive vote on the matter. Perhaps for this reason, on October 17, 1979, Judge Gasch granted the plaintiffs' motion to alter or amend his judgment of June 6. Judge Gasch discusses at length the difficult questions of justiciability presented in the litigation and found no obstacle either in the standing doctrine[29] or the political question doctrine[30] to reaching the merits of the case. In deciding the case on the merits, the Judge declared that President Carter's notice of termination of the 1954 Mutual Defense Treaty was ineffective as a matter of constitutional law because it lacked the authority of congressional participation in some form. Accordingly, the Judge enjoined Secretary of State Vance and his subordinate officers from taking any action to implement the President's notice of termination until congressional approval to effectuate such notice was secured.[31]

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27. (Continued)
125 Cong. Rec. S7862 (daily ed. June 18, 1979). In a debate three days later, Senator Goldwater responded:

> We will have a situation where once again this whole thing gets put off until next week and then next week we will find that ... this subject will be pushed aside again. I am anxious to bring this to a close. I am anxious to get a determination on it. It has been since the 15th of January. So I seriously and sincerely hope that my friend from New York [Senator Javits] and my friend from Idaho [Senator Church] will agree to a time certain to vote this afternoon on this amendment.

Id. at S8190 (daily ed. June 21, 1979). In the course of the ensuing debate with Senator Goldwater, Senator Church refused to agree to a time for a vote, arguing instead:

> Under the circumstances and until the 100 Senators have had an opportunity to read these debates or participate in them to examine the true ramifications involved in the substitute now before us, I think it would be unwise to vote. I do not believe we should rush to a vote when it is entirely possible that large numbers of Senators have not fully informed themselves as to the true nature of this issue before us.

Id. at S8191.

28. *See id.* at S8191-95 (remarks of Senator Javits in opposition to the Goldwater amendment).

29. 481 F. Supp. 949, 951-56 (D.D.C. 1979).

30. *Id.* at 956-58.

31 *Id.* at 965.

On November 13, 1979, the United States Court of Appeals for the District of Columbia Circuit heard on an expedited basis the defendants' appeal from Judge Gasch's order. The D.C. Circuit is accustomed to a leisurely pace of decision making, often keeping parties waiting for up to two years before it discloses its judgment and publishes its opinions. Sensing the urgency of the *Goldwater* case, however, the judges on the D.C. Circuit announced their judgment in this case more swiftly than is their wont.[32] On November 30, 1979, the Court issued a thirty-one page per curiam order, agreeing with Judge Gasch on the justiciability issues presented by the case, but disagreeing with Judge Gasch and reversing him on the merits. The appellate court framed the central issue before it as follows:

> The constitutional issue we face ... is solely and simply the one of whether the President in [the] precise circumstances [of the Mutual Defense Treaty] is, on behalf of the United States, empowered to terminate the Treaty in accordance with its terms. It is our view that he is, and that the limitations which the District Court purported to place on his action in this regard have no foundation in the Constitution.[33]

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32. On rare occasions involving constitutional crises of some magnitude, the District of Columbia Circuit Court of Appeals expedites the hearing and announces its decision swiftly. *See, e.g.*, United States v. Washington Post, 446 F. 2d 1327 (D.C. Cir.), *aff'd*, 403 U.S. 713 (1971), discussed in text accompanying notes 254-64 *infra*.

Perhaps partly because of the circuit court's reputation for deliberateness, the Supreme Court has, on rare occasions, been willing to review the judgment of the district court without waiting for the opinion of the circuit court. *See, e.g.*, Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952), discussed in text accompanying notes 245-53 *infra*; United States v. Nixon, 418 U.S. 683 (1974), discussed in text accompanying notes 265-71 *infra*.

33. Goldwater v. Carter, No. 79-2246, 48 U.S.L.W. 2380 (D.C. Cir. Nov. 30, 1979), *quoted in* Appendix to Petition for A Writ of Certiorari at 3A-4A, Goldwater v. Carter, 100 S. Ct. 533 (1979).

Chief Judge Skelly Wright, joined by Judge Tamm, concurred in the result reached by the majority, but disagreed with their colleagues on the standing issue and would have vacated the District Court's opinion and ordered the complaint to be dismissed solely on the grounds that the plaintiffs-appellees lacked standing to bring the action in the first place.[34] Judge MacKinnon issued a sixty page opinion, concurring with his colleagues' reversal of Judge Gasch's order forbidding presidential treaty termination without the consent of the *Senate* by a two-thirds vote, but dissenting from his colleagues' reversal of Gasch's order forbidding presidential treaty termination without the consent of a majority of *both Houses of Congress:*

> The appetite of the presidential office will be whetted by the court's decision today. In future years a voracious President and Department of State may easily use this grant of *absolute power* to the President to develop other excuses to feed upon congressional prerogatives that a Congress lacking in vigilance allows to lapse into desuetude.
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> I would instead preserve the congressional function of treaty termination, recognizing that exercise of this power requires a majority vote of Congress and the approval of the President. Accordingly, I respectfully dissent and would affirm the decision of the District Court to the extent that it requires an Act of Congress and approval thereto by the President.[35]

The D.C. Circuit's opinion was issued on Friday, November 30, 1979. On the following Monday, December 3, the attorneys for the plaintiffs-appellees filed with the Supreme Court a petition for a writ of certiorari, arguing that the Court should hear the *Goldwater* case because it involved an important question of constitutional law which had not been, but should be, settled by the

34. *Id.*, at 104A-105A (emphasis supplied)(Wright, J., concurring).

35. *Id.* (emphasis in original)(footnote omitted).

Supreme Court,[36] and because the appellate court's opinion had expanded the concept of the President's Foreign Affairs Power on an unprecedented scale.[37] Three days later the Solicitor General, Wade H. McCree, filed a brief for the respondents, opposing the granting of certiorari in the case, and arguing both that the appellate court was correct on the merits and that the court should not have reached the merits because the plaintiffs-petitioners lacked standing to pursue the litigation and because the case prsented a nonjusticiable political question.[38]

Two days later the petitioners filed a reply brief and on December 12 they filed a supplemental brief. On the following day, December 13, 1979, the *Goldwater* litigation came to an abrupt halt. In a terse per curiam order, the Supreme Court granted the petition for certiorari, summarily vacated the judgment of the appellate court, and remanded the case to the District Court with directions to dismiss the complaint.[39] Only Justices White and Blackmun voted to set the case for

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36. Petition for Writ of Certiorari at 11-13, Goldwater v. Carter, 100 S.Ct. 533 (1979)(mem.); *See* Rule 19(1) (b) Rules of the Supreme Court.

37. *Id.* at 13-31.

38. Brief for the Respondents in Opposition, Goldwater v. Carter, 100 S. Ct. 533 (1979)(mem.) [hereinafter cited as Brief for Respondants]. The Solicitor General was joined on this brief by Alice Daniel, the Assistant Attorney General for the Civil Division, Peter Buscemi, Assistant to the Solicitor General, and three Justice Department attorneys, Robert Kopp, Michael Hertz, and Linda Cole. In addition to arguing on standing and political question grounds, they claimed that the "severe time constraints under which the Court would inevitably labor in seeking to render an effective decision on the merits of the current controversy provide an additional reason why petitioners' request for further review should be denied." *Id.* at 8. The respondents based this claim on the view that unless the Court provided injunctive relief before January 1, 1980, the case would become moot because the treaty would, under international law, be irrevocably terminated on that date, "regardless of any subsequent judicial holding that the United States internal procedures for arriving at the decision to terminate were deficient." *Id. See* 5 G. Hackworth, Digest of International Law 328 (1943). *But see* text accompanying note 40 *infra*.

39. Goldwater v. Carter, 100 S. Ct. 533 (1979).

argument and give it plenary consideration. As Justice Blackmun wrote:

> In my view, the time factor and its importance are illusory; if the President does not have the power to terminate the Treaty (a substantial issue we should address only after briefing and oral argument), the notice of intention to terminate surely has no legal effect. It is also indefensible, without further study, to pass on the issue of justiciability or on the issues of standing or ripeness.[40]

Justice Rehnquist, who had supervised legal analysis of the treaty termination issue while serving as Assistant Attorney General for the Office of Legal Counsel in the Nixon-Mitchell Justice Department, wrote a plurality opinion joined by the Chief Justice,[41] and by Justices Stewart and Stevens, which adopted the posture that the *Goldwater* case presented a "political question" and was "nonjusticiable because it involves the authority of the President in the conduct of our country's foreign relations."[42] The plurality opinion written by Justice Rehnquist did not even bother to discuss the leading case on the political question doctrine, *Baker v. Carr*.[43] Justice Rehnquist surely overstated his case when he

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40. *Id.* at 539 (Blackmun, J., dissenting in part).

41. One of the plaintiffs in the *Goldwater* case stated to the present author on April 11, 1979 that the Chief Justice had privately indicated to him that "we [the Justices of the Supreme Court] will have to decide your case." Assuming that this report is accurate, I am of the opinion that it was of dubious propriety for the Chief Justice to have intimated even this much of an opinion on a case so likely to reach the Supreme Court for adjudication. *See* Canon 17, *Canons of Judicial Ethics* (ex parte communications). In light of the Chief Justice's vote in *Goldwater* one can infer either that he changed his mind after the April 1979 conversation with one of the plaintiffs in the case, or that he had in mind a tortuous sense of the term "to decide" (*viz.* the power of the Court to decide that it lacked the power to decide). Or, perhaps, the Chief Justice never said what the plaintiff told this author he had said.

42. 100 S. Ct. at 536-38 (Rehnquist, J., concurring).

43. 369 U.S. 186, 217 (1962).

suggested that federal courts have no role whatever in cases involving the "authority of the President in the conduct of our country's foreign relations."[44] In any event, the full weight of such a sweeping view cannot be sustained solely by the two slender reeds relied on by Rehnquist: *Coleman v. Miller*,[45] a 1939 case having nothing whatever to do either with foreign affairs or with a critical conflict over the allocation of power between the President and the Congress, and *United States v. Curtiss-Wright Corp.*,[46] a 1936 case now remembered for an overstated dictum by Justice George Sutherland to the effect that the Executive enjoys a sort of constitutional hegemony over "external" or "foreign affairs."

Both Justice Brennan, the author of the Court's opinion in *Baker v. Carr*, and Justice Powell repudiated the Rehnquist plurality view of the political question doctrine. For Justice Brennan, the plurality opinion "profoundly misapprehends the political question principle as it applies to matters of foreign relations."[47] Justice Powell likewise repudiated the suggestion that the treaty termination issue should always be viewed as a nonjusticiable political question,[48] for Powell could not reconcile this view with any of the relevant and recent precedents on political question, including *Baker v. Carr*, *Powell v. McCormack*,[49] *United States v. Nixon*,[50] and *Buckley v. Valeo*.[51]

Justice Powell, however, concurred in the per curiam order dismissing the complaint on the sole ground that

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44. 100 S. Ct. at 536 (Rehnquist, J., concurring).

45. 307 U.S. 433 (1939).

46. 299 U.S. 304 (1936). *See* discussion in text accompanying notes 120-27 and 230-37 *infra*.

47. 100 S. Ct. at 539 (Brennan, J., dissenting).

48. *Id.* at 534-36 (Powell, J., concurring). Powell cited Brennan's statement in *Baker v. Carr* that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." 369 U.S. at 211. *See also* L. Henkin, Foreign Affairs and the Constitution 214-15 (1972); Henkin, *Is There a Political Question Doctrine?*, 85 Yale L.J. 597 (1976); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 Yale L.J. 517 (1966).

49. 397 U.S. 486, 519 (1969).

50. 418 U.S. 683, 707 (1974).

51. 424 U.S. 1, 138 (1976).

the issue presented in *Goldwater* was not yet ripe for judicial review.[52] Only Justice Brennan voted in *Goldwater* to reach the merits. In so doing, he would have decided the constitutional question of the allocation of power to terminate the Mutual Defense Treaty with the ROC in favor of the Executive on the ground that the treaty termination power is within "the President's well-established authority to recognize, and withdraw recognition from, foreign governments."[53]

In light of the rather off-hand treatment given the *Goldwater* case by a badly fragmented Supreme Court, it would appear that Professor Laurence H. Tribe's diagnosis of the case as a "constitutional red herring"[54] was not

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52. 100 S.Ct. at 534 (Powell J., concurring) "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."

53. *Id.* at 539 (Brennan, J., dissenting).

54. Tribe, *Goldwater v. Carter: A Constitutional Red Herring*, The New Republic, (Mar. 17, 1979), [hereinafter cited as *Constitutional Red Herring*]. In this brief piece Professor Tribe asserts that the case for mandatory congressional involvement is stronger when the termination of a commercial treaty is at issue than when the fate of a defense pact is involved. The basis for this remarkable opinion is surely not the constitutional text, which does not differentiate among treaties when it describes them as part of the supreme law of the land. U.S. Const. art VI. Moreover, Tribe's opinion cannot be squared with historical precedents asserted by the State Department to be the basis for an absolute executive power over treaty termination, and Tribe himself would apparently not welcome the result of a court opinion accepting this extravagant claim. Nor does Tribe's view hold up when scrutinized in the light of the more careful research on this subject done by such eminent historians as Arthur Bestor, Richard Morris, and Irwin Rhodes. Finally, Tribe's opinion is at odds with his own arguments in support of a broader congressional voice in foreign policy matters. *See* L. Tribe, American Constitutional Law 172-81 (1978) [hereinafter L. Tribe].

It seems clear that Tribe has modified his absolutist perspective on presidential power to terminate treaties. *Compare* L. Tribe, American Constitutional Law 164-65 (1978), *with Constitutional Red Herring, supra,* at 16. It is, however, regrettable that the President's attorneys were apparently unaware of this development in Tribe's thought, for they cited the unsupported assertion in his 1978 treatise as authority for exclusive presidential responsibility for terminating treaties. Brief for Appellants at 50 Goldwater v. Carter, No. 79-2246, 48 U.S.L.W. 2380 (D.C. Cir. Nov. 30, 1979) [hereinafter cited as Brief for Appellants].

wide of the mark, at least as far as the Justices were concerned. On the other hand, the care and seriousness with which the issue of appropriate allocation of constitutional power in treaty termination was treated by nearly all the major actors[55] in this case prior to its summary dismissal by the Supreme Court suggests that it presented structural questions concerning our constitutional order of the utmost importance for our republic. These questions will not disappear merely because a majority of the Justices have chosen on this occasion to behave like ostriches. In my opinion, the significant questions left unresolved in *Goldwater* include the following:

> (1) Who may raise the issue of the constitutional allocation of power to terminate a treaty (the question of standing)?
>
> (2) Who shall decide how this power is to be allocated and how the process of treaty termination is to be effectuated within our constitutional order (the political question doctrine)?
>
> (3) What can we learn from the past about this issue (the historical problem)?

55. During the debate on the Taiwan Relations Act, the Senate Majority Leader entered into an unusual unanimous consent agreement to allow an up or down vote on the congressional role in treaty termination within sixty days. The Senate Foreign Relations Committee hired a prominent scholar, Professor Louis Henkin, to serve as a consultant on treaty termination and held hearings on this subject for three days in April. The committee unanimously repudiated the Executive's assertion of exclusive control over the entire process of treaty termination, but the language offered by a majority of the committee was closely scrutinized by the entire Senate, which voted 59 to 35 in favor of the Byrd amendment instead of the committee version. Both the June 6 and the October 17 opinions of Judge Gasch are careful, reflective deliberations which suggest that he regarded the case as more than a "red herring." Likewise, the willingness of the entire circuit court to grant expedited *en banc* review of Judge Gasch's opinion, as well as the thoughtful and prompt consideration which the circuit judges gave the case in opinions totalling 105 pages, would suggest that these judges viewed the *Goldwater* litigation as raising substantive constitutional questions of some moment.

(4) Would any principles of our constitutional order be threatened by judicial approval of the absolute claims of power made by the Executive in this case (the problem of separation of powers)?

(5) Would a resolution of this case in favor of absolute executive power be a good precedent for the future conduct of American foreign policy in an increasingly interdependent world (the question of the role of the people in the formation of public policy)?

Each of these questions is implicated in this case, and none is susceptible of simple, unequivocal responses. This article elaborates a response to each question in light of the arguments made in *Goldwater*.

I. THE STANDING QUESTION: WHO MAY RAISE THE ISSUE OF ALLOCATION OF POWER TO TERMINATE A TREATY?

A. TAXPAYER STANDING

In *Frothingham v. Mellon*,[56] a wealthy taxpayer outraged at the distribution of federal dollars to state programs designed to reduce maternal and infant mortality sued to enjoin Secretary of the Treasury Andrew J. Mellon from carrying out the Maternity Act of 1921.[57] Raising an objection to the act on the basis of vertical separation of powers, Frothingham's attorney, William Rawls, argued that the Court had often permitted constitutional challenges to the validity of legislation by a single member of a large class affected by an arguably invalid law.[58] Rawls noted further that in *Bradfield v. Roberts*[59] the right of a taxpayer to maintain a suit to enjoin an allegedly unauthorized payment of public moneys from the Treasury of the United States had been

56. 262 U.S. 447 (1923).

57. Pub. L. No. 67-69, 42 Stat. 224 (1921).

58. 262 U.S. at 475, citing Hammer v. Dagenhart, 274 U.S. 251 (1918), Truax v. Raich, 239 U.S. 33 (1915), and Millard v. Roberts, 202 U.S. 429 (1906).

59. 175 U.S. 291 (1899).

expressly adjudicated by the Court of Appeals of the District of Columbia and that the Supreme Court had decided the case on the merits without discussing the issue of taxpayer standing.[60] The direct injury alleged by Frothingham was that she would be subjected to taxation to pay her proportionate part of allegedly unauthorized or impermissible payments. Given the economic views of a majority of the Justices on the Supreme Court, Rawls must have expected these arguments to be powerfully persuasive, at least to Chief Justice Taft, and Justices Van Devanter, McReynolds, Sutherland, and Butler. But to Frothingham's dismay, Justice Sutherland wrote for a unanimous Court:

> The party who invokes the [judicial] power must be able to show not only that the statute is invalid but that she sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.... Here the parties plaintiff have no such case.[61]

In the wake of popular discontent with *Engel v. Vitale*[62] (Regent's school prayer case) and *Abington School District v. Schempp* and *Murray v. Curlett*[63] (the Bible reading cases), the Supreme Court in *Flast v. Cohen*[64] lowered the *Frothingham* barrier to allow federal taxpayers to challenge a federal statute on the grounds that it violates the religion clauses of the First Amendment. With this sole exception, *Frothingham* still states a generalized rule against taxpayer standing. This rule was reaffirmed in two 1974 decisions, *United States v. Richardson*[65] and *Schlesinger v. Reservists*

60. 262 U.S. at 476, citing Roberts v. Bradfield, 12 App. D.C. 453 (1898).

61. *Id.* at 488. Justice Sutherland distinguished *Bradfield* as a suit against a municipal corporation, *id.* at 486; he ignored the other cases cited in note 57 *supra*.

62. 370 U.S. 421 (1962).

63. 374 U.S. 203 (1963). For an analysis of the reaction to these cases, see Beaney & Beiser, *Prayer in Politics: The Impact of Engel and Schempp on the Political Process*, in The Impact of Supreme Court Decisions 22-36 (T. Becker & M. Feeley eds. 2d ed. 1973).

64. 392 U.S. 83 (1968).

65. 418 U.S. 166 (1974).

Committee to Stop the War.[66]

B. LEGISLATOR STANDING

Keenly aware that access to the federal courts on the treaty termination issue cannot be gained merely by asserting "generalized grievances about the conduct of government or the allocation of power in the Federal System,"[67] the plaintiffs in *Goldwater v. Carter* studiously avoided mentioning in their complaint that they were taxpayers or citizens. Instead, the plaintiffs' strategy on the standing question was to rely primarily on the rationale in *Kennedy v. Sampson*,[68] that a Member of Congress could be said to be injured in fact by an arguably unlawful act or omission of the Executive which deprived the Member of Congress of his or her right to vote.[69] Senator Goldwater, for example, is described in the complaint filed in the district court:

> Plaintiff Senator Barry Goldwater is a United States Senator from the State of Arizona, and has his official address in the District of Columbia. Senator Goldwater sues herein in support of his constitutional right to vote and otherwise to give his advice and consent with respect to the termination of the 1954 Treaty with the Republic of China, and in support of his sworn duty to preserve, protect, and defend the Constitutional allocation of powers to the Executive and Legislative branches of the federal government. Senator Goldwater was a member of the Senate in 1955 at the time the Mutual Defense Treaty was submitted

66. 418 U.S. 208 (1974); *see also* Velvel v. Johnson, 287 F. Supp. 846 (D.Kan. 1968), *aff'd sub nom.* Velvel v. Nixon, 415 F. 2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970) (private citizen lacks standing to sue President for conducting an undeclared war in Southeast Asia).

67. 418 U.S. at 173.

68. 511 F. 2d 430 (D.C. Cir. 1974).

69. *Id.* at 433-36. The gist of Senator Kennedy's complaint was that President Nixon's "pocket veto" over a Christmas recess of the Congress had unconstitutionally nullified the Senator's vote in favor of the bill in question, and had deprived him of an opportunity to override the President's veto.

> to the Senate for its advice and consent.[70]

This strategy had the obvious strength of placing the plaintiffs in a different category than private citizens alleging generalized grievances, but it suffered from the weakness that few legislators since *Kennedy* have prevailed in their claim of access to the federal courts.[71] At the outset it should be recognized that Judge Gasch noted in his memorandum opinion of October 17 that "no special standards govern congressional standing questions."[72] Hence he applied the four standards governing standing generally: (1) has the plaintiff suffered injury in fact?; (2) are the interests asserted within the zone of interests to be protected by the Constitution?; (3) is the injury caused by the challenged action?; (4) is the injury capable of being redressed by a favorable judicial decision?[73]

1. INJURY IN FACT

As of June 6, Judge Gasch was reluctant to find that the President's action had caused the plaintiffs to suffer injury in fact. One of the troubling aspects of *Goldwater v. Carter* is that it is difficult to determine with precision what changed the Judge's mind on the standing issue between June 6 and October 17. The suggestion made above that the Judge may have been motivated

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70. Complaint, *supra* note 4, at 3. Plaintiff Senators Strom Thurmond and Carl Curtis are further characterized in the Complaint as seeking "to preserve the effectiveness of their past votes" (in 1955 advising and consenting to ratification of the Mutual Defense Treaty).

71. *See, e.g.*, Reuss v. Balles, 584 F. 2d 461 (D.C. Cir. 1978); Edwards v. Carter, 580 F. 2d 1055 (D.C. Cir.), *cert. denied*, 436 U.S. 907 (1978); Harrington v. Bush, 553 F. 2d 190 (D.C. Cir. 1977); Metcalf v. National Petroleum Council, 553 F. 2d 176 (D.C. Cir. 1977). *See also* Riegle v. Federal Open Market Committee, Civ. Action No. 79-1703 (D.D.C. Oct. 26, 1979).

72. 481 F. Supp. 949, 951 (D.D.C. 1979).

73. *Id.; see also* 553 F. 2d at 204, 205, n. 68.

to rule in favor of plaintiffs on the standing issue because of the clear contrast between Senator Goldwater's behavior and that of his colleagues was not purely speculative. The reason announced by the Judge is that he thought it prudent to allow some time for alternative political remedies to be developed:

> Believing that the resolution of the ultimate issue of treaty termination authority in this case should in the first instance be in the legislative forum, the Court stated that its judicial powers should be exercised only after the legislative branch had been given the opportunity of acting.[74]

The vote of June 6 and the "relative congressional inaction" thereafter were apparently enough to persuade the Judge that the vote evidenced "some congressional determination to participate in the process whereby a mutual defense treaty is terminated and clearly [fell] short of approving the President's termination effort."[75]

2. JUSTICE DEPARTMENT VIEW ON STANDING

As the litigation progressed, the President's attorneys argued with increasing vigor, or at least at increasing length, that the plaintiffs lacked standing to assert a constitutionally based role in treaty termination. The memorandum of points and authorities in support of the defendants' motion to dismiss or, in the alternative, for summary judgment, filed by the Justice Department on February 26, 1979, devoted three pages to the standing question and twenty-three pages to the merits of the question concerning constitutional power in treaty termination.[76] The defendants' reply brief in opposition to the plaintiffs' cross motion for summary judgment, filed May 4, 1979, did not mention standing at all. On June 12, 1979, the plaintiffs moved to alter or

74. 481 F. Supp. 949, 953-54 (D.D.C. 1979).

75. *Id.*

76. Defendants' Memorandum of Points and Authorities, Goldwater v. Carter, 481 F. Supp. 949 (D.D.C. 1979); *compare id.* at 19-22 (standing) *with id.* at 22-45 (question on the merits).

amend Judge Gasch's order of June 6, 1979, arguing that standing had been conferred on the plaintiffs by the Senate's vote on the Byrd resolution. This motion was supported by a memorandum of points and authorities in which it was noted that, before the vote of June 6, Senator Goldwater had placed on each Senator's desk a brief memorandum describing the Judge's order and the pertinence of the vote on the Byrd resolution to the standing question.[77] On June 29, the Justice Department filed a memorandum of points and authorities in opposition to the plaintiffs' motion to alter or amend Judge Gasch's preliminary order. The Justice Department devoted five of the thirteen pages in this memorandum to the standing issue, asserting that the plaintiffs had suffered no injury in fact because no final action had been taken on the Byrd resolution.[78] The Justice Department devoted thirteen pages to the standing question in its brief[79] to the court of appeals and managed to persuade both Chief Judge Wright and Judge Tamm of the correctness of its position.[80] The Solicitor General devoted two and a half pages to the standing question in his brief in opposition to the grant of a writ of certiorari, but none of the Justices of the Supreme Court was persuaded by his argument.[81]

The heart of the Justice Department's argument on standing was that the plaintiffs had not made a showing that the acts of the President injured them. Before the appellate court, the Justice Department argued that "[i]f ordinary citizens must seek political remedies for perceived injuries to the separation of power doctrine, both law and logic compel elected officials to do the same."[82] The authorities cited for this proposition are *Reuss v. Balles*[83] and *Harrington v. Bush*.[84] In these two cases Congressmen Henry Reuss and Michael Harrington were denied standing to sue as legislators because the court did not find in their allegations an impairment of

77. Plaintiffs' Reply Brief at 4-5, Goldwater v. Carter, 481 F. Supp. 949 (D.D.C. 1979).
78. *See* Defendants' Opposition, *supra* note 24, at 2-6.
79. Brief for Appellants, *supra* note 54, at 29-41.
80. *See* note 34 *supra*
81. *See* Brief for Respondents *supra* note 38.
82. Brief for Appellants, *supra* note 54, at 31.
83. 584 F. 2d at 466.
84. 553 F. 2d at 204.

the efficacy of the legislator's vote as it had in *Kennedy v. Sampson*[85]. The Justice Department has urged the narrowest possible reading of the *Kennedy* precedent: that standing should be conferred only on a legislator who can show majority support for his or her positions from a vote already cast and allegedly nullified by unlawful executive action or inaction,[86] or who has been authorized to litigate a matter on behalf of the Congress.[87]

In support of the Justice Department, it must be acknowledged that the principle of separation of powers underlies the District of Columbia Circuit's parsimony in conferring standing on legislators who cannot show that they enjoy the support of a majority of their colleagues in the legislative branch. Doing so ensures that the judicial branch will not be used to circumvent or short-circuit the very process of decisionmaking which the Constitution entrusts to Congress in Article I. The *Kennedy* court intimated as much:

> In light of the purpose of the standing requirement ... we think the better reasoned view of both *Coleman* [*v. Miller* 307 U.S. 433 (1939)] and of the present case is that an individual legislator has standing to protect the effectiveness of his vote with or without the concurrence of *other members of the majority*.[88]

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85. 511 F. 2d at 432. The *Kennedy* court noted that Senator Kennedy had alleged that President Nixon's pocket veto of the Family Practice of Medicine Act had injured the senator by nullifying his past vote in favor of the bill and by precluding him from subsequently voting to override the veto.

86. Brief for Appellants, *supra* note 54, at 34-38. The brief also suggests that it is proper to confer standing on a committee or a Member of Congress where there is a showing of majority approval of litigation brought to override the veto.

87. *See* United States v. American Telephone and Telegraph, 551 F. 2d 384, 391 (D.C. Cir. 1976); Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F. 2d 725, 727 (D.C. Cir. 1974). *See also* Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 § 701 (1978).

88. 511 F. 2d at 435 (emphasis supplied). This portion of the court's opinion is inaccurately cited at page 23 of the Brief for Appellees, Goldwater v. Carter, 481 F. Supp. 949 (D.C. Cir., 1979) [hereinafter cited as Brief for Appellees]. A typographical error ("the" in place of "other") yields a different sense than that intended by the Court.

In my opinion, the Justice Department's attempt to limit legislator standing to narrow confines was misguided.

First, the Justice Department misread the holding in *Kennedy* to mean that Senator Kennedy had no standing with respect to his right to vote to override President Nixon's "pocket veto," and that Senator Goldwater, by analogy, had no standing with respect to a vote not yet cast at the time the lawsuit was going forward. The *Kennedy* court did not hold that no legislator could ever have standing conferred because of a denial of his opportunity to vote in the future. It did not have to reach that question because it ruled in favor of the Senator's claim that his prior vote had been unlawfully nullified.

The misreading of *Kennedy* by President Carter's lawyers may be illustrated by a hypothetical example which changes only one detail in our recent past. It is well known that after the repeal of the Tonkin Gulf Resolution, the Senate majority leader, Mike Mansfield, and the current chairman of the Senate Foreign Relations Committee, Frank Church, led an effort to bring about an end to American military operations in Southeast Asia through the mechanism of a funding cutoff. If, however, the leadership of the Congress had, through parliamentary maneuvers of one sort or another, effectively frustrated for over two years any possibility of a vote on the appropriations used by the executive branch of government as ongoing legal authority for those military operations, the courts would have been compelled to recognize the standing of a member of Congress alleging that he had suffered injury in fact from this deprivation of an opportunity to vote,[89] if only because the text of the Constitution explicitly mandates continuous congressional oversight of military operations by limiting military appropriations to a maximum of two years.[90] To be sure, the federal courts were uniformly unwilling to allow a judicial test of the conflict between the congressional war-making power and the presidential commander-in-chief power which was alleged during the

89. *See e.g.*, Mitchell v. Laird, 488 F. 2d 611, 614 (D.C. Cir. 1973).

90. U.S. Const. art. I. § 8, cl. 12.

Vietnam era,[91] but it is surely wrong to suggest that the federal courts may not grant standing with respect to threatened injuries[92] as well as to past injuries.

In the *Goldwater* case, this fundamental element of the standing doctrine becomes significant because it is eminently reasonable to infer from the behavior of both the Senate leadership and the executive branch that dilatory tactics were relied upon not only to frustrate attempts of the Senate to finalize its vote of June 6, but also to keep the legal issue raised by Senator Goldwater and others from being decided by the federal courts. It was apparently hoped that this suit would be rendered moot after January 1, 1980.

Second, the Justice Department suggested that Senator Goldwater and his colleagues lacked standing because their suit was not authorized by a majority of the Congress or by the Office of the Senate Legal Counsel.[93] This suggestion has the clear advantage of overcoming the anti-majoritarian difficulties alluded to above as well as the representational difficulties which can arise when an individual claims to speak on behalf of an institution. The application of this argument to *Goldwater v. Carter*, however, is flawed for two reasons. It seems clear as a matter of legislative history that Congress did not intend the Office of the Senate Counsel to deny standing to individual members of Congress alleging

91. *See, e.g.*, Massachusetts v. Laird, 400 U.S. 886 (1970) (attempt by Commonwealth to bring an original action to prevent its citizens from being sent to Viet Nam); Velvel v. Johnson, 287 F. Supp. 848 (D. Kan. 1968), *aff'd sub nom.*, Velvel v. Nixon, 415 F. 2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970)(suit by private citizen; no standing and political question); Luftig v. McNamara, 252 F. Supp. 819 (D.D.C. 1966), *aff'd*, 373 F. 2d 664 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 945 (1968); Mora v. McNamara, 387 F. 2d. 862 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 934 (1968) (suits by servicemen being sent to Viet Nam; political question); Ashton v. United States, 404 F. 2d 95 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1967) (defense on refusing to submit to induction). For a brief discussion of the refusal of the Supreme Court to review these cases, see L. Henkin, Foreign Affairs and the Constitution 214-15 (1972) [hereinafter cited as L. Henkin]; Brief for Appellees, *supra* note 88 at 37.

92. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 499 (1975).

93. The Senate Legal Counsel is a new institution created in the wake of the confrontation between Congress and the President that was established to deal with abuses of executive power. 2 U.S.C. § 288 (Supp. 1979).

personal injury in their roles as legislators.[94] Moreover, the Justice Department's suggestion that Senator Goldwater and his colleagues are "suing the Executive in an effort to obtain a political victory in the Courts which had eluded him in the Congress"[95] too conveniently overlooks the fact that on June 6, the Senate voted by a margin of 59 to 35 to replace the committee text of the resolution on treaty termination, which was supported by the Carter administration, with the resolution offered by Senator Byrd concerning termination of mutual defense treaties.[96] Whatever one is to make of that act, and of the subsequent refusal of the Senate leadership to allow a final vote on the matter, it is ridiculous to characterize Senator Goldwater either as one who was attempting to subvert the normal processes of legislative decision-making or as one who believes in extravagant judicial activism.

In any event, as Judge Gasch noted in his opinion of October 17, 1979, "the potential availability of a remedy through the legislative process...is not conclusive on the question of injury in fact and thus certainly not fatal to a legislator's standing claim."[97] Judge Gasch distinguished all of the cases in which legislator standing had been denied[98] by noting that in those cases:

> there was no impediment to the legislative process whatsoever and the powers of the plaintiff Congressmen remained rather clearly undiminished [and that] there was a genuine risk of interfering with or circumventing the legislative process, and thus provid[ing] judicial redress for Congressmen who had simply failed to take advantage of, or to succeed in persuading their colleagues to take advantage of, an expedient opportunity for legislative action.[99]

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94. *See* Appendix at 583-85 Goldwater v. Carter, (D.C. Cir. Nov. 30, 1979) [hereinafter cited as Appendix].

95. Brief for Appellants, *supra* note 54, at 37.

96. 125 Cong. Rec. S7038-39 (daily ed. June 6, 1979).

97. 481 F. Supp. 949, 952, citing *Metcalf v. National Petroleum Council*, 553 F. 2d at 189 n. 129, *Reuss v. Balles*, 584 F. 2d at 468, *Kennedy v. Sampson*, 511 F. 2d at 435, n. 17.

98. *See* cases cited at note 71 *supra*.

99. 481 F. Supp. 949, 953.

In Judge Gasch's mind, those cases are distinguishable because the plaintiffs in *Goldwater* had made bona fide efforts to take advantage of every available opportunity for legislative action.[100]

Moreover, the leading cases on standing support the view that Senator Goldwater and his co-plaintiffs had suffered injury in fact. In *Warth v. Seldin*,[101] Justice Powell wrote that the core notion of the injury requirement is that the plaintiff must allege such a "personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf."[102] The "personal stake in the outcome" test is derived from *Baker v. Carr*[103] where Justice Brennan wrote that the purpose of this test is "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[104] It seems clear that the plaintiffs in *Goldwater* easily passed this "personal stake in the outcome" test. Because Judge Gasch was reversed on the merits, the plaintiffs were in fact denied participation in the process of terminating a treaty about which the Senate, by a unanimous vote (94-0) taken less than three months prior to President Carter's announcement of December 15, 1978, had indicated its strong desire to be consulted.[105] Had

100. *See* text accompanying notes 25-28 *supra*.
101. 422 U.S. 490 (1975).
102. *Id.* at 498-99.
103. 369 U.S. 186 (1962).
104. *Id.* at 204.
105. Section 26 (b) of the International Security Assistance Act of 1978 reads as follows: "It is the sense of 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." 22 U.S.C. § 2151 note. The plaintiffs in *Goldwater* sought declaratory relief that the defendants violated this provision by failing to consult with the Congress on the termination of the Mutual Defense Treaty. Complaint, *supra* note 4, at 14. Judge Gasch denied this relief in his order of June 6, 1979, noting that Pub. L. No. 95-384 (1978), also known as the Dole-Stone Amendment, is a non-binding sense of the Congress Resolution. To be sure, several Senators, including the authors of the Dole-Stone Amendment roundly criticized President Carter for failure to consult with them prior to his announcement. *See, e.g.*, Cong. Rec. S101 (daily ed. Jan. 15, (1979)(remarks of Sen. DeConcini); *id.* at S309 (remarks of Sen. Roth). But Judge Gasch correctly noted that even

Judge Gasch been affirmed on the merits, the plaintiffs' role in the policy decision of whether to terminate a mutual defense with a friendly nation would have been performed. In either result, the plaintiffs clearly had a "personal stake in the outcome."

From the sheer volume (or, to be more precise, the four volumes of the appendix filed with the appellate court) and from the sharpness of the debate between the attorneys for the parties in the *Goldwater* case, it is obvious that Justice Brennan's concern in *Baker v. Carr* was met. The *Warth* rationale was likewise fulfilled in *Goldwater*, for it seems plain that the plaintiffs demonstrated sufficient personal interest in the outcome of the case to warrant invoking federal court jurisdiction.

C. CAUSATION AND JUDICIAL REDRESSABILITY

Since at least 1970, Justices Brennan and White have been of the opinion that the only standing requirement imposed by the Constitution is that the plaintiff allege injury in fact.[106] But this view has never enjoyed the support of a majority of the Court. To the contrary, after announcing a relatively simple two-prong test in 1970,[107] the Court has added two more requirements: causation and judicial redressability. The causation requirement is exemplified in *Warth v. Seldin*,[108] where the Court denied standing to low-income persons seeking the invalidation of a restrictive zoning ordinance because they had failed to demonstrate that their inability to obtain adequate housing within their means was

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105. (Continued)
if the Dole-Stone Amendment had obligated the President to consult with the Congress, it did not specify the sort of consultation or the amount of consultation which would satisfy its intent. *See* Greater Tampa Chamber of Commerce v. Adams, Civ. No. 78-0517, (D.D. C. Nov. 30, 1978), *appeal docketed*, No. 79-1123 (D.C. Cir. Dec. 21, 1978).

106. *See* Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 167 (1970) (Brennan, J., concurring).

107. In *Data Processing*, the Court held that standing should be conferred on plaintiffs if they have suffered injury in fact and if the interests they assert are within the zone of interests protected by the statute or constitutional guarantee in question.

108. 422 U.S. 490 (1975). *See also* Tushnet, *New Law of Standing: A Plea for Abandonment* 62 Cornell L. Rev. 663 (1977).

fairly attributable to the challenged ordinance instead of to other factors. The redressability requirement is exemplified in *Simon v. Eastern Kentucky Welfare Rights Organization*,[109] in which the Court denied standing to a group of welfare recipients who challenged a change in the federal tax policy which extended a tax benefit to certain hospitals. The Court found that the plaintiffs had failed to show that any judicial alteration of the new IRS policy would result in better treatment of indigents by these hospitals, or otherwise redress their grievance.

The Justice Department construed these two requirements as denying standing to the plaintiffs in *Goldwater*. First, the defendants' attorneys asserted that the plaintiffs had failed to show that their grievance could "fairly be traced"[110] to a conflict between them and the Executive. In support of this theory, the President's lawyers argued to the Court of Appeals that "the Senate's actions, *not the President's*, have prevented this issue from coming to a vote."[111] The Justice Department's view of congressional maneuvering and political conflict rests on solid evidence.[112] The argument that is developed from that evidence, however, places too much emphasis on Congress' responsibility. In focusing exclusively on the actions and inactions of the Senate on the Byrd and Goldwater resolutions, the argument fails to account for the executive department's role in these events. It overlooks the fact that many State Department officials have repeatedly stated, sometimes through a speech drafted in Foggy Bottom and uttered on Capitol Hill by a leading Senator such as Edward Kennedy,[113] that the power to terminate treaties resides exclusively in the Executive. More significantly, the Justice Department view of causation in the chain of events being litigated in *Goldwater* is little more than

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109. 426 U.S. 26 (1976).

110. *Id.* at 41.

111. Brief for Appellants, *supra* note 54, at 32 (emphasis supplied). *See also id.* at 33, where the appellants argued: "The Senate's treatment of these measures [including the Goldwater resolution] strongly suggests that the frustration of plaintiffs' desire to vote 'fairly can be traced' to political conflict within the Senate itself *rather than* to political conflict between the Executive and the Legislature." (emphasis supplied).

112. *See* Appendix, *supra* note 94, at 802-10; *see also* notes 25-28 *supra*.

113. *See, e.g.*, Wash. Post, Aug. 16, 1977, at A1; The Boston Globe, Aug. 16, 1979, at A1; Wash. Post, Aug. 17, 1977, at A17.

a shell game whereby the principal agent of these events, the President, mysteriously disappears when one asks; "Whose actions provoked this lawsuit?". Judge Gasch apparently saw through the ruse, as did fourteen of the other sixteen judges who were involved in the case.

The lack of judicial redressability was also asserted by the Justice Department as a reason for denying standing to the plaintiffs in *Goldwater*. Before the Court of Appeals, the President's lawyers argued that the plaintiffs were "not asking for an advisory opinion by demonstrating that the court can redress [their] injury."[114] This assertion was gratuitous, for the plaintiffs had briefed the District Court on redressability,[115] and that Court ruled on October 17, 1979, that "a judicial decision declaring the constitutional requirements for terminating the Treaty can afford plaintiffs the *precise relief requested*, and thus the injury is one likely to be redressed by a favorable decision."[116]

In summary, plaintiffs made a persuasive argument for resolving the standing question in *Goldwater* in their favor. Only two of the seventeen judges who participated in the case were persuaded by the claim made by President Carter's attorneys that the plaintiffs lacked standing to commence the action. One way to interpret the fact that all of the Supreme Court Justices voted to grant certiorari and then failed to address the standing question is that the plaintiffs succeeded in demonstrating that they had been injured in fact, that there was a causal nexus between the alleged injury and the acts of the defendants, and that the injury complained of could be redressed by a court. In short, Senator Goldwater and his colleagues were proper to raise the question of the allocation of constitutional power to terminate treaties.

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114. Brief for Appellants, *supra* note 54, at 30, citing Simon v. E. Ky. Welfare Rights Org., 426 U.S. at 38.

115. Points and Authorities in Support of Plaintiffs' Opposition to Defendants' Alternative Motions and Plaintiffs' Cross-Motions for Summary Judgment at 24 Goldwater v. Carter, 481 F. Supp. 949 (D.D.C. 1979) [hereinafter cited as Points and Authorities in Support of Plaintiffs' Opposition], citing Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 80 (1978), in which Chief Justice Burger wrote for a unanimous Court that the appropriate standard for conferring standing is a substantial likelihood that judicial relief will redress the claimed injuries.

116. 481 F. Supp. at 955 n. 23.

II. THE POLITICAL QUESTION DOCTRINE: WHO SHOULD DECIDE HOW TREATIES ARE TO BE TERMINATED?

The *Goldwater* case illustrates the truth of Professor Tribe's generalization that the "[p]olitical question doctrine is in a state of some confusion."[117] Tension, if not confusion, is to be found as early as *Marbury v. Madison*.[118] In *Marbury*, Chief Justice Marshall declared, on the one hand, that "[i]t is emphatically the province and duty of the judicial department to say what the law is.... If two laws conflict with each other, the courts must decide on the operation of each.[119] On the other hand, the same case serves as the origin of the political question doctrine, for Marshall also wrote in *Marbury* that "[b]y the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience."[120]

Confusion, but no tension, has arisen when the political question doctrine has been used to exalt the power of one branch (generally the Executive branch) over another (generally the Congress). A classic example of this is the famous, if exaggerated, phrase coined by Justice Sutherland in *United States v. Curtiss-Wright Export Corp.*[121] to the effect that presidential hegemony over foreign affairs is complete: "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in international relations -- a power which does not require as a basis for its exercise an act of Congress."[122] Given the mood of the Court in 1936, it may seem strange that the "Nine Old Men," who were ripping up domestic New Deal legislation right and left as "delegation running riot,"[123] found themselves virtually unanimous (only Justice McReynolds dissented and without a word of explanation) in bestowing on President Roosevelt plenary powers over

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117. 5 U.S. (1 Cranch) 137 (1803).
118. L. Tribe, *supra* note 54, at 71.
119. *Id.* at 177.
120. *Id.* at 165-66.
121. 299 U.S. 304 (1936).
122. *Id.* at 320.
123. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

foreign affairs. Arthur M. Schlesinger, Jr., has suggested that the extravagant *Curtiss-Wright* opinion is accounted for by attending to the background of Chief Justice Hughes, a former Secretary of State, and Justice Sutherland, a former member of the Senate Foreign Relations Committee. As a Senator Sutherland had advocated exclusive presidential control over foreign affairs.[124]

In passing, one might note the background of two of the Justices who explicitly stated their adherence to the Sutherland view in *Goldwater*. Justice Rehnquist, who cited *Curtiss-Wright* as his principal authority for the claim that a legal controversy is a nonjusticiable political question if it involves the authority of the President to conduct foreign affairs,[125] served in the Nixon administration as the sub-cabinet officer in the Justice Department chiefly responsible for developing constitutional interpretation within the executive branch. Similarly, Chief Justice Burger, who concurred in Justice Rehnquist's opinion in *Goldwater*, also served as an Assistant Attorney General in a Republican administration, and was charged with the task of defending the executive branch in civil litigation. That one may not infer that such service automatically produces either undying loyalty to the executive branch of government or an uncritical attitude toward the claims put forward by the Solicitor General is illustrated by the vote of Justice White, who also served in a high-ranking Justice Department position before joining the Court. But at least one commentator has argued that a pattern of ideological preference in favor of the power of the Executive can be deduced from the opinions of Justice Rehnquist.[126]

Another important feature of the Sutherland view is that it was uttered in a period when America was still profoundly isolationist in character. Now that technology and multinational economic actors have reduced our world to an interdependent market, it is difficult, if

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124. *See* A. Schlesinger, Jr., The Imperial Presidency 101 (1973). Schlesinger repeats a story told by Judge Charles Wyzanski that Professor Thomas Reed Powell used to tell his students at Harvard Law School: "Just because Mr. Justice Sutherland writes clearly, you must not suppose that he thinks clearly." *Id.* at 103.

125. 100 S. Ct. at 537-38 (Rehnquist, J., concurring).

126. *See* Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 Harv. L. Rev. 293 (1976).

not impossible, to sustain a dichotomy between foreign and domestic policies. As the turbulent episode which erupted at our embassy in Teheran in November 1979 demonstrates, the decision to admit a single person to enter our country can have profound effects across the world. Similarly, as anyone who has shopped in a bargain basement knows, domestic consumers would have to pay a lot more for clothing if we did not have friendly relations with places like Taiwan, Singapore, Hong Kong, and South Korea. In short, our domestic policies have ramifications throughout the globe, and our foreign policies have profound consequences for our domestic economy.

It is, of course, conceivable that the Congress might be effectively excluded from the domain of foreign affairs. This could occur through increasing reliance on executive agreements to an extent that would dwarf the advise-and-consent function of the Senate.[127] Another possibility would be congressional acquiescence in the extravagant claim that treaty termination is, to use Sutherland's phrase, the "plenary and exclusive power of the President..., a power which does not require as a basis for its exercise an act of Congress...."[128] If either method yields the result of exclusive presidential power over foreign affairs, that result will in turn need to be justified on a different worldview than the dichotomous one of Justice Sutherland.

If the rightful role of Congress in the formation of our foreign policy, including the making and unmaking of binding international commitments in treaties, is to be safeguarded against presidential usurpation, Congress will have to be more vigorous in reclaiming that role for itself. For, as Justice Jackson wrote in *Youngstown Sheet and Tube Co. v. Sawyer* (the *Steel Seizure Case*), "only Congress itself can prevent power from slipping through its fingers."[129] As the *Goldwater* case illustrates, however, one of the legitimate means of reassertion of congressional power in foreign relations is the commencement of a lawsuit by a Member of Congress, the goal of which would be to restore to the Congress more vivid participation in the process of formulating the

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127. For a brief statement of my views on this matter, *see Treaty Termination, supra* note 13, at 491-94.

128. 299 U.S. 304, 320 (1936).

129. 343 U.S. 579, 654 (1953)(Jackson, J. concurring).

policy of treaty termination. And as the improper delegation cases of the 1930's,[130] the *Steel Seizure Case*,[131] the impoundment cases,[132] and *United States v. Nixon*[133] all illustrate, federal courts have been receptive to suits challenging exaggerated claims of executive authority. I hasten to add that nothing is served by exaggerated claims of congressional authority.[134]

Professor Reisman has provided a very helpful way of differentiating various stages in the process of termination of a treaty: (1) the formulation of policies as to whether an agreement should be terminated, (2) the conduct of negotiations to effect termination, (3) the repeal of the law of the land established by an agreement and (4) formally notifying the other party of the termination of an agreement.[135] In Reisman's view, with which I agree, it is proper for Congress to share with the President the first and third stages, but the President should retain exclusive control over the second and fourth stages.

Judge Gasch was clearly aware of the need to distinguish among various stages in the treaty termination process. In his opinion of October 17, 1979, he wrote:

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130. Schechter Poultry Corp. v. United States, 295 U.S. 495 and Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). It is worth noting that one of the dubious gifts to society which resulted from the death of the Blue Eagle of the NRA was the birth of the Federal Register. 44 U.S.C. § 301. As a result of the daily publication of all executive orders and federal administrative regulations, there has not been a significant case holding that Congress had improperly delegated legislative functions to an executive agency that had not bothered to inform people of its myriad rules.

131. *See* text accompanying notes 223-30

132. *See, e.g.*, Train v. City of New York, 420 U.S. 35 (1975); text accompanying notes 253-55 *infra*.

133. 418 U.S. 683 (1974); *see* text accompanying notes 242-247 *infra*.

134. For a brief statement of my views on congressional overreaching, see *Treaty Termination, supra* note 13, at 494-96.

135. *Id.* at 390-91.

> [T]he President's status as the nation's *spokesman* and representative in foreign affairs [cannot] serve as the basis for exclusive executive power over the entire process of treaty termination. While the President may be the sole *organ of communication* with foreign governments, he is clearly not the sole *maker of foreign policy*.[136]

It is likewise clear that Judge Gasch understood the still more limited function appropriate to a federal court in passing on the dispute in *Goldwater*, *i.e.*, "not to attempt to evaluate the wisdom of the underlying political decision or to substitute its judgment for that of a political department, but simply to determine whether the treaty termination was effectuated by constitutionally permissible means."[137]

In short, I do not think that *Goldwater* should have been viewed as a nonjusticiable political question, in part because I do not accept the simplistic bifurcation of our national policy into hermetically sealed areas, with domestic affairs susceptible of congressional participation, and foreign affairs the exclusive domain of the Executive. The view expressed in *Baker v. Carr*[138] concerning the role of the judiciary in refereeing foreign policy conflicts between the political branches of government is far more realistic: "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[139] This view was expressly adopted by Justices Brennan and Powell in *Goldwater*, was implicitly shared by the majority in the appellate court, and was expressly adopted by Judge Gasch in the District Court.

Identifying a political question according to the six standards articulated by Justice Brennan in *Baker v.*

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136. 481 F. Supp. at 961 (emphasis supplied).

137. *Id.*

138. 369 U.S. 186 (1962).

139. *Id.* at 211. In Pillai v. CAB, 485 F. 2d 1018 (D.C. Cir. 1973), Judge Wilkey echoed this theme when he wrote: "The time has long passed when the words 'foreign policy,' uttered in hushed tones, can evoke a reverential silence from either a court or the man on the street." *Id.* at 1031, n. 34.

Carr[140] indicates that the issues in *Goldwater* were judicially cognizable. The first criterion states the standard rule that a court should refrain from interposing its judgment where there is "a textually demonstrable commitment of the issue to a coordinate political department."[141] After the ingenious construction of the constitutional text in *Powell v. McCormack*,[142] in which the Court decided that the question of membership in the House of Representatives was a justiciable rather than a political question, one might wonder what is left of this first criterion. Indeed, the leading article on the political question doctrine, written by the Senate Foreign Relations Committee's consultant on treaty termination, Professor Louis Henkin, suggests that the "textual commitment" test has little validity or vitality.[143]

In any event, the test seems wholly inapplicable to the *Goldwater* litigation. The one point on which all the parties seemed to agree was that the text of the Constitution is clear about the making of treaties[144] but not about their unmaking. To construct an argument

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140. The six criteria articulated in *Baker* are:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department;
> [2] or a lack of judicially discoverable and manageable standards for resolving it;
> [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion,
> [4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
> [5] or an unusual need for unquestioning adherence to a political decision already made;
> [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217.

141. *Id.*

142. 395 U.S. 486 (1969).

143. Henkin, *Is There a "Political Question" Doctrine?*, 85 Yale L.J. 604-05 (1976).

144. "He [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." U.S. Const. art. II, § 2, cl.2.

in favor of treaty termination as a shared power, one is forced to rely on implications of the Take Care clause,[145] the supremacy clause,[146] and on the general model of separation of powers found in the structure rather than the text of the Constitution. To construct an argument in favor of exclusive presidential power in treaty termination, one is constrained to derive from the Article II authorization of the President to nominate ambassadors[147] much more than the "plain meaning" of the text of the Constitution: that the treaty termination power is committed to a coordinate branch of the government.

Scholars have labelled Brennan's second and third criteria "functional."[148] These criteria would characterize as political questions those for which there was no judicially discoverable standard of resolution and those which could not be decided without making preliminary policy determinations deemed beyond the bounds of judicial discretion. The criteria identify those questions that, in some aspect, exceed the limits of the judicial function.

The question which the federal courts were asked to resolve in *Goldwater* required judicially discoverable standards which did not demand that the courts pass on the wisdom of whether to terminate the Mutual Defense Treaty of 1954. Chief Justice Marshall relied on the distinction between policy judgments and constitutional interpretation to defend his handling of *McCulloch v. Maryland:* "The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional."[149]

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145. "He [the President] shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

146. "[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const. art. VI, § 2.

147. "He [the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors [and] other public Ministers and Consuls," U.S. Const. art. II, § 2, cl. 2

148. *See, e.g.,* Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 Harv. L. Rev. 1, 7-9 (1959)(classical interpretation); A. Bickel, The Least Dangerous Branch, 189-96 (1962) (prudential interpretation); Scharpf, *Judicial Review and the Political Question: A Functional Analysis,* 75 Yale L.J. 517, 596-97 (1966) (functional interpretation).

149. Marshall's defense of McCulloch v. Maryland 190-91 (G. Gunther, ed. 1969).

Now that biographies of Marshall have moved beyond federalist filiopietism, we are in a better position to assess whether the Chief Justice drew such a bright line between policy preferences and constitutional adjudication throughout his career.[150] And, although few judges are candid enough to admit it,[151] it seems plain that many of them read their own policy preferences into constitutional "doctrine." Indeed, some scholars have made telling arguments why, in some circumstances, this should be the case.[152]

In light of the popularity of the recent volume by two journalists purporting to reveal the "inside" of the Supreme Court,[153] we may experience a revival, preferably short-lived, of legal realism in its more vulgar form of "judicial hunch" as explanatory of the outcome of cases. If the judges involved in *Goldwater* engaged in exercises of "raw judicial power,"[154] it was not because the case involved a policy-making decision inappropriate to the judiciary. At the least, it may fairly be claimed that the plaintiffs never called upon the judges to decide the case on the basis of the judges' personal political inclinations for or against the new China policy. To be sure, our China policy is controversial, but the judges were never invited into that controversy. They were not asked to pass judgment on the wisdom of selling Coca-Cola and computers in Peking or to opine about the adequacy of the protection of human rights in Taipei. They were, rather, asked to fashion a judicial remedy to resolve an apparent conflict among the branches as to who is authorized under domestic constitutional law to

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150. *See, e.g.*, L. Baker, John Marshall: A Life in Law (1974).

151. Chief Justice Charles Evans Hughes was the exception who proved the rule. While Republican Governor of New York in 1907 he stated: "We are under a Constitution, but the Constitution is what the judges say it is." M. Pusey, Charles Evans Hughes 204 (1951). Cf. B. Cardozo, The Nature of the Judicial Process 88-94 (1921).

152. *See, e.g.*, Hazard, *The Supreme Court as a Legislature*, 64 Cornell L. Rev. 1 (1978); D. Horowitz, The Courts and Social Policy (1977); Linde, *Judges, Critics, and the Realist Tradition*, 82 Yale L.J. 227 (1972); Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 Stan. L. Rev. 169 (1968). *Contra*, P. Kurland, Politics, The Constitution, and the Warren Court (1970); Bickel, The Least Dangerous Branch (1962).

153. *See* B. Woodward & S. Armstrong, The Brethren (1979).

154. Roe v. Wade, 410 U.S. 113, 222 (1973)(White, J., dissenting).

terminate treaties. The remedy proposed by Judge Gasch did not involve him in answering the ultimate question in *Goldwater*, to terminate or not to terminate the Mutual Defense Treaty with the ROC; it merely stated that both political branches must be engaged in the resolution of that question. In short, the functional criteria announced in *Baker v. Carr* were met in *Goldwater*: the judges could have decided the question before them without making an initial policy determination of a kind clearly calling for nonjudicial discretion.[155]

The last three criteria identified by Justice Brennan in *Baker v. Carr* involve prudential considerations. A case is to be considered as implicating a nonjusticiable "political question" if the court cannot undertake a resolution without expressing lack of respect due coordinate branches of government; if there is an unusual need for unquestioning adherence to a political decision already made; or if there is a potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Careful analysis of these prudential criteria suggests that they need not have deterred a federal court from reaching the merits in *Goldwater*. The Justice Department briefs repeatedly sounded ominous warnings about the imminent collapse of American foreign policy with respect to the PRC if the defendants did not prevail in this case.[156] This hyperbolic style appears to surface in the Justice Department when the executive branch finds itself in court in the midst of a significant crisis, such as the *Steel Seizure Case*[157] or *United States v. The Progressive*.[158] In the former instance President Truman was able to continue prosecution of the Korean war without unauthorized federal supervision and operation of steel mills idled by a labor-management dispute. In the latter instance, no one will learn any significant "secret" about the construction of nuclear weaponry and still less will anyone be enabled to make such weapons

155. *See* Baker v. Carr, 369 U.S. at 211-12, 217; *see also* United States v. Am. Tel. and Tel. Co., 567 F. 2d 121, 126 (D.C. Cir. 1977)(differentiating between "political controversy" and "political question").

156. *See, e.g.*, Brief for Appellants, *supra* note 54, at 18-28.

157. *See* 343 U.S. 579 (1952) (arguments made by Solicitor General Philip Perlman); *see also* note 247 *infra*.

158. 467 F. Supp. 990 (D. Wisc. 1979).

as a result of the publication of the story in *The Progressive*. As to *Goldwater*, it is worth noting that the Great Wall of China withstood Judge Gasch's opinion of October 17, and that, if I read the ads in *The New Yorker* correctly, Americans were still able to obtain a visa to visit the Forbidden City or to conduct more profitable commercial ventures.[159]

One more point needs to be made about the prudential criteria concerning the political question issue. The Justice Department briefs relied on Justice Sutherland's dictum in *Curtiss-Wright* and on a string of cases involving various aspects of foreign affairs to support the remarkable conclusion that courts have no business inquiring as to the possibility of *ultra vires* executive action. But the authorities relied on by the President's attorneys do not support the generalized proposition for which they were cited. In *Curtiss-Wright*, for example, a joint resolution of Congress had explicitly authorized the very sort of executive decision challenged by the defendant as an improper delegation of legislative authority. And in *United States v. Belmont*[160] and *United States v. Pink*,[161] the Court merely ruled that the supremacy clause required that an otherwise valid international agreement would take priority over a conflicting state law.

In sum, as Professor Henkin has written:

> Despite common impressions and numerous citations, there are in fact few cases, and apparently no foreign affairs case, in which the Supreme Court ordained or approved. . . judicial abstention from constitutional review or from deciding some other question that might have led to a different result in the case. In the foreign affairs cases commonly cited the courts did not refrain from judging political actions by constitutional standards; they judged them but found them constitutionally not wanting ....

159. *See, e.g., Chinese Seem Unruffled by U.S. Court Decision on Accord with Taiwan*, Wash. Post, Oct, 20, 1979, at A14, col. 5.

160. 301 U.S. 324 (1937).

161. 315 U.S. 203 (1942).

> There is, then, no Supreme Court precedent for extraordinary abstention from judicial review in foreign affairs cases.[162]

The most recent expression of Professor Henkin's thought on treaty termination is that this power is exclusively presidential. He thinks that the argument for congressional or senatorial participation in this power has only "specious plausibility."[163] Nonetheless, even after the Vietnam-era political question cases[164] Professor Henkin was apparently of the view that the *Goldwater* case should not have been dismissed as a nonjusticiable "political question."[165]

III. THE HISTORICAL QUESTION: WHAT CAN WE LEARN FROM THE PAST?

The intent of the framers and the historical experience in treaty termination is the chief focus of the leading articles on treaty termination.[166] Historical

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162. L. Henkin, *supra* note 91, at 213-15.

163. *Id.*

164. *See* cases cited in note 91 *supra; see also* Holtzman v. Schlesinger, 484 F. 2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); Mitchell v. Laird, 488 F. 2d 611 (D.C. Cir. 1973).

165. *See* Henkin, *Litigating the President's Power to Terminate Treaties*, *supra* note 14, at 647. *But see* Henkin, *Is There a Political Question Doctrine?*, *supra* note 48. *Cf.* Scharpf, *supra* note 48, at 542. ("The constitutional scope of the treaty power vis-à-vis the states and vis-à-vis individual rights, and the *allocation of competence in this field among the executive and legislative departments*, were never held to present nonjusticiable questions.") (emphasis supplied).

166. Scheffer, *supra* note 1, at 977-1005; Emerson, *The Legislative Role in Treaty Termination*, 5 J. Legis. 46, 48-69 (1978); Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties: The Original Intent of the Framers of the Constitution Historically Examined*, 55 Wash. L. Rev. 1 (1979); Thomas, *The Abuse of History: A Refutation of the State Department Analysis of Alleged Instances of Independent Presidential Treaty Termination*, 6 Yale Stud. World Pub. Ord. 1, 25-78 (1979).

arguments likewise occupied considerable portions of the trial[167] and appellate briefs.[168] In the opinion of October 17, 1979, Judge Gasch made use of the historical materials presented to him in *Goldwater*. First, the judge noted that treaties have been terminated in a variety of ways, including the following: by statute directing the President to deliver notice of termination;[169] by the President acting pursuant to a joint resolution of Congress or otherwise acting with the concurrence of both houses of Congress;[170] by the President acting with senatorial consent;[171] and by the President acting alone.[172]

As Professor Henkin noted in a recent editorial, the State Department and Senator Goldwater counted and weighed the precedents differently.[173] After reviewing the historical materials, Judge Gasch concluded that the precedents cited for unilateral executive action were of "only marginal utility."[174] Without attempting to resolve the quarrel between the parties concerning the number of treaties terminated in the past and the means whereby each had been terminated, Judge Gasch stated that the historical evidence in favor of exclusive presi-

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167. *See, e.g.,* Points and Authorities, in Support of Plaintiffs' Opposition, *supra* note 115, at 28-35; Points and Authorities in Support of Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment at 33-38, Goldwater v. Carter, 481 F. Supp. 949 (D.D.C. 1979).

168. *See* Brief for Appellants, *supra* note 54, at 53-57; *see also* Brief for Appellees, *supra* note 88, at 48-51; Reply Brief for Appellees at 23-27 Goldwater v. Carter, No. 79-2246, 48 U.S.L.W. 2380 (D.C. Cir. Nov. 30, 1979).

169. For the evidence of this mode of treaty termination, see Scheffer, *supra* note 1, at 1002-05; Emerson, *supra* note 166, at 52-53, 59-60.

170. *See* Emerson, *supra* note 166, at 53-59.

171. *Id.* at 69-77.

172. *See, e.g.,* Kennedy, *Normal Relations with China: Good Law, Good Policy* 65 A.B.A. J. 194, 195-96 (1979), *reprinted in* 125 Cong. Rec. S7017 (daily ed. June 6, 1979).

173. *Compare* Memorandum from the Legal Adviser, Herbert Hansell, to the Secretary of State, Dated Dec. 15, 1978 [hereinafter cited as Hansell Memorandum] in *Treaty Termination, supra* note 13, at 147-91, *with* the memorandum on the history of treaty termination prepared for Senator Goldwater by his staff counsel, J. Terry Emerson, *reprinted in* 125 Cong. Rec. S1891-95 (daily ed. March 1, 1979); *see also id.* at S2158-59 (daily ed. March 7, 1979), S2300 (daily ed. March 8, 1979), and S7042 (daily ed. June 6, 1979).

174. 481 F. Supp. at 959.

dential authority was not persuasive because:

> [N]one of these examples involves a mutual defense treaty, nor any treaty whose national and international significance approaches that of the 1954 Mutual Defense Treaty. Virtually all of them, moreover, can be readily distinguished on the basis of some triggering factor not present here.[175]

The Judge explained in a footnote how those cases of apparent unilateral presidential action might be distinguished:

> Unilateral executive action in terminating a treaty would presumably be permissible, as both parties recognize, when the treaty is superseded by an inconsistent law or treaty; when the treaty becomes impossible to perform or is otherwise rendered inoperative; when the treaty is violated or denounced by the other party; or when there has been a fundamental change in circumstances affecting treaty....
>
> Many of the instances cited by defendants in which the President has acted alone involve one or more of the above factors. In others, if the treaty was not actually superseded by inconsistent legislation, there was at the very least a substantial participation by Congress in establishing the policy that led to the termination, the result of which amounted to an implied authorization.[176]

Perhaps because of the extraordinary speed with which *Goldwater* was decided, neither the appellate court nor the Supreme Court expressed any serious interest in the historical evidence presented by both sides in the litigation. Indeed, of the sixteen judges who reviewed Judge Gasch's opinion, only one, Judge MacKinnon, made

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175. *Id.*
176. *Id.* at 959, n. 46 (citations omitted).

any significant use of these historical arguments.[177]

Judges have often been faulted by scholars for their naive acceptance of sloppy "law office history" hastily created by lawyers not trained in historical method and inserted into briefs, not that all relevant factors might be weighed, but so that the judges will be more likely to decide a case in favor of the lawyers' clients.[178] To be sure, some of the scholars who have roundly excoriated the Court for using "evidence wrenched from its contemporary historical context" or for "carefully select[ing] those materials designed to prove the thesis at hand, suppressing all data that might impeach the desired historical conclusions,"[179] have themselves been known on occasion to have written one-sided, biased history for insertion into briefs submitted to the Court.[180] The scholars then, might at least modify the tone of their criticism of judges, for on the record of their performances, neither group can afford to be too smug.

One eminent legal historian, Professor William Nelson, who served as law clerk to Justice White, is of the opinion that since historical data are ambiguous or polyvalent and since few judges are good historians, history should seldom be used to justify the results reached.[181]

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177. *See* Goldwater v. Carter, No. 79-2246, 48 U.S.L.W. 2580 (D.C. Cir. Nov. 30, 1979), *quoted in* Appendix to Petition for Writ of Certiorari at 54A-91A, Goldwater v. Carter, 100 S.Ct. 533 (1979). (MacKinnon, J., dissenting in part and concurring in part.)

178. *See, e.g.*, Gaffney, *History and Legal Interpretations: The Early Distortion of the Fourteenth Amendment By the Gilded Age Court*, 25 Cath. U. L. Rev. 207 (1976); C. Miller, The Supreme Court and the Uses of History (1969); Levy, *The Right Against Self-Incrimination" History and Judicial History*, 85 Pol. Sci. Q. 1 (1969); Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 Sup. Ct. Rev. 89; Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. Chi L. Rev. 502 (1964); Murphy, *Time to Reclaim: The Current Challenge of American Constitutional History*, 69 Am. Hist. Rev. 64 (1963); Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1 (1955).

179. Kelly, *Clio and the Court; An Illicit Love Affair*, 1965 Sup. Ct. Rev. 119, 126.

180. Professor Alfred Kelly was the scholar principally responsible for the N.A.A.C.P.'s brief in Brown v. Bd. of Educ., 347 U.S. 483 (1954). The Court's reliance on that brief was criticized by Bickel, *supra* note 178.

181. Nelson's views on "The Use of History by Judges" are contained in an unpublished paper of that title.

But there are cases in which legal judgment should be informed by the past. There are cases in which courts explicitly require counsel to brief them on the historical evidence concerning the intent of the framers and the ratifying legislatures or conventions with respect to various constitutional provisions.[182]

Although neither the District Court nor the Court of Appeals formally requested counsel in *Goldwater* to brief them on the historical evidence concerning treaty termination, this evidence was crucial to a proper determination of the case. Judge Gasch's training as a trial attorney and federal judge served him well in the analysis of the historical evidence submitted to him. He carefully sorted out the conflicting claims presented in *Goldwater* and saw through the defendants' inflated and erroneous claim that there are fourteen instances in our nation's history in which a President has given notice of treaty termination independently of the Senate or of the Congress.[183] If the appellate judges and the Justices of the Supreme Court had taken the opportunity carefully to scrutinize the historical evidence, they would have discovered that virtually all cases of treaty termination have involved some form of legislative consent, whether at the initiative of Congress (thirty nine instances), in response to a presidential request for treaty termination authority (four instances), through implied authorization in statutes and treaties (two instances), and through enactment of later inconsistent law or approval of new treaties (seven instances).[184]

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182. *See, e.g.*, Brown v. Bd. of Educ., 345 U.S. 972 (1953). Professor Bickel, then serving as law clerk to Justice Felix Frankfurter, drafted the historical questions addressed to counsel in the school segregation cases. *See* R. Kluger, Simple Justice 614-16 (1976).

183. This inflated count of the precedents is found in the Hansell Memorandum, *supra* note 173, and in Kennedy, *supra* note 172. It is repeated in the Brief for Appellants, *supra* note 54, at 54-57.

184. This evidence is presented in Schaffer, *supra* note 1 and Emerson, *supra* note 165 and is summarized in the Brief for Appellees, *supra* note 88, at 57-64.

Assuming, however, the wisdom of Professor Nelson's caution against asking judges to perform the task of historical criticism, the plaintiffs-appellees in *Goldwater* might even have conceded the defendants' contention that there are thirteen instances of unilateral presidential action to terminate a treaty. What follows? However one counts and weighs these acts (plaintiffs said there were three, all distinguishable from the case at bar; defendants said there were thirteen, all on point), they do not add up to legal or constitutional authority for exclusive presidential power in this area.[185] In short, as Judge Tamm wrote in *Kennedy v. Sampson*: consistent practice cannot create or destroy an executive power.[186]

One final point should be made in a consideration of the use of history in the *Goldwater* case -- the history surrounding the negotiation and ratification of the entire complex of mutual defense treaties which entered into force after World War II[187] and surrounding the particular mutual defense treaty with the ROC at issue in *Goldwater*.[188] The American ambassador to the ROC in 1954, Karl L. Rankin, who played a major role in negotiating and concluding this treaty, has stated: "To the best of my knowledge, it never dawned on the negotiators that the treaty would be terminated by the President acting alone.[189] To be sure, the negotiators in 1954 could not

185. However characterized, these acts do not grant the president unreviewable discretion any more than the eight alleged "seizures" of industrial plants and facilities by Presidents without statutory or constitutional authority kept the Supreme Court from ruling against President Truman's Secretary of Commerce in the *Steel Seizure Case*, 343 U.S. at 648-49 (Jackson J., concurring); than the executive practice of impounding funds appropriated by Congress deterred the Supreme Court from declaring such practice illegal in Train v. City of New York, 420 U.S. 35; or than the presidential custom of refusing to comply with subpoenas was regarded as authority for President Nixon's claim of immunity from a subpoena to produce recordings needed for a criminal trial in United States v. Nixon, 418 U.S. 35.

186. 511 F. 2d 430, 441 (D.C. Cir. 1974).

187. *See Treaty Termination, supra* note 13, at 290-97 (testimony of Professor Alan Swan).

188. *Id.* at 389-95 (testimony of Professor Michael Reisman).

189. 125 Cong. Rec. S15797 (daily ed. Nov. 2, 1979).

have foreseen that Richard Nixon, then the Vice-President and well known for his strong opposition to Communism, would have initiated a new China policy in 1972 that led to President Carter's announcement in 1978. But the records of the executive sessions of the Senate Foreign Relations Committee concerning this treaty, made public on April of 1978, disclose at several points that President Eisenhower, Secretary of State John Foster Dulles, and Senator William Fulbright clearly understood that the term "party" in the treaty termination clause (Article X) did not refer to the President alone.[190] Although President Carter's attorneys ignored this material in their briefs, it was highly relevant to the resolution of this lawsuit and could be ignored by the courts only at the risk of inviting the sort of criticism of judges' historical anlysis that was outlined above.[191]

IV. THE CONSTITUTIONAL QUESTION: SEPARATION OF POWERS

In the discussion of the "textual commitment" test of the political question doctrine, I argued above that the text of the Constitution itself does not support the theory that the President alone has the power to terminate a treaty. In this section of the article, I examine in greater detail the constitutional arguments relied on by President Carter's attorneys. Secondly, I suggest that the structure of the Constitution and several provisions in the text indicate a central concern of our constitutional order, the model of separation of powers, which militates against the concentration of powers, especially against implied or vaguely "inherent" powers, in any one branch of government.

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190. *See* Executive Sessions of the Senate Foreign Relations Committee (historical series) vol. VII, 84th Cong., 1st Sess. 65, 285 (1978). *See also* Exec. Rep. 2, 84th Cong., 1st Sess. 7 (1978).

191. *See* text accompanying notes 177-179 *supra*.

A. THE JUSTICE DEPARTMENT VIEWS

Throughout this article, I have referred to the attorneys for the defendants in *Goldwater v. Carter* not with the familiar designation, "the Government," but rather as "the President's attorneys." The point of this designation is neither to be overly fastidious nor to cast aspersions on the Justice Department, but simply to highlight that this case involved an inter-branch conflict. For either party to claim under these circumstances to represent "the Government," or more presumptuously, "the people," would be to beg the very question which the third branch of government was called upon to resolve: should both political branches of government be involved in treaty termination or does the Constitution vest that power exclusively in the Executive? In short, before analyzing the constitutional arguments put forward by the attorneys for the President, it must be pointed out that in *Goldwater* the Justice Department attorneys were not engaged in their customary task of defending the legitimacy of an act of Congress or of an administrative regulation issued pursuant to such an act, but rather were defending the authority of the President against a challenge brought by members of a coordinate branch of government. Bearing in mind that these attorneys are cabinet or sub-cabinet officers within the executive branch,[192] one can readily under-

192. Former Attorney General Griffin Bell argued the case in the District Court, urging Judge Gasch to dismiss the case as a non-justiciable political question. Former Assistant Attorney General Barbara Babcock, who has resumed her position as professor of law at Stanford, supervised and signed the trial briefs. In her capacity as a law professor, Ms. Babcock has been critical of the excessive use of jurisdictional arguments such as standing, ripeness, mootness, and political question to keep federal plaintiffs from reaching the merits of questions they choose to litigate. Assistant Attorney General Alice Daniel assumed responsibility for the appellate brief. In her former capacity as General Counsel of the Legal Services Corporation, Ms. Daniel urged greater access to federal courts. Assistant Attorney General John M. Harmon shared in the responsibility for the appellate brief. Mr. Harmon was formerly a law clerk for Justice Powell, who wrote the opinion of the Court in Warth v. Seldin, 422 U.S. 490, and in Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, elaborating its new standing requirements. When the *Goldwater* case went to the Supreme Court, it was, of course, under the direct supervision of Solicitor General Wade McCree. To the best of my knowledge, while

stand why their constitutional outlook was sympathetic to the President.

President Carter's attorneys put forward a series of constitutional arguments in support of the proposition that the Executive alone enjoys the power to terminate any treaty it wishes. They contended that this power is derived from "the constitutional allocation of specific powers to the President" and from the "fact that the Executive is the branch of Government with plenary power over the conduct of foreign relations."[193] The "specific powers" to which the brief alluded include the recognition power, the Commander-in-Chief power, the appointment and removal power, and the provision requiring the President to take care that the laws are faithfully executed. To assertions of these four specific powers, the Justice Department added an argument concerning the President's "plenary power" over foreign relations derived, of course, from Justice Sutherland's dictum in *Curtiss-Wright*. Each of the five arguments is seriously flawed.

1. Recognition Power

First, the Justice Department argued that the President may, without the consent of the Senate or the Congress, terminate a treaty as a consequence of his implied power to recognize foreign governments. As mentioned above, the recognition power is a derived power thought to be implicit in the provision authorizing the President "to nominate and by and with Advice and Consent of the Senate [to] appoint Ambassadors."[194] Although the recognition power is now secure as a presi-

192. (Continued)
serving on the Court of Appeals for the Sixth Circuit, Judge McCree did not write any opinions involving standing or the political question doctrine.

193. Brief for Appellants, *supra* note 54, at 42.

194. U.S. Const. art II, § 2, cl. 2.

dential prerogative,[195] it is not easy to leap from that implied power to that of treaty termination. First, the facts involved in *Goldwater* do not support the claim that treaty termination is implied in the recognition power. President Carter never stated that his termination of the ROC treaty was grounded in his recognition of the PRC,[196] but rather based his action on the notice provision (Article X) of the treaty, on the theory that "Party" in that provision means "any future President."[197] Second, the legal authority cited by the Justice Department does not support the boot-strapping operation which the Justice Department would have had the courts perform. Neither *United States v. Belmont*[198] nor *United States v. Pink*[199] involved the termination of a treaty;[200] both

195. Although the constitutional text, *quoted at* note 145 *supra*, from which the implied power or recognition is derived, speaks of an interaction or sharing, I do not wish to suggest that the President must secure the advice and consent of the Senate before recognizing a foreign government. For cases referring to the President's prerogatives under the recognition power, *see, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964), Baker v. Carr, 369 U.S. at 212, United States v. Pink, 315 U.S. at 228-230, *cited in Goldwater*, 100 S. Ct. at 539 (Brennan, J., dissenting).

196. The chief proponent of the theory that derecognition of the ROC causes all treaties to pass to the PRC is Professor Jerome Cohen. *See, e.g., Normalization of Relations with the People's Republic of China: Practical Implications, Hearings Before the Senate Subcomm. on Asian and Pacific Affairs* 95th Cong., 1st Sess. 81 (1977); *Termination of Treaties, supra* note 1, at 293-302. This position is reviewed and refuted in Scheffer, *supra* note 1, at 944-66. The Taiwan Relations Act, 22 U.S.C. §§ 3301-3316 may fairly be seen as having robbed Cohen's view of whatever vitality it previously had. *See Taiwan, Hearings Before the Senate Comm. on Foreign Relations*, 96th Cong., 1st Sess. (1979), S. Rep. 96-7 and H. Conf. Rep. 96-71, 96th Cong., 1st Sess. (1979), *reprinted in* [1979] U.S. Code Cong. and Ad. News 65-718. *See also* 44 Fed. Reg. 1075 (Jan. 4, 1975).

197. This position is refuted by the history of the negotiations leading up to the initialling of the treaty in 1954, *see* text accompanying note 192 *supra*, and by subsequent legislative history of the senatorial participation in the process of making the treaty effective, *see* text accompanying note 193 *supra*.

198. 301 U.S. 324 (1937).

199. 315 U.S. 203 (1942).

200. For a statement of my views on executive agreements from Theodore Roosevelt to Richard Nixon, see *Treaty Termination, supra* note 13, at 490-94.

cases dealt with executive agreements, not treaties. In these cases, then, the Court merely ruled that when the President entered into a valid executive agreement with a foreign government, that agreement would, under the supremacy clause (which includes treaties), take precedence over conflicting state law.

2. Commander-in-Chief Power

Another argument employed by the Justice Department was that the President alone has the power to terminate treaties because he is the "Commander-in-Chief of the Army and Navy."[201] In resting the treaty termination power on this provision, the President's attorneys have, perhaps unwittingly, made a concession that the presidential prerogative to terminate treaties is confined to defense treaties or to treaties involving the military forces. The chief flaw with the argument, however, is that one can as easily argue from the enumerated congressional powers "to provide for the common Defence,"[202] "to declare War,"[203] "to raise and support Armies,"[204] and "to provide and maintain a Navy,"[205] that if Congress ought to participate in the policy judgment leading up to the termination of treaties, the kind of treaty in which it has a direct and constitutionally grounded interest is a mutual defense treaty. The consequences of the termination of a military alliance, especially with a friendly nation, can easily implicate all of the above-mentioned congressional duties.[206] In short, this argument fails to take into account the deliberate tension between the branches created by the framers when they made the President the Commander-in-Chief (or the "first general and admiral of the Confederacy,"[207] as Hamilton put it) but left major decisionmaking concerning military affairs in the hands of Congress.

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201. U.S. Const. art. II, § 2, cl. 1.

202. U.S. Const. art. I, § 8, cl. 1.

203. *Id.* at cl. 11. *See* T. Eagleton, War and Presidential Power: A Chronicle of Congressional Surrender (1974); J. Javits, Who Makes War (1973); L. Tribe, *supra* note 118, at 172-81.

204. U.S. Const. art. I, § 8, cl. 12.

205. *Id.* at cl. 13.

206. *See Treaty Termination, supra* note 13, at 290-97 (testimony of Professor Alan Swan).

207. *See* The Federalist No. 68 (A. Hamilton), The Federalist Papers 418 (C. Rossiter, ed. 1961).

The Supreme Court did not accept the Justice Department's argument that the Commander-in-Chief power authorized the President to act without any authority from Congress to take possession of private property in order to keep labor disputes from stopping production of military weapons during the Korean war.[208] In *Goldwater*, the courts rejected the claims of exclusive presidential power over treaty termination derived from a similarly inflated view of the Commander-in-Chief power.[209]

3. Appointment and Removal Power

The President's attorneys also argued that the pattern of authority in the process of treaty notification and termination was analogous to that in the presidential appointment and removal powers. The Senate must approve the appointment of certain government officials. There is no requirement of congressional or senatorial participation in decisions to remove those officials. The President's attorneys suggested parallel patterns of participation in treaty ratification and termination. Judge Gasch rejected this argument because the removal of a subordinate officer who refuses to carry out the Executive's designs is consistent with the duty placed upon the Executive to take care that the laws be faithfully executed, whereas "treaty termination impacts upon the substantial role of Congress in foreign affairs ... and is a contradiction rather than a corollary of the Executive's enforcement obligations."[210]

The argument based on the appointment and removal powers was renewed by the Justice Department lawyers before the appellate court and the Supreme Court, but neither court gave the argument much attention. Perhaps this was because the appellants-respondents had asked the relevant case authority to carry more weight than it

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208. 343 U.S. at 587.

209. *See* Berger, *War Making by the President*, 121 U. Pa. L. Rev. 29 (1972); *Treaty Termination*, *supra* note 206.

210. 481 F. Supp. at 960.

would bear. *Myers v. United States*[211] is a slender reed on which to rest the weighty proposition that a President may terminate unilaterally any treaty he views as inappropriate or impolitic.[212] Frank Myers was a Democratic postmaster in Portland, Oregon, appointed in the Wilson administration and fired by Warren Harding's Postmaster General in violation of a statute which required senatorial participation in the process of removal of postmasters from office. Chief Justice Taft ruled that statute unconstitutional.[213]

In so doing, Taft rambled on for seventy pages of "history that is neither right nor relevant" and of argumentation which was "largely an insubstantial shield for political values" because "other appropriate vehicles of interpretation for reaching its conclusion [were] largely lacking."[214] The leading constitutional commentator of the day, Edwin S. Corwin, severely criticized Taft's sloppy history in *Myers*.[215] Moreover, without overruling *Myers*, a unanimous Court retreated from its extravagant rhetoric less than a decade later in *Humphrey's Executor v. United States*.[216] As Professor Charles Miller has stated:

> The postmaster removal case was flawed by history in two ways. First, the history related by the Court was poor

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211. 272 U.S. 52 (1926), cited in Brief for Respondents, *supra* note 38, at 15.

212. "Postmasters of the first, second, and third class shall be appointed and may be removed by the President by and with the advice and consent of the Senate and shall hold their offices for four years unless sooner removed or suspended according to law."

Act of July 12, 1876, 19 Stat. 80, 81. The provision was ruled unconstitutional in *Myers*, 272 U.S. at 176.

213. 272 U.S. at 63-64.

214. C. Miller, Presidential Removal Power: The First Congress as Constitutional Interpreter, in The Supreme Court and the Uses of History 52, 68 (1969).

215. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 Colum. L. Rev. 353 (1927).

216. "Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office." 295 U.S. 602, 631 (1935) (invalidating President Roosevelt's attempt to remove a member of Federal Trade Commission). *See also* Wiener v. United States, 357 U.S. 349 (1958); L. Tribe, *supra* note 118, at 187.

> history. Second, and more important, history . . . was really the Court's only principle of adjudication. The failure to offer additional justification for the *Myers* holding brought into question its constitutional adequacy from the time it was announced. The historical discussion so weighed down the opinion that it was in constant danger of disappearing from the surface of contemporary constitutional law--which it soon did.[217]

Judge Gasch rightly rejected the analogy to the presidential removal power as unpersuasive. It would be unfair to the memory of Chief Justice Taft to resurrect one of his sloppiest opinions, already given decent, if unceremonious, burial and expect it to serve as a persuasive rationale for presidential hegemony over treaty termination. "To the victor belong the spoils" might have adequately reflected the mood in 1925 of a jolly former President turned Chief Justice who did not wish to impede the distribution of political favors by a fellow Republican. But this attitude towards tenure in office is now discredited even with respect to employment in the Postal Service. Unless President Carter's lawyers view our treaty obligations as among the political plums to be distributed by a new president, the *Myers* rationale simply will not do as a basis for asserting the concentration of all treaty termination power in the Oval Office.

4. The Take Care Clause and the Supremacy Clause

In my opinion, the most puzzling and least persuasive constitutional argument articulated by the Justice Department attorneys was the claim that President Carter derived his authority to unilaterally terminate a treaty from the requirement that the President "take Care that the Laws be faithfully executed" (Take Care clause).[218] Perhaps this argument is best seen as a play on the word "executed." The normal sense of the term refers to

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217. C. Miller, *supra* note 214, at 70.

218. U.S. Const. art. II, § 3. For a statement of the Justice Department's view, *see* Brief for Appellants, *supra* note 54, at 67-70.

carrying out or implementing, but the Justice Department brief, perhaps written by someone fresh from research on capital punishment, uses the term "faithfully executed" to mean "terminated."

Three reasons lead me to the conclusion that a lighthearted interpretation of this argument is more plausible than a serious one. First, the author of the argument tipped his hand that he was not serious when he compared a mutual defense treaty to a government lease or contract which can easily be annulled without consulting Congress.[219] Second, if correct, this argument proves too much. The argument would result in all treaties being subject to unilateral termination by the President. I seems unlikely that the Take Care clause was intended to grant the President a power that, if unilaterally exercised, could so destabilize United States foreign relations.

The argument from the Take Care clause is further weakened by the fact that, unless one accepts the pun on "executed," the clause means that the Executive is duty bound to carry out the policies and obligations contained in treaties. This seems to me to be an implication which may fairly be derived from the supremacy clause, which declares treaties as well as the federal Constitution and federal statutes to be the "supreme Law of the Land" (supremacy clause).[220] Article V makes clear byond cavil that the Executive powerless to alter or amend the Constitution on his own. Still less is he empowered to "execute" the Constitution in the sense of terminating it as the chief instrument of our public order.[221]

The Constitution is silent on the method of repealing federal statutes, but no Executive in modern Anglo-American constitutional history since Charles I has unilaterally attempted to repeal a statute and stayed in power. Given a constitutional system which explicitly limits the President's role in the process of constitu-

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219. *Id.* at 68.

220. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or shall be made, under the Authority of the United States, shall be the supreme Law of the Land...." U.S. Const. art. VI, cl.2. For comments on this provision, see *Treaty Termination, supra* note 13, at 40 (remarks of Senator Goldwater), at 274 (remarks of Professor Franck), and at 515 (testimony of Professor Gaffney).

221. U.S. Const. art V.

tional amendment and which, at least customarily, denies him the power to repeal a statute without congressional authorization, I fail to see how the Constitution's silence as to a precise mode of treaty termination can be interpreted to grant the President unilateral termination power.

Professor Louis Henkin has suggested that the interpretation of the supremacy clause advanced here is flawed because the clause is directed not to the Executive, but to the courts, and because treaties are mentioned there "principally for the purpose of declaring treaties supreme in relation to state law and policy."[222] In his view, to call treaties "supreme" in the sense of binding the Executive is but another play on words.

Three counterarguments are possible. First, I think the strength of the theory that treaties are generally binding[223] on the Executive derives not from the supremacy clause exclusively, but from the conflation of that clause with the Take Care clause. Second, if the argument is merely a play on words, it is at least an old one. Thomas Jefferson wrote as follows in the Rules and Manual of the Senate: "Treaties being declared equally with the laws of the United States, to be the supreme Law of the Land, it is understood that an act of the legislature alone can declare them infringed and rescinded."[224] Third, some commentators have suggested that the President may abrogate a treaty without consultation of Congress only at the peril of being impeached and removed for so doing.[225] In support of this view, there is sound historical evidence in the form of several speeches of delegates to the state

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222. Henkin, *supra* note 14, at 653.

223. Even the version of S. Res. 15 reported by the Senate Foreign Relations Committee on May 7, 1979, but never voted on by the Senate, rejects complete presidential hegemony over the process of treaty termination. *See* text accompanying note 19 *supra*.

224. T. Jefferson, *A Manual of Parliamentary Practice for the Use of the Senate of the United States*, Sec. L. 11 (1801), as reprinted in *Senate Manual*, S. Doc. No. 93-1, 93d Cong., 1st Sess. 560 (1973).

225. *See, e.g.*, R. Berger, Impeachment: The Constitutional Problems (1973); Emerson, *supra* note 166, at 77.

conventions called to ratify the Constitution.[226] It is, of course, most unlikely that the impeachment mechanism would be invoked to remove a President from office because of an unlawful termination of a treaty, especially if the President enjoys the support of a majority in either the House or the Senate.[227] Hence the outcome of the *Goldwater* litigation will determine to a great extent whether Congress will be able to play a significant role in the termination of treaties in the future.

5. Plenary Power Over Foreign Affairs

A fifth constitutional argument used by the Justice Department attorneys was that presidential hegemony over treaty termination is consonant with the Executive's plenary power over foreign affairs. This view is derived from the extravagant dictum in *Curtiss-Wright*. As noted above, the holding in this case rejected the attack made by a criminal defendant upon the delegation of a power which the Congress had specifically entrusted by law to the Executive.

Moreover, several provisions of the Constitution entrust important foreign policy functions to the legislative branch.[228] In light of these explicit textual

226. *See* 3,4 J. Elliot, ed., Debates in the Several State Conventions on the Adoption of the Federal Constitution vol.3, at 240 (Nicholas); at 516 (Madison); vol. 4, at 124 (Spaight); at 276 (E. Rutledge); and at 281 (C.C. Pinckney). For further evidence of Madison's view that the President could not act alone to terminate a treaty, see Letter of James Madison to Edmund Pendleton, Jan. 2, 1791, 1 Letters and Other writings of James Madison 524 (1865). Madison is incorrectly cited in the Hansell Memorandum, *supra* note 171, at 195, as being the first President to unilaterally terminate a treaty. In 1815, the new state of the Netherlands denounced our 1782 Treaty of Amity and Commerce with the United Netherlands as having expired because the state with whom it was made no longer existed. *See also* S. Crandall, Treaties: Their Making and Enforcement 429 (1916). For Madison's views on treaty termination, *see* Emerson, *supra* note 166, at 51-52.

227. *See* Broderick, *Citizens' Guide to Impeachment's Problem Areas*, 23 Cath. U.L. Rev. 205 (1973).

228. *See* Brief for Appellees, *supra* note 88, at 36 n.1.

commitments of major foreign affairs responsibility to the Congress, the argument based on presidential control over foreign affairs falls apart as too undifferentiated and unsophisticated. Professor Irwin Rhodes has asked: "If the President cannot, on his sole initiative, amend a treaty, how can it be claimed that he can annul one? If the lesser act is wrong, how can the greater be right?"[229] These questions cannot be effectively laid to rest merely by citing Justice Sutherland's expansive and unnecessary dictum in *Curtiss-Wright*. Still less can an effective response be fashioned by listing the number of scholars who uncritically repeat the dictum or its sentiment as the sole apparent basis of their opinion in favor of a presidential prerogative to terminate treaties.[230] Saying that something is so does not make it so.[231] In sum, the chief flaw in the argument based on the President's "plenary power" in foreign affairs is that it begs the question and so fails to account for two important realities: The nature of the treaty termination process as a series of acts with room for several actors at various stages,[232] and the explicit commitment of many foreign affairs powers to the Congress. As Judge Gasch stated in his opinion of October 17:

> [T]he President's status as the nation's spokesman and representative in foreign affairs cannot serve as the basis for exclusive executive power over the entire process of treaty termination. While the President may be the sole organ of communication with foreign governments, he is clearly not the sole maker of foreign policy. In short, the conduct of foreign affairs is not a plenary executive power.[233]

Or, as Justice Jackson stated with reference to the con-

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229. *Treaty Termination, supra* note 13, at 37.

230. *Id.*

231. Chief Justice Taney's regrettable characterization of blacks as non-persons in Scott v. Sanford, 60 U.S. (19 How.) 393, 404-06, 417-20 (1817), illustrates this point.

232. *See Treaty Termination, supra* note 13, at 289-95 (testimony of Professor Reisman). *See also* Reisman and McDougal, *Who Can Terminate Mutual Defense Treaties?*, in Nat'l L. J. at 19 (May 21, 1979); and *Can the President Unilaterally End Treaties?*, in Nat'l L. J. at 17 (May 28, 1979).

233. 481 F. Supp. at 961.

stitutional provision[234] which vests executive power in the President: I cannot accept the view that this clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated.[235]

B. THE MODEL OF SEPARATION OF POWERS

As I have attempted to show in my comments on the Justice Department's constitutional arguments, the search for relevant and compelling legal precedents in a case of first impression is always a difficult task and often yields arguments based on weak analogies. I make no claim to be able to cite crystal-clear legal authority for the desirability or necessity of congressional participation in treaty termination. But a plausible argument can be made that Congress or the Senate should have some voice in the formation of the national policy leading up to the termination of a treaty.

First, a congressional role in treaty termination is inferable from the very fact that the President alone cannot make a treaty.[236] As Alexander Hamilton

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234. "The executive Power shall be vested in a President of the United States of America" U.S. Const. art. II, § 1, cl. 1.

235. 343 U.S. at 641 (1952)(Jackson, J., concurring). Jackson had served as a justice in the Nuremburg Tribunal on War Crimes. This personal experience may explain his pointed reference to Fascist theories of unlimited executive power: "[I]f we seek instruction from our own times, we can match it only from the executive powers in those governments we disparagingly describe as totalitarian." *Id.*

236. "He [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...." U.S. Const. art. II, § 2, cl. 1. *See* Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined,* 5 Seton Hall L. Rev. 527 (1974).

wrote in Federalist 75:

> The particular nature of the power of making treaties indicates a peculiar propriety in the union [of the Executive with the Senate]. Though several writers on the subject of government place that power in the class of executive authorities, yet this is evidently an arbitrary disposition; for if we attend carefully to its operation it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them. . . . The history of human conduct does not warrant the exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstances as would be a President of the United States.[237]

In Federalist 75, Hamilton was writing of the making rather than the unmaking of treaties. When, in 1793, the leader of the Federalists, President George Washington, issued a proclamation of neutrality with respect to France, Hamilton wrote a letter which appears to support the ability of a President to suspend the operation of a treaty in the limited situation of a rebellion in a foreign country which requires a judgment "whether the new rulers are competent organs of the national will."[238] The Justice Department lawyers distorted this carefully limited utterance into a bold but erroneous claim before the Court of Appeals that Hamilton believed that the President has exclusive responsibility for terminating treaties.[239]

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237. The Federalist No. 75 (A. Hamilton), *supra* note 207, at 450-51.

238. Letters of Pacificus and Helvidius on the Proclamation of Neutrality 12-13 (1845).

239. Brief for Appellants, *supra* note 54, at 50 n. 32.

This overly generalized claim is unreliable for three reasons. First, Hamilton was an ardent supporter of separation of powers.[240] Second, the treaties cancelled as a result of the French Revolution can hardly be cited as an instance of presidential hegemony over treaty termination. On the contrary, the cancellation in 1798 of four Franco-American treaties was effected primarily by Congress, with no further notice thought to be required or actually given by President John Adams.[241] Third, Hamilton's co-author of the *Federalist Papers*, John Jay, later to serve as the first Chief Justice of the United States Supreme Court, wrote in Federalist 64 concerning the unmaking of treaties: "They who make laws may, without doubt, amend or repeal them; and it will not be disputed that *they* who make treaties may alter or cancel them. . . ."[242]

Irrespective of whether the framers of our Constitution ever explicitly applied the concept of separation of powers to the process of treaty termination, they bequeathed us a constitutional structure in which powers often overlap so as to avoid lodging absolute governmental power in any one branch. My opinion is that some form of congressional or senatorial participation in appropriate stages of the process of treaty termination is both desirable and necessary as constitutional policy. I derive this conclusion from my reading of the *Steel Seizure Case*, the *Pentagon Papers Case*, and *U.S. v. Nixon*, and from three recent legisla-

240. *See* The Federalist No. 9 (A. Hamilton), *supra* note 207, at 72; The Federalist No. 66 (A. Hamilton, *id.* at 401-2; The Federalist No. 79 (A. Hamilton), *id.* at 472; The Federalist No. 81 (A. Hamilton), *id.* at 483. *See also* The Federalist Nos. 47 and 48 (J. Madison), *id.* at 300-13.

241. *See* Emerson, *supra* note 166, at 52-53; Scheffer, *supra* note 1, at 995-96.

242. The Federalist No. 64 (J. Jay), *supra* note 207, at 394 (emphasis supplied). According to Professor Richard B. Morris, the editor of The Papers of John Jay, the original draft of The Federalist No. 64 contained the following sentence in Jay's handwriting: "With respect to the responsibility of the President and Senate [to alter or cancel treaties], it is difficult to conceive how it could be increased." It cannot be argued that by deleting this sentence from the final version, Jay intended to vest control over the treaty termination process solely in the Executive. Professor Morris has stated recently his opinion that "Throughout [Federalist 64] Jay is talking about treaty-making as a shared function, and it is a fair inference from his text that he would have regarded treaty termination in the same light." 125 Cong. Rec. S15718 (daily ed. Nov. 1, 1979).

lative developments: the impoundment controversy, the war powers resolution, and the 1979 hearings on treaty termination before the Senate Foreign Relations Committee.

1. The *Steel Seizure Case*

Three aspects of the *Steel Seizure Case* are relevant to the *Goldwater* case. First the case demonstrated how swiftly the courts can act in an impending constitutional crisis.[243] Second, it showed that judges need not be cowed by alarmist predictions of "catastrophic" consequences, "tragedy," and "disaster"[244] if the Court declined to rule in favor of the President's assertion of inherent power to act without statutory authority to "seize" and operate the steel mills idled by a labor-management dispute. Third, several of the Justices took the opportunity in the *Steel Seizure Case* to articulate their positions on the core constitutional value of the separation of powers.[245] As Justice Frankfurter

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243. On April 9, 1952, President Truman issued Executive Order 10340, directing his Secretary of Commerce, Charles Sawyer, to take possession of most of the country's steel mills and keep them running. 16 Fed. Reg. 3503 (1952). The President reported his action to Congress the following day. 98 Cong. Rec. 3962 (April 9, 1952), and sent the Congress a second message on the matter twelve days later. *Id.* at 4192 (Apr. 21, 1952). The steel companies obeyed the Secretary's orders under protest and sought injunctive and declaratory relief in the District Court for the District of Columbia. The district court issued a preliminary injunction on April 30. Youngstown Sheet & Tube v. Sawyer, 103 F. Supp. 569 (D.D.C. 1952). On the same day, the court of appeals stayed the injunction. 197 F.2d 582 (D.C. Cir. 1952). On May 3, the Supreme Court granted certiorari. 343 U.S. 937. The Court heard oral argument on May 12 and 13, and the case was decided on June 2, 1952. 343 U.S. 579.

244. The Government produced affidavits from nine executive department heads predicting severe consequences if President Truman's Executive Order were not upheld by the Court. *See* Brief for Appellees, *supra* note 33, at 41 n.1.

245. The issues in *Goldwater* clearly raise a separation of powers question. The constitutional value represented by the separation of powers doctrine was among plaintiff's principal concerns in the case. Underlying the American constitutional scheme of separated powers are mistrust of concentrated governmental authority and fear of its political consequences. Legislators, and every other actor in the democratic system, must take care that this fundamental value not be compromised by unnecessary concentration of power.

observed in *Youngstown*, "The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most dis-interested assertion of authority."[246]

Given the reality of the Korean conflict, it might be plausibly argued that President Truman thought he was acting within his executive authority in ordering his Secretary of Commerce to continue the operation of the steel mills after the steel industry had rejected the recommendations of the Wage-Price Stabilization Board.[247] The Supreme Court, however, found that the order violated the constitutional doctrine of separation of powers. The case generated seven opinions from the Justices. Only the dissent was united in an opinion written by Chief Justice Vinson. Perhaps the most useful of all the opinions for resolution of the question of treaty termination is the concurrence of Justice Jackson, who wrote that presidential authority is at its maximum when the President acts pursuant to an express or implied authorization of Congress, in a twilight zone of uncertainty when the President acts in the absence of either a congressional grant or denial of authority, and at its lowest ebb when the President takes measures incompatible with the expressed or implied will of Congress.[248]

According to Larry Hammond, the Deputy Assistant Attorney General for the Office of Legal Counsel, Justice Jackson's "zone of twilight" analysis cannot be read to support congressional action where the Consti-

246. 343 U.S. at 594 (Frankfurter, J., concurring).

247. *See* M. Marcus, Truman and the Steel Seizure Case: The Limits of Presidential Power (1977); Black, Book Review, N.Y. Times, Jan. 9, 1977, § 7 (Review of Books) at 26. For a critical analysis of the case, *see* Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 Colum. L. Rev. 53 (1953); Freund, *Foreword: The Year of the Steel Case*, 66 Harv. L. Rev. 90 (1952).

248. 343 U.S. at 635-41 (Jackson, J., concurring).

tution itself is silent.[249] Hammond's point is somewhat puzzling, for no one doubts that the President would be at the lowest ebb of his power (*i.e.*, he would have none) were he to attempt to repeal a statute without congressional approval, even though the Constitution says not a word about the process of annulling or repealing a statute. In any event, the *Steel Seizure Case* should have been instructive, if not controlling, in *Goldwater*; the former six Justices clearly repudiated the President's claims that he enjoys inherent powers nowhere granted him in Article II and that prior "seizures" by other Presidents amounted to the legitimation of such a presidential power by way of custom and congressional acquiescence.

2. The *Pentagon Papers Case*

New York Times v. United States[250] is instructive in *Goldwater* for three reasons. First, as in the *Steel Seizure Case* and the *Pentagon Papers Case*, the Supreme Court moved swiftly in the face of a serious crisis.[251] The Court did not, however, move swiftly enough for four

249. Letter from Larry A. Hammond to Senator Frank Church, no date, *reprinted in Treaty Termination, supra* note 13, at 219-20. In this letter Hammond offered Church his opinion that the Senate Foreign Relations Committee had committed "fundamental error" in applying Justice Jackson's "zone of twilight" analysis in its report accompanying the Taiwan Relations Act, S. Rep. No. 96-7, 96th Cong., 1st Sess. 18-19 (1979), *reprinted in* [1979] U.S. Code Cong. & Ad. News 667-68.

250. 403 U.S. 713 (1971). *See* Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. Pa. L. Rev. 271 (1971).

251. On June 13, 1971 the New York Times began publishing portions of a classified history of American involvement in Vietnam known as the Pentagon Papers. Two days later the Government sought an injunction against further publication of this document. A parallel suit was initiated against the Washington Post when it began to publish this material on June 18. By June 23, the Second Circuit had ruled in favor of the Government, United States v. N.Y. Times, 444 F.2d 544 (2d Cir. 1971), and the D.C. Circuit had ruled in favor of the Post, United States v. Wash. Post, 446 F.2d 1327 (D.C. Cir. 1971). On June 25, the Supreme Court granted certiorari in both cases. 403 U.S. 942 (1971). Oral argument was heard on the following day. On June 30, 1971, the Court issued a per curiam order authorizing immediate publication of the controverted materials. The order was accompanied by nine separate opinions. 403 U.S. 713 (1971).

Justices,[252] but three others felt it had acted with "frenetic haste" and "inadequate time to ponder great issues."[253] Second, most of the Justices again seemed unruffled by the Government's threats of dire consequences to our national security, prolongation of the Vietnam War, and further delay in the freeing of American prisoners of war if the Court were not to authorize prior restraint upon publication of the Penagon Papers.[254] Third, the theme of separation of powers resurfaced as a vital component in the opinions of Justices Stewart,[255] White,[256] and Marshall.[257] Justices

252. On June 25, 1971, Justices Black, Douglas, Brennan and Marshall dissented from the grants of certiorari, urged summary action, and stated that they "would not continue the restraint" on the newspapers. 403 U.S. at 943. *See also* 403 U.S. at 714-15 (Black, J., concurring) and 403 U.S. at 724-25 (Brennan, J., concurring).

253. "[T]he frenetic haste is due in large part to the manner in which the Times proceeded from the date it obtained the purloined documents. It seems reasonably clear now that the haste precluded reasonable and deliberate judicial treatment of these cases and was not warranted...." *Id.* at 749 (Burger, C.J., dissenting); *id.* at 753 (Harlan, J., dissenting).

254. "I hope that damage has not already been done. If, however, damage has been done, and if, with the Court's action today, these newspapers proceed to publish the critical documents and there results therefrom 'the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate, to which list I might add the factors of prolongation of the war and of further delay in the freeing of United States prisoners', then the Nation's people will know where the responsibility for these sad consequences rests." *Id.* at 763 (Blackman, J., dissenting).

255. In a curious opinion, Justice Stewart suggested that the separation of powers problem was that the Executive, which in his view is given "a large degree of unshared power in the conduct of foreign affairs," had asked the courts "to perform a function that the Constitution gave to the Executive, not the Judiciary," *Id.* at 729 (Stewart, J., concurring).

256. "At least in the absence of legislation by Congress, based on its own investigations and findings, I am quite unable to agree that inherent powers of the Executive and the courts reach so far as to authorize remedies having such sweeping potential for inhibiting publications by the press...." *Id.* at 732 (White, J., concurring).

257. "It would ... be utterly inconsistent with the concept of separation of powers for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit." *Id.* at 742 (Marshall, J., concurring).

Black,[258] Douglas,[259] and Brennan[260] all unequivocally rejected the Executive's expansive claim to "inherent power" to seek to enjoin publication of the controverted material.

3. *United States v. Nixon*

Like the *Steel Seizure Case* and *Pentagon Papers* cases, *United States v. Nixon*[261] provides an example of how the Justices can act swiftly[262] when they deem it neces-

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258. "To find that the President has 'inherent power' to halt the publication of news by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make 'secure'." *Id.* at 719 (Black, J., concurring).

259. "[The First Amendment] leaves, in my view, no room for governmental restraint on the press. There is, moreover, no statute barring the publication of the material which the Times and Post seek to use .... The Government says that it has inherent powers to go into court and obtain an injunction to protect the national interest, which in this case is alleged to be national security. Near v. Minnesota, 283 U.S. 697, repudiated that expansive doctrine in no uncertain terms." *Id.* at 720-723 (Douglas, J., concurring).

260. "The entire thrust of the Government's claim throughout these cases has been that publication of the material sought to be enjoined 'could,' or 'might,' or 'may' prejudice the national interest in various ways. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result." *Id.* at 725-26 (Brennan, J., concurring).

261. 418 U.S. 683 (1974).

262. On May 20, 1974, Judge Sirica denied President Nixon's motion to quash a subpoena *duces tecum* directing the President to produce certain tape recordings and documents relating to his conversations with aides and advisers who had been indicted because of their participation in one phase or another of "Watergate." On May 24, the President appealed from the district court to the D.C. Circuit. Later that day, the Watergate Special Prosecutor filed a petition for writ of certiorari before judgment. One week later, that petition was granted with an expedited briefing schedule. Oral argument was heard on July 8, and the case was decided on July 24, 1974. On July 27, 29, and 30 the House Judiciary Committee adopted three articles of impeachment. On August 5, the President released the transcripts of 64 tape recordings, among which was the "smoking gun" of a conversation

sary.[263] It also provides another example of the ability of the Court to differentiate between a controversy with manifest ramifications in the political order and a nonjusticiable "political question," for in *Nixon* eight Justices[264] were willing to assume their judicial function of "saying what the law is" in a difficult case of first impression.[265] Finally, the result reached in *Nixon* should have been instructive in *Goldwater*. In *Nixon*, a unanimous Court in a single opinion written by Chief Justice Burger[266] rejected President Nixon's interpretation of the doctrine of separation of powers claiming an absolute executive privilege to withhold the requested tapes and documents from the District Court.[267]

None of these cases is so directly on point in *Goldwater* that it should have controlled the outcome of that litigation. None, of course, involved treaty termination. But all of them were ambivalent in that they involved not simply domestic issues[268] but also, according

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262. (Continued)
in the Oval Office on June 23, 1972, six days after the break-in at the offices of the Democratic National Committee by employees of the Committee for the Re-Election of the President. On August 9, President Nixon resigned from office.

263. It also illustrates that the Court can survive the criticism of legal scholars for so acting. Professor Gerald Gunther criticized the Court's decision to bypass full consideration of the case by the circuit court, because this expedited review had the effect of aborting the impeachment process which was going forward at the time. *See* Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process*, 22 U.C.L.A. L. Rev. 30 (1974). For a contrasting view, supporting the Court's decision to grant expedited review, see Miskin, *Great Cases and Soft Law: A Comment on United States v. Nixon*, 22 U.C.L.A. L. Rev. 76 (1974).

264. Justice Rehnquist recused himself, perhaps because he had served as a former Assistant Attorney General under John Mitchell, one of the defendants in the case in chief. 418 U.S. at 716, 904.

265. *Id.* at 692-97 (no political question), and at 703-709 (citing *Marbury*).

266. For an account of the contributions of the Associate Justices to the Chief Justice's effort in this case, *see* B. Woodward and S. Armstrong, The Brethren 308-47 (1979).

267. 418 U.S. at 705-707.

268. *See Steel Seizure Case* (the government operation of steel mills); *Pentagon Papers* (the prior restraint of publication); *U.S. v. Nixon* (compliance with a subpoena of evidence).

to the allegation of the Executive in all three cases, weighty matters of our foreign policy.[269] In each of the three cases, the Court rejected the theory that the Executive had an inherent power to act, either without congressional authorization as in the *Steel Seizure Case* and *Pentagon Papers* or contrary to an explicit enactment of the Congress as in *Nixon*. In short, these three cases contain many lessons for those who wish to read the silence of the constitutional text on the process of treaty termination to mean that it vests exclusively in the Executive because of some inherent power as Commander-in-Chief or as organ and representative of the nation on the execution or conduct of our foreign affairs. Because the Court in the *Steel Seizure Case, Pentagon Papers,* and *Nixon* reasoned that the silence of the constitutional text implied shared power rather than exclusive and absolute executive power, it is somewhat bewildering that President Carter's attorneys did such a weak job of distinguishing the *Steel Seizure Case*[270] and did not bother to discuss *Pentagon Papers* or *Nixon* at all. It is also disappointing that the Justices themselves paid little or no attention to these precedents.

C. CONSTITUTIONAL LESSONS FROM LEGISLATIVE EXPERIENCE

Probably because of the power of judicial review of legislative enactments or executive acts, judges are accorded considerable deference in the function of declaring what the law is. But public officials in both of the political branches take the same oath to support the Constitution as do judges, and attention must be paid to the substantive meaning of the Constitution which emerges from the experience of the nonjudicial actors in our constitutional order.[271] Specifically, constitutional law can be enriched by focusing on the recent efforts of the Congress to maintain a tension between the roles of the executive and the legislative branches of government in three areas: war powers, impoundment of appropriated funds, and treaty termination.

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269. The availability of military weapons to U.N. forces in South Korea, the prosecution of American intervention in Vietnam, and the ability to conduct confidential discussions with foreign diplomats were at issue in *Steel Seizure Case, Pentagon Papers* and *U.S. v. Nixon*, respectively.

270. Brief for Appellants, *supra* note 54, at 21.

271. *See* Linde, *supra* note 152; L. Tribe, *supra* note 118, at 13-14, 27-28.

1. War Powers Resolution

Some commentators have criticized the War Powers Resolution[272] as an excessive intrusion by the Congress into a domain properly belonging to the Commander-in-Chief. If this Act be extreme, it must be acknowledged that there was at least some presidential *hubris* involved in continuing a full-scale military operation which was never declared as a war by the Congress. For this reason, the procedural requirement that the Executive promptly submit to the Congress a written report of the reasons for the introduction of our armed forces into hostilities or into the territory of a foreign nation for combat purposes, strikes me as a legitimate means of restoring the tension of powers which lies at the heart of our constitutional structure.[273]

Those who voted to enact the War Powers Resolution over the veto of President Nixon[274] were surely asserting that Congress must have a major voice in the determination of our foreign policy. Evidently, some of these Congressmen such as Senators Church, Javits, and Kennedy now wish to assert that the best public policy is to reserve to the Executive the function of treaty termination. Yet no principled explanation appears as to why it is appropriate for Congress to assert control over the sending of armed forces abroad absent a declaration of war, but inappropriate to assert congressional participation in decisions concerning the conduct of armed forces which we may have committed to another friendly nation's defense by means of a treaty. The two decisions are indistinguishable in this context. The constitutional model of separation of powers calls for congressional participation in both decisions.

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272. 50 U.S.C. § 1541 (1976). The literature on this question is voluminous. *See, e.g.*, Rodino, *Congressional Review of Executive Action*, 5 Seton Hall L. Rev. 489, 498-502, 513-17 (1974); Note, *1973 War Powers Legislation: Congress Re-Asserts Its Warmaking Power*, 5 Loy. Chi. L.J. 83 (1974); Van Alstyne, *Congress, the President, and the Power to Declare War*, 121 U. Pa. L. Rev. 1 (1972); Berger, *supra* note 211 and Bickel, *Congress, the President and the Power to Wage War*, 48 Chi.-Kent L. Rev. 131 (1971).

273. *See* L. Tribe, *supra* note 118, at 172-81.

274. The vote to override the President's veto was 75 in favor and 18 against in the Senate, 119 Cong. Rec. 9661 (daily ed. Nov. 7, 1973), and 284 in favor and 135 against in the House. *Id.* at 20015.

2. Impoundment

Throughout American history, Presidents have exercised discretion, often explicitly authorized by the terms of an appropriations enactment, not to spend all the funds authorized for various purposes. After repeated conflicts with the Congress over impoundment of funds, President Nixon announced at a news conference at the beginning of his second term that he thought he had an "absolutely clear" inherent constitutional right to impound funds even in the face of a mandatory spending directive from Congress. As Justice Jackson would have put it--and as future events would show--Nixon had moved beyond the "zone of twilight" to the "lowest ebb" of his powers. President Nixon's expansive claims did not enjoy the support of his own constitutional law expert, William Rehnquist, then Assistant Attorney General for the office of Legal Counsel and subsequently appointed by Nixon to the Supreme Court.[275]

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275. In December of 1969, Rehnquist prepared a memorandum concerning presidential authority to impound funds appropriated for assistance to federally aided schools. In this memorandum Rehnquist wrote:

> With respect to the suggestion that the President has a constitutional power to decline to spend appropriated funds, we must conclude that existence of such a broad power is supported by neither reason nor precedent.... It is in our view extremely difficult to formulate a constitutional theory to justify a refusal by the President to comply with a Congressional directive to spend. It may be argued that the spending of money is inherently an executive function, but the execution of any law is, by definition, an executive function, and it seems an anomalous proposition that because the Executive branch is bound to execute the laws, it is free to decline to execute them.

Cited in Executive Impoundment of Appropriated Funds, Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 92nd Cong., 1st Sess. (1971). *See generally* Note, *Presidential Impoundment: Constitutional Theories and Political Realities*, 61 Geo. L. J. 1295 (1973); and Note, *Impoundment of Funds - The Courts, the Congress, and the President: A Constitutional Triangle*, 69 Nw. L. Rev. 335 (1974).

Nixon also met with strong opposition in Congress. This clash culminated in the passage of the Congressional Budgeting and Impounding Control Act of 1974,[276] signed by Nixon in July of 1974, during the pendency of impeachment proceedings against the President. Like the War Powers Resolution, the Impounding Control Act is an important statement by the Congress that the doctrine of separation of powers does not allow the Executive to exercise a governmental function entrusted by the Constitution to both the legislative and executive branches.

The arguments set forth above all make a plausible case for some congressional role in treaty termination. The impoundment controversy and the statute it produced did not, of course, control the result[277] in *Goldwater*. But they did offer an important, if extrajudicial, statement of the constitutional model of separation of powers; one that should be instructive whenever the President claims to possess inherent power to act unilaterally without explicit constitutional warrant or congressional authorization.

3. Treaty Termination Hearings

The hearings on treaty termination held by the Senate Foreign Relations Committee on April 9, 10, and 11, 1979[278] and the Senate resolution concerning the appropriate role of the Congress in treaty termination[279] together form a third important source of constitutional law by lawmakers instead of judges. As mentioned above, the Committee had the benefit of advice from one of the country's leading scholars in this area, Professor Henkin, and it heard from a variety of witnesses on the subject. In the parliamentary scuffle between Senator

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276. 31 U.S.C. §§ 1301-1353 (1974).

277. For example, in the memorandum cited in note 275 *supra*, Rehnquist wrote: "Of course, if the Congressional directives to spend would interfere with the President's authority in any area confided by the Constitution to his substantive direction and control, such as his authority as Commander-in-Chief of the Armed Forces and his *authority over foreign affairs*, a situation would be presented very different from the one before us." (emphasis supplied).

278. *See* note 13 *supra*.

279. *See* text accompanying note 19 *supra*.

Goldwater and Senators Church and Javits which followed the vote of June 6 on the Byrd resolution, a crucial point appears to have been overlooked. Although the Carter administration witnesses and several witnesses from prior administrations argued strenuously for presidential hegemony over the entire process of treaty termination, that position was unanimously rejected by the Foreign Relations Committee and was repudiated to a large extent in the resolution which a majority of the Committee recommended that the Senate pass. The unanimous view of the Committee that the Congress has a rightful role to play in treaty termination should not have been overlooked in the *Goldwater* litigation.

Now that the lawsuit has been decided, it is my hope--and perhaps Professor Tribe's as well[280]--that the Senate will enact a resolution similar in language to the resolution reported by the Church Committee in May of 1979,[281] with whatever amendments may be necessary to effectuate meaningful participation by the Congress or by the Senate in the process of treaty termination. In light of Judge Gasch's treatment of the Dole-Stone Amendment, if the Senate or the Congress means to be taken seriously in the matter, it must include language which is binding and obligatory in whatever legislation it may choose to enact.[282] This result did not come to pass before the lawsuit was finally decided. But after extensive consultation among the principal Senators

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280. "This case [Goldwater v. Carter] presents a danger that the court will take advantage of the opportunity that Goldwater has provided to *enlarge* the president's powers -- by holding, for example, that the president is *never* required to secure congressional approval before terminating *any* treaty. Many who believe that President Carter stands on firm constitutional ground in this case would not welcome such a holding--a holding which, of course, would be the very opposite of the result Senator Goldwater seeks." *Constitutional Red Herring*, *supra* note 54, at 16 (emphasis in original). It is difficult to know how a court could *enlarge* the power which Professor Tribe ascribed to the President in his treatise on constitutional law, L. Tribe, *supra* note 118, at 164-65; but presumably Tribe is now to be numbered among those who, like Senator Goldwater, would not welcome the expansive holding which the professor hypothesized.

281. For another view on the need of legislation in this area, see Scheffer, *supra* note 1, at 1005-1007.

282. Both the Dole-Stone Amendment, *supra* note 105 and the resolution offered by Senator Goldwater and co-sponsored by 21 other Senators, use the hortatory "should" instead of the mandatory "shall".

involved in the treaty termination debate (Robert Byrd, Harry Byrd, Goldwater, Church and Javits), Majority Leader Robert Byrd announced dramatically on November 15, 1979 that he proposed that the Senate adopt an amended version of the resolution offered by Senator Harry Byrd on which the Senate took an initial vote on June 6. The language proposed by Senator Robert Byrd, and apparently acceptable to Senator Javits,[283] stated that: "It is the sense of the Senate that approval of the United States Senate is required to terminate any mutual defense treaty between the United States and another nation. The Senate shall determine the manner by which it gives its approval to such proposed termination."[284]

The plurality opinion written by Justice Rehnquist and joined by the Chief Justice and Justices Stewart and Stevens emphasized that the conflicting opinions of Judge Gasch and of the appellate court on the merits of the constitutional question in *Goldwater* were vacated.[285] Consequently, both the Executive and the Congress have been left with no legal precedent to guide and inform them as to the most intelligent way to terminate future treaties. To be sure, the Carter administration, then in a state of crisis over the prolonged holding of American hostages at our embassy in Teheran, was quick to interpret the Supreme Court's December 13, 1979 decision as a vindication of the President's claims.[286] But if Professor Tribe thought that Senator Goldwater and President Carter were engaged in "dubious battle,"[287] the Supreme Court's decision in the case is a dubious victory for the Executive. Nothing in the Court's terse per curiam order, indeed nothing written in any of the concurring opinions, suggests that the two more politically responsive branches of government do not have to continue to struggle to find a way for both to participate meaningfully in the treaty termination process. The Congress and the Executive might choose to share in this process through a generalized formula such as that found in the War Powers Resolution or the Impoundment Act. A compromise measure might be adopted authorizing congressional

283. 125 Cong. Rec. S16689-90 (daily ed. Nov. 15, 1979).
284. *Id.* at S16684.
285. 100 S. Ct. at 538 (Rehnquist, J., concurring).
286. *See* 16 Weekly Comp. of Pres. Doc. 345 (Feb. 19, 1980).
287. *See* note 53 *supra*.

participation in treaty termination only with respect to certain types of treaties (which could be identified either specifically by name or generically by category) or only prospectively with respect to future treaties. If some such generalized formula cannot be agreed upon by the Congress and the Executive, the Senate could always decline to give its advice and consent to the ratification of any future treaty that did not provide for the approval of the Senate or by both Houses of the Congress before the treaty could be terminated. Proponents of congressional participation in treaty termination, however, will have to attend carefully to the need for some play in the joints. For, as Professor Henkin and the Senate Foreign Relations Committee have reminded us through the substitute resolution which the Professor helped draft and which the Committee reported to the Senate in June 1979, there are some circumstances under which congressional participation in treaty termination would be unnecessary. By the same token, opponents of any form of congressional participation in treaty termination will have to bear in mind that, after *Goldwater*, they have neither legal precedent to cite as authority nor a consensus in the Congress as a comfortable fallback position in support of their view. To the contrary, the group in the Congress that has given the most serious consideration to the treaty termination issue, the Senate Foreign Relations Committee, unanimously repudiated the position maintained by President Carter's attorneys throughout the *Goldwater* litigation: that the Executive has exclusive and plenary control over the entire process of treaty termination. In any event, one may safely conclude after *Goldwater* that the more politically responsive branches of government have only begun the process of searching for an effective way of sharing in the important policy decisions involved in the unmaking of a treaty.

V. THE POLICY QUESTION: STRUCTURING POPULAR PARTICIPATION IN PUBLIC POLICY FORMATION

One of the reasons the treaty termination case was not a "constitutional red herring," as Professor Tribe would have it,[288] is that it raised an important question of how the people are best represented in our republic.

288. *Constitutional Red Herring, supra* note 54, at 16.

To be sure, the United States Congress is not a New England town meeting, nor is the town meeting model of democracy the most apt way of conducting the complicated global policies which arise in the making and unmaking of treaties. On the other hand, the assertion that the President alone has the power to terminate any treaty he finds impolitic reduces the ability of the people to participate meaningfully in the formation of our foreign policy. For if a first term President were to terminate a treaty which enjoyed widespread support, the only opportunity for popular response to such an act would be to vote him out of office in the next presidential election. This remedy would, of course, be unavailable in the case of a second term President. If, however, the Senate or the Congress were a vital structural component in treaty termination, the popular will might be heard more effectively. Foggy Bottom is not necessarily a better listening post for the voice of the people on foreign affairs than is Capitol Hill. If the Congress is to be regarded as a significant constitutional instrument through which the people might voice their own opinions concerning major issues of United States' policy, its role will have to be delineated with as much care in the treaty termination area as has been shown in the War Powers Resolution and the Impoundment Control Act.

Congressman Norman Lent has pointed out that President Carter's decision to terminate the mutual defense treaty with the ROC raised a "most disturbing question: Will Israel be abandoned just as casually [as the ROC]?"[289] Congressman Lent's question reflected not simply the concern of one or two of his constituents. It reflected the public declaration of the Israeli Government: "Israel must give thorough consideration to the U.S. decision about Taiwan and reconsider Washington's ability to maintain its obligations under its agreements and treaties with other nations."[290]

To be sure, the Carter Administration, which struggled long and hard to achieve the breakthrough of the Camp David accords and which has actively pursued many avenues to peace in the Middle East, is not likely to effectuate any major change in our commitments to the safety and security of Israel as the search for peace

289. 125 Cong. Rec. F101 (daily ed. Jan. 18, 1979).
290. As *quoted in id.*

continues. But neither Israel nor its friends in this country can be certain that this commitment will remain secure in the years ahead. This point is easily made merely by examining the range of policy perspectives adopted by three of the contenders for the Republican nomination to the presidency in 1980. George Bush, former head of the United States liaison office in Peking, without mentioning Israel specifically, criticized President Carter for "renouncing a treaty with an ally [the ROC] without cause or benefit."[291] It would seem unlikely that Bush would seek to terminate the friendship of this nation with Israel. In late 1979, however, John Connally, then still a presidential candidate, made a campaign speech which raised that very possibility.[292] Ronald Reagan has not indicated that he would take any action to jeopardize our relationship with Israel, but he has, of course, adopted an "America first" mentality on the energy crisis and has publicly denounced the bipartisan efforts of the Nixon, Ford, and Carter administrations to negotiate and ultimately to ratify the Panama Canal treaty. Consistent with the position adopted by President Carter's attorneys throughout the *Goldwater* litigation, could not Governor Connally have dramatically altered our relations with Israel had he pursued and achieved the Presidency? And could not Governor Reagan unilaterally repudiate or terminate the Panama Canal treaty? This prospect is acknowledged by at least one supporter of President Carter's decision to terminate the Mutual Defense Treaty with the ROC, Professor Alpheus Thomas Mason, for whom an absolute presidential power over treaty termination has "awesome implication[s]."[293] Before we adopt a *de facto* constitutional order which gives complete control over treaty termination to the incumbent of the Oval Office and to his experts in Foggy Bottom, I think we need to think long and hard about ways not only of allowing our elected representatives in the Congress to have some say about the termination of long-standing alliances throughout the world, but also of insuring effectually that through them the voice of the people will be heard.

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291. "For the first time in history a peacetime American government has renounced a treaty with an ally without cause or benefit..., We gave all and got nothing..., We are simply diminishing U.S. credibility around the world." *As quoted in id.* at E102.

292. *See* Editorial, *John Connally, Weakling,* 181 The New Republic 5-6 (October 27, 1979).

293. Mason, *What It Takes To Sink A Treaty,* N.Y. Times, Jan. 29, 1979, as *cited in Treaty Termination, supra* note 13, at 588.

CONCLUSION

In the final chapter of *Foreign Affairs and the Constitution*, Professor Henkin wrote of the need to explore new ways of achieving better collaboration and cooperation between the Congress and the Executive in conducting our foreign affairs. Trusting that the constitutional reflections which I have put forward here will be understood as an attempt to foster such collaboration, I would like to conclude by making Henkin's words my own: The quest must be for more and better cooperation, consultation, accommodation, by better legislative *modî vivendî et operandî*. Vietnam, in particular, persuaded many that separating the authority to go to war from the authority to use other means of foreign policy has proved, or has become, unworkable, and that there is need to develop and improve institutions and procedures to mitigate the deficiencies of that constitutional conception. Here "checks"--as by giving one branch a veto on the other--do not work very well. The need is for built-in "balances," for arrangements and procedures that will assure appropriate roles for both in the making of foreign policy. The Executive must learn to conduct foreign relations with less secrecy and greater responsibility. Congress must have a timely, honest, meaningful role, and the flow of information to fulfill it. Congress's part cannot be equal to the President's, but the constitutional conception (as well as the impulsions of a democratic foreign policy) suggest that the degree and kind of congressional participation should increase as the means of foreign policy begin to include uses of force and to approach a national commitment to war, and as the cost of policy begins to loom large in the competition for national resources. But Congress will have to assert and demand a role. "Only Congress itself can prevent power from slipping through its fingers."[294]

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294. Henkin, *supra* note 91, at 279-80. The internal citation is from Justice Jackson's concurring opinion in *Youngstown*, 343 U.S. at 654.