

GOLDWATER V. CARTER: CRISIS IN
AMERICAN CONSTITUTIONAL ARRANGEMENTS FOR THE
CONDUCT OF INTERNATIONAL RELATIONS

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I. *The Fundamentals Sketched*

On December 13, 1979, the Supreme Court vacated and dismissed, on political question and ripeness grounds, a suit by several members of Congress challenging President Carter's unilateral termination of the 1954 Mutual Defense Treaty between the United States and the Republic of China (ROC).¹ Although six members of the Court concurred in the dismissal,² no single rationale garnered a majority vote.

Justice Rehnquist, in a plurality opinion joined by Chief Justice Burger, and Justices Stewart and Stevens, dismissed the case as presenting a nonjusticiable political question involving the authority of the President in the conduct of foreign relations.³ Justice Powell concurred in the result but advocated dismissal on ripeness rather than political question grounds. Powell contended that Congress' lack of "official action" with regard to the President's termination precluded the existence of an actual confrontation between the legislative and executive branches.⁴ His opinion emphasized, however, that if an actual confrontation occurred, the Court would be obliged to reach the merits of the case.⁵

Justices Blackmun and White dissented in part, joining in the grant of certiorari but advocating full oral argument and plenary consideration of the case. Justice Brennan also dissented from the political question rationale, voting to uphold the termination as part

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1. *Goldwater v. Carter*, 100 S.Ct. 533 (1979)(mem.).

2. Chief Justice Burger and Justices Powell, Rehnquist, Stewart, and Stevens concurred in the judgment. Justice Marshall concurred in the result.

3. 100 S.Ct. at 536.

4. *Id.* at 533.

5. *Id.* at 536.

of "the President's well established authority to recognize, and withdraw recognition from foreign governments."⁶

The Supreme Court's failure to articulate a coherent rationale in *Goldwater v. Carter*, considered in light of the contradictory district⁷ and circuit court⁸ opinions in the case, highlights the existence of a constitutional crisis of authority in the international agreements field. This crisis, brought about by Congress's increasing "Will to Participate"⁹ in foreign affairs operations, is also manifested by the Panama treaties problems, the Salt II uncertainty, and the risk of delay on four belatedly submitted human rights conventions.¹⁰

The fundamental problem is that in times of potential danger, the newly asserted congressional "Will to Participate" in foreign policy choices and operations is not being approached in a scientific or curative fashion. Instead, we have resorted to exegetic argument by and to courts, as if the legalistic process of interstitial

6. *Id.* at 539.

7. *Goldwater v. Carter*, 481 F. Supp. 949 (D.D.C. 1979); *rev'd. per curiam*, No. 79-2246 48 U.S.L.W. 2380 (D.C. Cir., November 30, 1979) (presidential notice of termination not effective unless approved by two-thirds of Senate or majority of both houses of Congress).

8. *Goldwater v. Carter*, No. 79-2246 48 U.S.L.W. 2380 (D.C. Cir., November 30, 1979).

9. This phrase was first used by the author during the 1976 Bicentennial Conference on the Constitution, offered by the American Academy of Political and Social Science for an evaluation of the Constitution. The report of the entire Conference will be published shortly and will contain oral commentaries and summaries as well as formal study papers. See C. Oliver, *The United States and the World* (Paper for Committee IV) reprinted in 426 *Annals* 166 (1976); see also E. Leech, Summary of the Plenary Session on Topic IV reprinted in *id.* at 204.

10. Three United Nations conventions on human rights and the Organization of American States Convention on Human Rights were open for signature for several years before they were even signed (*ad referendum* to Senate approval) by a President. Another period passed before these, with many executive branch proposed reservations appended, were sent up to the Senate, where in 1980 they may be debated. Undoubtedly a good deal of delay--during which the United States has vigorously pushed its support of human rights vis-à-vis other states--is the result of the requirements that the conventions be approved by two-thirds of the Senators present under Article II of the Constitution.

constitutional interpretation by a branch not skilled in and not responsible for the conduct of foreign affairs could provide a clear and reliable solution to the participation issue. Unfortunately, formal amendment, theoretically the most desirable way to deal with the problem, is not a feasible means of clarification at this time. The Senate is unlikely to approve by the necessary two-thirds majority any reduction in its treaty-ratification authority, and the alternate method of amendment via constitutional convention, already an extraordinary remedy, has been rendered even less plausible by fears of an "open constitutional convention" spawned by the aftermath of California's Proposition 13. With judicial resolution dubious, both as to clarity and effectiveness, and formal amendment impractical, we should not overlook the legitimacy of accepting governmental practice over time as a part of the evolving, "unwritten" Constitution. Thus, one way to alleviate our present crisis is to encourage the wider use of elements readily identifiable in United States foreign affairs practice, *viz*:

(1) International agreements referred by the President to the Congress should be brought into effect by simple majority vote in both Houses wherever feasible, especially where a two-thirds majority in the Senate is doubtful and the agreement is one of great significance or urgency.

(2) There should be executive restraint, monitored by Congress, in the use of "executive agreements," *i.e.*, those international undertakings not referred to the Congress for approval.

(3) Unless Congress, in approving an international agreement under (1) provides otherwise, the President should have the option to decide whether to terminate the agreement unilaterally, reporting his action to the Congress, or to involve both houses in the actual termination process.

(4) If Congress should, in giving bicameral, majority approval to an international agreement, stipulate

that Congress must participate in termination, and the President does not veto the bill or resolution of approval, he should refer termination of such agreement to Congress or face the risk of impeachment and trial for removal from office.

The judiciary should carefully consider whether it ought to subsume issues of major contention between the President and the Congress as to the sharing of authority in foreign relations to its mission to declare "what the law [Constitution] is."¹¹ If the courts take any such cases they should give great weight to what governmental practice has been and avoid misuse of the process of "interpretation" to substitute judicial preference for state practice.¹² Even more fundamentally, the courts should admit that the Constitution is silent on the termination question and that the skimpy history we have of the making of the Constitution gives no guidance either.¹³

II. *The Uniqueness of United States Arrangements for the Approval of International Agreements*

American thinking about our arrangements for the conduct of foreign relations is remarkably introverted.¹⁴ To require Senate approval for the termination of treaties, as urged by Senator Goldwater and several leading commentators,¹⁵ would put the United States even further

11. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

12. See *Goldwater v. Carter*, 100 S.Ct. at 538 n.1. (opinion of Rehnquist, J.) (quoting concurring opinion below).

13. *Id.* at 537.

14. See also Oliver, *Legal Relations among Legal Systems: Games, Pains, and Some Pending Problems* 127 U. Pa. L. Rev. 902 (1979).

15. See, e.g., Emerson, *The Legislative Role in Treaty Abrogation* 5 J. Legis. 46 (1978); Reisman & McDougal, *Who Can Terminate Mutual Defense Treaties*, *The National Law Journal*, May 21, 1979 at 19. *Resolution Concerning Mutual Defense Treaties: Hearings Before the Senate Committee on Foreign Relations on S. Res. 15*, 96th Cong., 1st Sess. 25-39, 288-297 (April 9-11, 1979) (statements of Professors Arthur Bestor, Charles E. Rise, Irwin S. Rhodes, Eugene V. Rostow, and Alan Swan).

out of step with the rest of the world as to the question of parliamentary participation in treaty arrangements.¹⁶ Such a requirement would also ignore past executive practice regarding the management of international agreements.¹⁷ It may be argued that a judge ought not to consider these factors in reaching a decision but if this is so, it becomes a fair question whether the judicial process is inherently capable of effectively resolving the treaty termination issue.

In the cycle of treaty crises during the Carter Administration, some chose to take an outdated federalist approach that viewed the Senate as the "permanent representative" of the States in the foreign affairs field and thus justified its veto power over all aspects of foreign affairs policy-making. This approach, however, ignores both the Seventeenth Amendment,¹⁸ and the "unwritten Constitution" that has evolved from long years of government practice.¹⁹ Others, opposed on policy grounds to the ending of the security relationship with Taiwan, invoke a non-existent parallelism to the constitutional provision regarding treaty approval: if the Senate must

16. See Oliver, *The Enforcement of Treaties by a Federal State*, Hague Academy of International Law Lecture Series Ch. 4, I-1974 Recueil des Cours 346.

17. See President's Power to give Notice of Termination of US-ROC Mutual Defense Treaty (memorandum to the Secretary of State from Herbert J. Hansell, the Legal Adviser) (Dec. 15, 1978), reprinted in *Hearings on S. Res. 15 supra* note 15, at 147.

18. "The Senate of the United States shall be . . . elected by the people . . ." This change from the selection of Senators by the state legislatures, as originally provided for in Article I § 3, was seen as reflecting the growing cohesion in American federalism. Senators have become less the chosen spokespersons for the government establishment of their state, and more the people's direct representatives, similar to members of the House, but with wider constituencies and longer terms.

19. The familiar account of President Washington's visit to the Senate to confer on a pending international relations matter that involved a treaty, his treatment there as an enemy within the gates, and his statement that ". . . [he'd] be God-damned if [he'd] ever go back. . ." set a precedent that no President since has departed from. "Advice" in a formal sense has disappeared, despite the efforts of former Senator Fulbright and some present members to act as if it had not. *But see* J. Fulbright, *The Arrogance of Power* (1966).

and does give its advice and consent to the making of a treaty, then it must follow that the Senate is entitled (by what vote?) to agree to the undoing of a treaty, even though the Constitution is silent on this.²⁰

It is true that the role given to two-thirds of the Senate by Article II of the Constitution is at the heart of our problems in this area. In dealing with the recent Panama Canal treaties, the Carter Administration chose not to invoke that role, instead seeking bicameral approval--with consequences that were easily foreseeable as to the implementing legislation, without which the United States would merely have entered into the treaties only to default upon them. Salt II, however--admittedly a less compelling case for bicameral action²¹--and the four human rights conventions

20. The silences of the Constitution are fascinating. No satisfactory methodology for their treatment has been worked out. In foreign affairs the most persuasive theory is that, mindful that they were writing articles "for ages to come," as John Adams put it, the Framers left the silences to the pull-and-haul of political contention between the President and the Congress. See, e.g., *Goldwater v. Carter*, 100 S.Ct. at 537-38 (opinion of Rehnquist, J.); *Coleman v. Miller*, 307 U.S. 433 (1939) (question whether constitutional amendment had been properly ratified by state legislature was political question while ultimate resolution should be left to Congress); *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936) (President's delicate and plenary power in field of international relations precludes imposition of narrowly defined standards of conduct).

21. Under Article VI of the Constitution, all treaties made under the authority of the United States are the "Supreme Law of the land," but functionally it does not follow from this that all treaties have a so-called "Zone of the Interior 'conduct-management'" content. The District Court in *Goldwater* did not accept the Government's distinction between treaty-based "Supreme Law" that is intended to and does have internal normative effects and "Supreme Law" in alliance, defense, and purely external affairs treaties that do not--beyond the general duty of all to treat any "treaty" as such "Supreme Law"--find expression in normative form. Cf. *Goldwater v. Carter*, 481 F. Supp at 962-63. Admittedly the problem is more difficult to disentangle when the mutual security treaty is part of a policy package that includes authorizing and appropriating defense legislation, but even in such cases it is not an overwhelmingly compelling concept that the legislative mutual security arrangement and the treaty are functionally indistinguishable as regards their "internal effect." If a mutual security international agreement is not submitted to the Senate

mentioned earlier,²² went only to the Senate where the two-thirds approval requirement for international commitment produces dangers of no action, diplomatically impossible reservations or understandings, and blackmail of the executive or related policy matters. These dangers call into question the appropriateness of the Senate as a treaty-approving body and highlight its lack of institutional sensitivity to America's unique treaty-making arrangements.

During the time of the Roman Republic, foreign negotiators never knew who spoke for Rome or when Rome became bound. The Roman Senate would send out emissaries with powers to negotiate, but the Senate frequently chose to reverse itself, post-treaty, or to change the agreement. Upsetting as this was to the international relations of the times, the Roman Senate was able to operate in this fashion because Rome was a sole superpower that needed neither allies nor good will in foreign parts. Even the most short-sighted American chauvinist would have to admit that this is not our situation today. On the contrary, we now live in a multipolar world in which the United States must co-exist and cooperate with other developed democratic states, the Socialist block, the Third World, and the oil-producing nations.

Despite this change in world power conditions, most Americans, public figures included, are still very "Roman" as to the making, performing, and ending of international agreements, the essential fabric of modern

21. (Continued)

but is brought into effect as an international agreement by the mutual security legislation (which required majority vote in both Houses), two questions could conceivably arise:

i) Can both Houses by simple majority constitutionally effectuate an international agreement negotiated by the Executive that is not intended to and does not have internal normative effects?

ii) In the situation supposed, can the above distinction be maintained as to the power of termination? As to this, see pp. 18-20 *infra*, reporting that even in states where the legislature must bring international agreements into effect by legislation the "executive" uniformly may terminate them on its sole authority.

22. See note 10 *supra*.

international relations. Under our structure of government it is difficult to know who speaks for and binds, the United States in international undertakings. As a person who has spent many years in diplomatic and other work involving foreign contact, I know that the American form of government for international relations is yet another "mystery inside an enigma."²³ This is so largely because our ways of providing for commitment and performance vary so from those that the rest of the world uses and knows. It is well for us to realize that this is so. It is more important to understand *why*.

1. *How other countries operate the "treaty power"*

a. *Representative democracies*

In every representative democracy except the United States the true executive is a cabinet chosen from the legislative branch and ultimately dependent on it for interim delegated power to manage both the legislative program and the "government."²⁴ In one variant, that of the United Kingdom and most of the Commonwealth, the executive (Crown) alone makes international commitments, and the parliament is involved strictly as a legislature and only when conforming internal law is required to perform the international undertaking.²⁵ However, the reality that despite the existence of the Crown, the true executive is a sub-group of the legislature makes a parallel to the dichotomy of the American Constitution illusory.

Under the continental model, the legislature must give its consent to certain enumerated types of treaties in the form of an authorizing statute which both validates the agreement internationally and makes it into national law.²⁶ Simple majorities control, and a single house may be given the ratification power. Article 59 of the Basic Law of the Federal Republic of Germany, for

23. W. Churchill, *The First Month of War*, in *Blood, Sweat, and Tears* 173 (1941).

24. See L. Wildhaber, *Treaty-Making Power and Constitution: An International and Comparative Study* (1971); I D.P. O'Connell, *International Law* 60-85 (1965).

25. Wildhaber, *supra* note 24 at 27-28; W. Blackstone, *Commentaries on the Laws of England* (1765) Bk. I, Ch. 7, p. 257.

26. Wildhaber, *supra* note 24 at 27; see also Oliver, *supra* note 16.

example, requires legislative consent to the treaties that "regulate the political relations of the Federation or relate to matters of federal legislation."²⁷ Similarly, Article 53 of the Constitution of the Fifth French Republic mandates approval by parliament of many major international agreements.²⁸ Such approval, however, is predicated on a majority rather than a two-thirds vote, and gives no special role to the French Senate in the making or effectuating of treaties.

b. Dictators, Absolute Monarchs, "Facade" Constitutions, and the Soviet Union

In this group of states, an international commitment is made by an all-powerful executive at whatever stage in the international agreement-making process that person or group chooses. Sometimes a ritual legislative ratification takes place, for example, by the federal congress in Mexico, or the Politburo in the Soviet Union. By parallel power processes, conforming national norms are also brought into effect by the executive. Compared with the countries in both groups (a) and (b), therefore, the United States stands alone in interjecting a high degree of uncertainty into its procedures for commitment by international agreement.

2. *The Power to End an International Commitment*

At the April 1979 meeting of the American Society of International Law, Professor Louis Sohn stated that comparative law research has shown that no other representative democracy, whatever its modalities for bringing international agreement into effect, requires parallel participation by the legislature in ending the obligation.²⁹ In the directed (non-democratic) countries, obviously, termination by the executive alone is standard. While it could conceivably be argued that in ministerial (cabinet) democracies the legislature does

27. Wildhaber, *supra* note 24, at 47-48; O'Connell, *supra* note 24 at 83.

28. Wildhaber, *supra* note 24 at 39-42; O'Connell, *supra* note 24 at 72.

29. *1979 Proceedings of the American Society of International Law*, not published at this writing (summary of proceedings of the Panel on the Power to Terminate a Mutual Defense Treaty).

participate in ending international agreements through its power to vote "no confidence" and turn out the Government, this seems an unlikely scenario; treaty termination is simply not the sort of issue that incites parliamentary bodies to force general elections. Elsewhere, then, the power to terminate clearly belongs to the arm of government that conducts foreign relations, the executive. To require congressional participation in this decision, as the District Court in *Goldwater* proposed, would raise more questions than it answers so far as certainty versus uncertainty is concerned.³⁰

3. *Separation of Powers and Judicial Review in Other Representative Democracies*

Where there is an established ministerial (cabinet) form of government, the melding of legislative and executive power is obviously not unconstitutional under notions of separation of powers.³¹ In the United Kingdom and most other Commonwealth countries it is also true that the judiciary has no authority to pass upon the legitimacy of a legislative act or an executive act that is within the Royal Perogative, *i.e.*, an Act of the Monarch (Crown). In the Federal German model, ordinary courts lack judicial review power, but there is a special Constitutional Court in which individuals may challenge the direct denial of constitutional rights by any statute, judicial decision or administrative act.³²

30. Judge Gasch's opinion, for example, would have allowed termination approval by either two-thirds of the Senate, based on that body's treaty making power, or a majority of both houses of Congress, based primarily on congressional authority to repeal the law of the land. 481 F. Supp at 964-965.

31. Although the Separation of Powers principle does not appear anywhere in the constitutional text, it has been repeatedly used, in place of a specific textual allocation of authority, to invalidate legislative and executive actions. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Congress lacks power under either "necessary and proper" clause or Twelfth Amendment to create Federal Election Commission in manner violative of presidential appointments power); *Smith v. Goguen*, 415 U.S. 566 (1974) (legislature may not abdicate to police, prosecutor, and juries its responsibility for setting standards of criminal law); *Ex Parte Garland*, 71 U.S. (4 Wall) 333 (1867) (pardoning power of the President not subject to legislative control).

32. M. Cappelletti, *Judicial Review in the Modern World* 22, 74-76 (1977).

The French version of separation of powers, unlike our own, makes it inappropriate for any branch of the government to sit in judgment upon the acts of another branch. Thus, the ultimate vindication of the constitution in France is not in the tribunals but at the barricades. This is, of course, moderated in practice by the capacity of the state and its officers to be sued by private persons in the administrative courts headed by the *Conseil d'Etat*, and by presidential politics.

Thus again, with regard to commitment by international agreement, the "uncertainty factor" of the United States is bound to be higher than that of other countries, either democratic or directed. Moreover, to an increasing degree, American courts are choosing to hear cases involving claims by Congressman against the President for deprivation of their rights as individual legislators.³³ Potentially, the Executive, too, may have separation of power grounds for appealing to the courts in regard to various aspects of congressional encroachment, such as the so-called "legislative veto."³⁴

4. *Foreign Affairs Practice and the Evolution of the Unwritten Constitution*

The Framers of the Constitution were acutely aware that they were designing a document which was to last for "ages to come" and which, therefore, would have to be capable of adapting to changes in political, social, and economic conditions. In many fields the design problems that time would otherwise have brought to light about an eighteenth century scheme of government have been avoided by informal change through the concept of an evolving, unwritten constitution--a concept too often reserved exclusively for the work of the judicial process--and by specific amendment. In the foreign relations field the Presidency has, from the beginning, filled out the strict

33. *See, e.g.*, *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974) (member of Congress said to be injured in fact by President's "pocket veto" which nullified member's vote in favor of bill and denied him opportunity to override presidential veto); *Mitchell v. Laird*, 488 F.2d 611, 614 (D.C. Cir. 1973) (congressman had standing to challenge Vietnam war but question whether President had exceeded his constitutional authority in continuing hostilities was non-justiciable).

34. *See* *Oliver*, *supra* note 9, at 176-77.

letter of the Constitution. Today these time-honored practices are, for the first time, being challenged in court by members of the legislative branch. It might serve to cure a present lack of perception to recall that from early times onward, in straight-line evolution, the Presidency has put certain glosses of practice upon the Constitution as written.

Foremost among these is *the concept of the President as Chief of State: i.e., as the international personification of the United States.*

In international law and diplomacy, foreigners may not question, legally or officially, the authority of the President and of his delegates in the field of foreign relations to say what the United States will do. The Constitution of 1789 brought this about. If the group that gave us the present Constitution had provided simply that federal authority was to be supreme in a federal sphere that would include foreign relations and treaties, the national legislature would undoubtedly have evolved into a parliamentary form not unlike those of other democracies today. But instead the Founding Fathers chose to provide a sole executive with great powers and to guard against tyranny through a structure of separation of powers and a system of checks and balances.

Although the Constitution did not spell out the details of the executive power, the first President rapidly began to do so. All subsequent Presidents have followed in his footsteps and all, until quite recently, have done so without the development of constitutional crises. On this issue there were no impeachments and trials before the Senate and, until lately, no lawsuits by members of Congress. In fact, only in very recent times has it ever been made clear that the President--as distinguished from a Secretary of State such as Mr. Madison--is not above "the law" as found by the federal courts.³⁵ Even more novel is judicial cognizance of suits by members of Congress in which a court must determine what the Constitution requires as to nuances and complications within the concept of separation of powers

35. The Court might well have thought twice before uttering its magnificent dicta in *Marbury v. Madison* if the defendant had been the President. Before *United States v. Nixon*, 418 U.S. 683 (1974), the question of the suability of a sitting President had not been faced.

itself.³⁶

In one line of cases, however--*United States v. Curtiss-Wright Export Corp.*³⁷ and its progeny--decided before the present wave of litigation, the Supreme Court recognized that the authority of the United States in the foreign relations field belongs fundamentally to the executive branch, except as the Constitution might specifically require under our system of "checks and balances" as alterations of historical concepts of "executive" and "legislative" power. The Supreme Court's opinion in *Goldwater v. Carter* reaffirms the logic of *Curtiss-Wright* and recognizes that the judicial power is itself limited by principles of appropriateness when Congress and the President grapple as to their respective foreign affairs authorities.

Another presidential gloss-by-practice that has grown up in response to the difficulties caused by the Senate's two-thirds approval rule for treaties is the use of "executive agreements." Clearly, Presidents would not so often have committed the United States internationally without making "treaties" in the Article II sense had the two-thirds principle not have been the tremendous impediment it has been to making timely and sensible arrangements with other nations. In all countries day-to-day foreign affairs operations require minor and implementing commitments within the frameworks of larger commitments. The use of the executive agreement in the United States however, has gone beyond this, although legally such agreements are valid only to the extent that the agreement is one within the inherent foreign relations powers of the President. The President cannot make an international agreement on his own that displaces an act of Congress. He probably could not make one which would have the force of federal law

36. For examples of courts' *unwillingness* to perform this task, see *Reuss v. Balles*, 584 F.2d 461 (D.C. Cir. 1978) (congressman lacks standing to seek declaratory and injunctive relief from allegedly unconstitutional composition of Federal Reserve System Committee); *Harrington v. Bush*, 553 F.2d 190 (D.C. Cir. 1977) (in absence of concrete injury, congressman lacks standing to challenge alleged misuse of funding and reporting provisions of C.I.A. Act); *Metcalf v. National Petroleum Council*, 553 F.2d 176 (D.C. Cir. 1977) (neither private citizen nor U.S. Senator has standing to challenge membership and functioning of National Petroleum Council).

37. 299 U.S. 304 (1936). See generally *Oliver*, *supra* note 9, at 191-93.

even if no act of Congress were contradicted. But until recently it had been assumed that the Chief of State could manage military alliances and carry on authorized use of force on his own, including making relevant, non-spending commitments to other states. The Supreme Court's decision in *Goldwater* re-enforces this assumption, while leaving Congress and the President free to work out appropriate arrangements for the sharing of power in other aspects of the international relations field.

III. *The Need for a Democratic Solution to the Treaty Termination Problem*

Thirty-five years ago, in their significant article supporting the equivalency of congressional-executive international agreements with Senate-consented "treaties," Professors McDougal and Lans argued for wider and thus more democratic participation in the commitment-by-agreement process.³⁸ Today, the resort by a few members of Congress to the courts reveals another aspect of democratic versus elitist responses to the problem.

The plaintiffs in *Goldwater* objected both to the termination of the Mutual Defense Treaty with Taiwan, and to what they perceived as an unconstitutional executive act. The defendants elected not to remove the reason for litigation because they felt that a principle had to be maintained.³⁹ Thus, we were left embroiled in court on a grave issue that needs reformist attention, before judges that could not, within the limitations of their offices, properly solve the problem. Fortunately, the Supreme Court recognized these limitations and correctly dismissed the suit, thus allowing Congress and the President, with help from the public and the media, to try to fashion sound solutions to the problem of international commitment for now and the future.

The beginning of wisdom would be for the Administration and the leaderships of the House and the Senate to

38. McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy* (pts. 1-2), 54 Yale L.J. 181, 534 (1944-1945).

39. As the District Court opinion noted, the President could have gone to Congress and gotten simple majority authorization to end the mutual defense treaty, thus rendering the litigation moot.

agree to work together toward a resolution, beginning perhaps with consideration of the simple lines of action sketched in part I, above. Such a solution would both protect the authority of the President in the foreign relations field and enhance congressional participation in the making and execution of international agreements.

