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Justiciability and Foreign Affairs--the Treaty Termination Power

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JUSTICIABILITY AND FOREIGN AFFAIRS—THE TREATY TERMINATION POWER

I. <i>Introduction</i>	164
II. <i>The First Case: Goldwater v. Carter</i>	164
III. <i>Judicial Review, Constitutional Interpretation, and "Political Questions": The Court's Power</i>	170
IV. <i>Ripeness and Standing: The Congress' Power to Sue</i>	179
V. <i>Domestic Allocation of Foreign Affairs Powers and the International Context: The President's Power</i>	186
IV. <i>Conclusion</i>	193

I. INTRODUCTION

Although the United States Constitution specifies how treaties are to be made, it contains no instruction on how they are to be unmade. For nearly two centuries disputes about which branch of government has the constitutional power to terminate treaties were not litigated. Other means were used to cope with this hole in the Constitution. Finally, in 1979, the United States Supreme Court was asked to address this issue in a dispute between members of Congress and the President in *Goldwater v. Carter*,¹ but the Court declined to resolve the issue. This Comment examines the *Goldwater* case and analyzes the justiciability block upon which the Court stumbled, concluding that a merits decision on the treaty termination power should have been or should be reached. The merits issues of which branch has which power also are addressed, in the contexts of both domestic and international law.

II. THE FIRST CASE:

Goldwater v. Carter

After President Jimmy Carter announced that the United States would recognize the People's Republic of China as the sole government of China and that the 1954 Mutual Defense Treaty² with the Republic of China

1. 444 U.S. 996 (1979) (mem.).

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

(Taiwan) was being terminated in accordance with its terms,³ nine Senators and sixteen members of the House of Representatives⁴ filed suit in the United States District Court for the District of Columbia challenging the latter action by the President. Judge Oliver Gasch at first found the plaintiffs had no standing because neither the Senate nor the Congress as a whole had asserted its claimed right to share in the treaty termination process, and thus the plaintiffs had suffered no injury.⁵ Judge Gasch dismissed the petition without prejudice.⁶ Within hours, the Senate called up and amended one of its resolutions to read: “[I]t 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.”⁷ The plaintiffs again approached the court and upon reconsideration Judge Gasch allowed the suit to proceed, although the Senate never took final action on the resolution.⁸

3. Joint Communiqué on the Establishment of Diplomatic Relations Between the United States of America and the People's Republic of China—January 1, 1979, 14 WEEKLY COMP. OF PRES. DOC. 2264 (Dec. 18, 1978), reprinted in 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, 937 n.20 (1978).

4. The plaintiffs were Senators Barry Goldwater, Strom Thurmond, Carl Curtis, Jake Garn, Orrin Hatch, Jesse A. Helms, Gordon Humphrey, James A. McClure, and Paul Laxalt and Congressmen Robert Bauman, Steve Symms, Larry McDonald, Robert Daniel, Jr., Bob Stump, Eldon Rudd, John Ashbrook, George Hansen, Robert K. Dornan, John H. Roussetol, Don Young, James M. Collins, Mickey Edwards, Newt Gingrich, Dan Quayle, and Clair W. Burgener. Congressman Kenneth B. Kramer was added as a plaintiff later. Brief for Appellees at 1, *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979). Secretary of State Cyrus Vance was named with President Carter as a defendant. Petitioners' Petition for Certiorari.

5. The district court observed that several resolutions then pending in the Senate might resolve the issue by resulting in Congressional approval of the President's action. *Goldwater v. Carter*, No. 78-2412 (D.D.C. order of June 6, 1979), discussed in *Goldwater v. Carter*, 481 F. Supp. 949, 950, 952-53 (D.D.C.), *rev'd*, 617 F.2d 697 (D.C. Cir.), *vacated mem.*, 444 U.S. 996 (1979).

6. *Id.*, discussed in *Goldwater v. Carter*, 481 F. Supp. 949, 950 (D.D.C.), *rev'd*, 617 F.2d 697 (D.C. Cir.), *vacated mem.*, 444 U.S. 996 (1979).

7. S. Res. 15, 96th Cong., 1st Sess., 125 CONG. REC. S220, S2147 (daily ed. Jan. 18, March 7, 1979). See *Goldwater v. Carter*, 617 F.2d 697, 701 (D.C. Cir.), *vacated mem.*, 444 U.S. 996 (1979).

8. The resolution was tabled because of a failure to agree on whether it should be applicable to the 1954 Treaty or should apply only prospectively. The Senate parliamentarian explained that the resolution's status was that no action had been taken on it, but that it could be recalled at any time. *Goldwater v. Carter*, 617 F.2d 697, 701 n.7 (D.C. Cir.), *vacated mem.*, 444 U.S. 996 (1979). The amended version quoted restored the wording of the resolution before it was sent to the Foreign Relations Committee. That Committee had rewritten the resolution to approve presidential power to terminate a treaty on any grounds

The plaintiffs alleged that the President had exceeded his constitutional and statutory⁹ power by making the decision to terminate the treaty without a vote of approval by either two-thirds of the Senate or a majority of each house of Congress.¹⁰ While conceding that the Constitution did not explicitly require congressional or Senate participation in the process of terminating a treaty, the plaintiffs argued by analogy to the constitutional requirement of senatorial advice and consent in the formation of treaties¹¹ that such participation was an implied requirement of the Constitution's system of checks and balances.¹² The plaintiffs' specific claim was that the

recognized as legitimate by international law. S. REP. NO. 96-119, 96th Cong., 1st Sess. 9-10 (1979). See notes 206-19 and accompanying text *infra*. The other pending resolutions never received Senate consideration. See *Goldwater v. Carter*, 617 F.2d at 701 n.5. Even if Senate Resolution 15 had been passed, its character as a "sense of the Senate" resolution still might not have made it sufficient to grant standing to the plaintiffs. Henkin, *Litigating the President's Power to Terminate Treaties*, 73 AM. J. INT'L L. 647, 650-51 (1979).

9. The Dole-Stone Amendment to the International Security Assistance Act of 1978, § 26(b), 22 U.S.C.A. § 2151 (1978), provides: "It is the sense of the Congress that there should be prior consultation between the Congress and the executive branch on any proposed policy changes affecting the continuation in force of the Mutual Defense Treaty of 1954." This amendment passed by a vote of 94-0 in the Senate and the Act was signed by President Carter September 26, 1978. See Brief for Appellees at 3, *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979).

The Taiwan Relations Act, signed by President Carter April 10, 1979, provides:

For all purposes, including actions in any court in the United States, the Congress approves the continuation in force of all treaties and other international agreements, including multilateral conventions, entered into by the United States and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, and in force between them on December 31, 1978, unless and until terminated in accordance with law.

Taiwan Relations Act, Pub. L. No. 96-8, § 4(c), 93 Stat. 14 (1979) (codified at 22 U.S.C.A. § 3303(c) (Cum. Supp. 1980)).

10. Brief for Appellees at 6-7, *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979).

11. U.S. CONST. art. II, § 2, cl. 2 provides: "[The President] shall have, Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur"

12. Brief for Appellees at 43-45, *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979). The plaintiffs also argued that article VI, referring to treaties, along with the "Constitution and Laws," as the "supreme Law of the Land," and article II, § 3, requiring that the President "shall take care that the laws be faithfully executed," prevent a President from acting alone to terminate a treaty just as they prevent a President from repealing a statute. *Id.* at 44-45. See also Petitioners' Petition for Certiorari at 17-21. See notes 153-205 and accompanying text *infra*.

"Party" invested by the treaty with power of termination¹³ was the United States, not the President,¹⁴ and that the United States could act constitutionally in this area only if both the executive and the legislative branches were involved.¹⁵

Judge Gasch declared the President's action invalid¹⁶ and imposed a requirement that consent of either two-thirds of the Senate or a majority of each house of Congress must be obtained before termination of the treaty constitutionally could be accomplished.¹⁷ The United States Court of Appeals for the District of Columbia, in reviewing the case, dealt first with two justiciability issues raised by the President. The appellate court unanimously rejected the argument that the case presented a non-justiciable political question.¹⁸ Two judges felt, however, that the plaintiffs had no standing under previous cases involving legislators.¹⁹ Nevertheless, a majority of the court of appeals reached the merits and reversed, issuing a narrow holding that, within the facts of the case, the President did possess the authority to terminate this treaty according to its terms.²⁰ In so ruling the court concluded that no constitutional provision governed the issue,²¹ that "[h]istory shows us that there are too many variables to lay down any hard and fast constitutional rules,"²² but that the court had a duty to confront and decide the issue.²³ The court found persuasive the combined import of ten factors which it did not rank, but which involved an examination of the constitutional grant of foreign affairs powers to the President and the role of Congress in foreign affairs, as well as an examination of specific facts pertaining to the 1954 Mutual Defense Treaty.²⁴

13. Article X of the Treaty provides: "This treaty shall remain in force indefinitely. Either Party may terminate it one year after notice has been given to the other Party." Mutual Defense Treaty, *supra* note 2, at 437.

14. See Petitioners' Petition for Certiorari at 2-3.

15. See note 12 *supra*.

16. 481 F. Supp. 949, 965 (D.D.C.), *rev'd*, 617 F.2d 697 (D.C. Cir.), *vacated mem.*, 444 U.S. 996 (1979).

17. *Id.*

18. 617 F.2d at 699 n.1. This issue was not briefed before the Supreme Court, but received a plurality of votes there. See note 28 and accompanying text *infra*.

19. Chief Judge J. Skelly Wright wrote an opinion concurring in the result which expressed this view. Judge Tamm joined the opinion. 617 F.2d at 709-16 (Wright, C.J., concurring).

20. *Id.* at 699.

21. *Id.* at 708.

22. *Id.* at 707.

23. *Id.* at 709.

24. See *id.* at 703-08. Judge MacKinnon filed a separate opinion expressing the view that a majority vote by each house of Congress was required before termination of a treaty could be accomplished legally. His opinion rested primarily on an interpretation of article VI of the Constitution, which identifies treaties as

The Supreme Court granted a writ of certiorari and, working under apparently intense time pressure,²⁵ decided the case without briefing or oral argument. The Court vacated the court of appeals opinion and ordered dismissal of the case.²⁶ Beyond these rulings the Court's position is difficult to ascertain. Four opinions were written and no law made except that the case must be dismissed.²⁷

One opinion, written by Justice Rehnquist, joined by Chief Justice Burger and Justices Stewart and Stevens, took the view that the case presented a nonjusticiable political question, although this issue was not raised before the Court.²⁸

Justice Powell flatly disagreed with this position, asserting that "we have the responsibility to decide whether both the Executive and Legislative Branches have constitutional roles to play in termination of a treaty."²⁹ Justice Powell concluded, however, that the issue was not ripe for judicial review because Congress had taken no formal steps to challenge the President's action, stating that "[i]f the Congress chooses not to confront the President, it is not our task to do so."³⁰

Justice Blackmun, joined by Justice White, expressed the view that neither the important preliminary issues of justiciability, standing, and ripeness, nor the validity of the President's action should be passed upon

one of the components of the supreme law of the land. *Id.* at 717 (MacKinnon, J., concurring and dissenting). He is the only member of either the court of appeals or the Supreme Court to take a position favoring the plaintiffs on the merits.

25. The district court opinion was issued October 17, 1979; the court of appeals opinion November 30, 1979. The treaty termination announced by the President was to become effective January 1, 1980. The Supreme Court's memorandum decision was announced December 13, 1979. Two Justices belittled the time factor and refused to participate in the Court's hurry-up decision. *See* note 31 and accompanying text *infra*. *Cf.* *Youngstown Sheet & Tube Co. v. Sawyer* (The Steel Seizure Case), 343 U.S. 579 (1952) (also involving a serious question about the constitutional limits of presidential power, in which the Supreme Court reached decision and issued 130 pages of opinions within 34 days of the decision by the district court).

26. 444 U.S. at 996.

27. Justice Marshall, whose name was not attached to any of the opinions, concurred in the result. *Id.*

28. *Id.* at 1002-06 (Rehnquist, J., concurring). The only reference to this issue in plaintiffs' petition for writ of certiorari was made by reporting in a footnote that in the court of appeals the "political question" doctrine received no votes. Petitioners' Petition for Certiorari at 9 n.7.

29. 444 U.S. at 1002 (Powell, J., concurring).

30. *Id.* at 998 (Powell, J., concurring). Although couched in terms of ripeness rather than standing, this position closely resembles that of Chief Judge Wright at the court of appeals level. *See Goldwater v. Carter*, 617 F.2d at 709-16 (Wright, C.J., concurring); notes 101-12 and accompanying text *infra*.

by the Court without oral argument and plenary consideration.³¹ Accordingly, these two Justices took no position at all, even on the threshold issue of whether the matter properly could be presented in a court.

Justice Brennan alone wished to affirm the court of appeals decision, at least insofar as it rested on the President's action being linked to his constitutional "authority to recognize, and withdraw recognition from, foreign regimes."³² Justice Brennan was therefore the only Justice who clearly believed the merits properly could be decided without requiring Congress to confront the President more directly.

As the Court is presently comprised, therefore, four Justices support the proposition that the courts never may pass upon the issue of whether a President may terminate a treaty without consulting Congress. Two Justices, Powell and Brennan, disagree with this proposition. The views of the remaining three are unknown.³³ The effect of this complicated voting is to render the Court unavailable as an arbiter in any future dispute between Congress and the President over termination of a treaty. A successful challenge to a presidential act which purports to terminate a treaty would require persuading all five Justices who are or may be willing to consider the merits of such a challenge. If these five Justices could be persuaded to consider the merits in a future case, however, success still would be unlikely for those challenging presidential power to terminate treaties because Justice Brennan has taken a stand on the merits of this case in favor of presidential power to terminate this treaty, and some sympathy for this view may be inferred from Justice Powell's and Justice Marshall's acquiescence in the result of this case. Obtaining a reasoned decision interpreting the Constitution's silence in this important area will be made possible only by reconsideration of the justiciability issue by the plurality or recomposition of the Court.

Goldwater v. Carter raised three separate questions, each of which related to the parameters of the power exercised by one branch of government: whether the President alone had the power to terminate this treaty; whether the judicial branch could entertain and decide a challenge to that asserted power; and whether members of Congress had the power to bring such a challenge. The Supreme Court floundered in the issue of its own power and neither clearly identified nor answered either of the other questions.³⁴ This Comment examines the various positions taken by different

31. Justice Blackmun stated, "In my view, the time factor and its importance are illusory; if the President does not have the power to terminate the Treaty . . . , the notice of intention to terminate surely has no legal effect." 444 U.S. at 1006 (Blackmun, J., dissenting in part).

32. *Id.* (Brennan, J., dissenting).

33. These three are Justice Marshall, *see* note 27 *supra*, and Justices Blackmun and White, *see* note 31 and accompanying text *supra*.

34. It can be argued that the merits issue of the President's power to terminate the treaty received *de facto* resolution by the Court's action. In competition

judges and Justices who passed upon the case and attempts to discover the value of these positions should a similar case arise.³⁵ It concludes that the Court should have decided the case on the merits and that the decision should have been in favor of presidential power to terminate the treaty. This conclusion is reached through an analysis of domestic justiciability doctrine and some of its individual components, as well as a review of both domestic and international law as they affect allocation of foreign affairs powers.

III. JUDICIAL REVIEW, CONSTITUTIONAL INTERPRETATION, AND "POLITICAL QUESTIONS": THE COURT'S POWER

As litigated in the district court and both higher courts, *Goldwater* presented the simple question of the meaning of the word "Party" in article

with Congress for power, the President enjoys enormous advantages, especially in the area of foreign affairs. See L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 37-38 (1972). Also, Congress historically has felt an obligation to cooperate with the Executive in this area because of the sensitive nature of foreign commitments. *Id.* at 108-09. An example of the accretion of extra-constitutional power to the President which has been resisted unsuccessfully by Congress is his power to conclude international agreements without the participation of Congress. *Id.* at 173-87. The President clearly has the power to terminate these executive agreements. Nelson, *The Termination of Treaties and Executive Agreements by the United States: Theory and Practice*, 42 MINN. L. REV. 879, 906 (1958). Given these facts, a victory for the President on the power of the Court question in *Goldwater*, especially given the strong negative position of the plurality on that issue, might reasonably be considered a victory for the President on the question of presidential power. The difficulties generally presented by nonresolution of issues brought before the Supreme Court have been commented upon extensively. See, e.g., Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964); Tigar, *Judicial Power, The "Political Question Doctrine," and Foreign Relations*, 17 U.C.L.A. L. REV. 1135 (1970) (a chronological reading of these articles provides a solid background). Even while endorsing a power in the Supreme Court to decline the exercise of judicial review, Judge Learned Hand spoke of the "disastrous" effect of a court's failure to achieve unanimity: "People become aware that the answer to the controversy is uncertain, even to those best qualified, and they feel free, unless especially docile, to ignore it if they are reasonably sure that they will not be caught." L. HAND, *THE BILL OF RIGHTS* 72 (1958).

35. Although the prospect of such a case arising again might seem remote, given the fact that this is the first such case to be litigated in the nearly 200 years since the Constitution was adopted, history and current trends indicate that in fact another such case is likely to occur. The plaintiffs in *Goldwater* identified some 57 treaties which have been terminated by the United States, three of which they conceded were terminated by the President acting without congressional or

X of the Mutual Defense Treaty.³⁶ Reaching the merits in this case merely meant resolving this question, guided by the Constitution. Questions of treaty interpretation historically have been regarded as matters properly addressed by courts in the United States,³⁷ and no prior Supreme Court case has been found which applies the "political question" doctrine to avoid performing a task of treaty interpretation.³⁸ The Court, however, has stated frequently that in performing its tasks it will give much weight to treaty interpretations made by the political branches, especially those interpretations of the Executive.³⁹ The Court previously had considered and

Senate involvement. Brief for Appellees at 61-64, *Goldwater v. Carter*, 617 F.2d 697 (1979). The defendants identified some thirteen treaties they claimed had been terminated by the President alone. Brief for Appellants at 53-56, *Goldwater v. Carter*, 617 F.2d 697 (1979). Professor Louis Henkin criticized this process of counting and weighing the precedents, terming it "misleading," since many of the precedents "antedat[e] the development of clear lines of constitutional authority in foreign affairs." Henkin, *supra* note 8, at 651. Henkin also noted a trend toward more frequent challenge in the courts of executive actions by members of Congress. *Id.* at 647. This phenomenon and the difficulties such actions encounter have been commented upon in Note, *Congressional Access to the Federal Courts*, 90 HARV. L. REV. 1632 (1977).

Three other similar bilateral treaties contain termination clauses similar to the one in the 1954 Mutual Defense Treaty. See Mutual Defense Treaty, Aug. 30, 1951, United States—Republic of the Philippines, art. VIII, 3 U.S.T. 3947, T.I.A.S. No. 2529; Mutual Defense Treaty, Oct. 1, 1953, United States—Republic of Korea, art. VI, 5 U.S.T. 2368, T.I.A.S. No. 3097; Treaty of Mutual Cooperation and Security, Jan. 19, 1960, United States—Japan, art. X, 11 U.S.T. 1633, T.I.A.S. No. 4509.

36. *Goldwater v. Carter*, 481 F. Supp. 949, 958 (D.D.C.), *rev'd*, 617 F.2d 697 (D.C. Cir.), *vacated mem.*, 444 U.S. 996 (1979); Petitioners' Petition for Certiorari at 3; Brief for Appellees at 1, *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979). For the text of article X of the Treaty, see note 13 *supra*.

37. See, e.g., *Kolovrat v. Oregon*, 366 U.S. 187, 191-96 (1961); *Factor v. Laubheimer*, 290 U.S. 276 (1933); *Sullivan v. Kidd*, 254 U.S. 433 (1921); *Charlton v. Kelly*, 229 U.S. 447, 462-76 (1913); L. HENKIN, *supra* note 34, at 167.

38. In fact, it appears that the "political question" doctrine has been relied upon as a ground for avoiding decision in only a few cases. See Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976); notes 75-90 and accompanying text *infra*.

39. See, e.g., *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961); *Factor v. Laubheimer*, 290 U.S. 276, 295 (1933) (stating that "the construction of a treaty by the political department of the government, while not conclusive upon courts called upon to construe it, is nevertheless of weight"); *Sullivan v. Kidd*, 254 U.S. 433, 442 (1921); *Charlton v. Kelly*, 229 U.S. 447, 468 (1913). The Court has refused to give comparable weight to executive pronouncements in other areas of foreign affairs. In *Zschernig v. Miller*, 389 U.S. 429 (1968), the Court disregarded the State Department's view and substituted its own judgment on issues of foreign

decided whether particular treaties were still in force.⁴⁰ No previous case, however, had presented a treaty interpretation question involving a conflict between Congress or members of Congress and the President.⁴¹ Both sides in *Goldwater* acknowledged that the Constitution contains no express provision controlling the termination of treaties,⁴² and both sides and the courts treated the case as one of first impression.⁴³ The meaning of the Constitution's silence on this matter, or more precisely, who may speak on this matter given the Constitution's silence, is the issue with which the Supreme Court struggled in *Goldwater*. One view, asserted in this Comment, is that the Court may speak and should have spoken on this matter. Another view, taken by the Supreme Court plurality, is that the Court is not empowered to interpret this silence, but that it must be filled in, if at all, by the political processes.

The Court's failure to get beyond the preliminary issues to the merits question identifies *Goldwater* as an important addition to the line of cases in which the Court has failed or refused to decide cases brought before it.

policy when it perceived a constitutional allocation of power question. L. HENKIN, *supra* note 34, at 61-62. *Zschernig* involved the validity of an Oregon escheat statute which required a resident of East Germany to prove that his claimed inheritance would not be confiscated and that United States citizens had a reciprocal right to inherit in East Germany. Despite the State Department's position to the contrary, the Court held that the statute was "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." 389 U.S. at 432. The Supreme Court's Act of State doctrine allows the Court to decline to decide the validity of an official act of a foreign country within its own territory, and the Court has resisted yielding to the Executive the decision about whether to apply the doctrine in a given case. *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972). Even the dissenters in the *First Nat'l City Bank* case said only that when the Executive took a position against application of the Act of State doctrine, the Court *should not* apply it, not that the doctrine *must not* be applied. See L. HENKIN, *supra* note 34, at 315 n.78. In both *Zschernig* and *First Nat'l City Bank*, of course, the Court was insisting that it was the body which properly decided allocation of power questions.

40. See, e.g., *Kolovrat v. Oregon*, 366 U.S. 187, 190 (1961) (finding that the 1881 treaty with Serbia was still in force between the United States and Yugoslavia); *Charlton v. Kelly*, 229 U.S. 447, 469-76 (1913) (finding that the 1882 extradition treaties with Italy were still in force despite violations by Italy, the United States having waived the right to denounce the treaties).

41. Henkin, *supra* note 8, at 648; Scheffer, *supra* note 3, at 966.

42. Petitioners' Petition for Certiorari at 9; Brief for Appellants at 16, 42, *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979).

43. 444 U.S. at 999 (Powell, J., concurring); *id.* at 1003-05 (Rehnquist, J., concurring); *Goldwater v. Carter*, 481 F. Supp. 949, 958 (D.D.C.), *rev'd*, 617 F.2d 697 (D.C. Cir.), *vacated mem.*, 444 U.S. 996 (1979); Petitioners' Petition for Certiorari at 24; Brief for Appellants at 55, *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979).

As such, it provides more fuel for one of the most enduring American constitutional debates: what is the proper scope of review by the judiciary of acts by the political branches of government?

This debate was engendered by the very case in which the power of judicial review was assumed by the Court, *Marbury v. Madison*.⁴⁴ In *Marbury*, Chief Justice John Marshall, in dicta, found that the President lacked power to refuse to deliver a sealed commission to an officer of the government,⁴⁵ but held unconstitutional the statute which purported to empower the Court to issue a writ of mandamus in such a case.⁴⁶ The primary significance of the case, however, was not the limits it placed on the powers of the other branches, but the power it asserted for the Court.⁴⁷ Marshall declared, "It is emphatically the province and duty of the judicial department to say what the law is."⁴⁸ Marshall limited this power, however, stating, "The province of the court is . . . not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."⁴⁹

Since *Marbury* was decided, several doctrines have been developed by the Court as limitations on the scope of its power to decide cases.⁵⁰ These doctrines are based on both the constitutional case-controversy requirement⁵¹ and on prudential concerns.⁵² One listing of these doctrines includes the following: advisory opinions, ripeness, mootness, collusive suits, the "political question" doctrine, and standing.⁵³

During the last quarter century the debate about the scope of judicial power has included an argument about whether the judicial review first practiced in *Marbury* was itself seized in a political maneuver, albeit one necessary to ensure the survival of the system established by the Constitution, or was constitutionally impelled. Judge Learned Hand took the

44. 5 U.S. (1 Cranch) 137 (1803). Before this case established that the Court could measure the acts of the other branches of government against the Constitution, whether the Court had any such power was the subject of debate. See L. HAND, *supra* note 34, at 6.

45. 5 U.S. (1 Cranch) at 162.

46. *Id.* at 176.

47. Alexander Bickel credited *Marbury* with making the United States Supreme Court "the most extraordinarily powerful court of law the world has ever known." A. BICKEL, *THE LEAST DANGEROUS BRANCH* 1 (1962).

48. 5 U.S. (1 Cranch) at 177.

49. *Id.* at 170.

50. See generally A. BICKEL, *supra* note 47, at 111-98; L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 3-7 to -41 (1978).

51. U.S. CONST. art. III, § 2, cl. 1 provides: "The judicial Power shall extend to all Cases, . . . to Controversies"

52. See generally L. TRIBE, *supra* note 50, §§ 3-7 to -8.

53. *Id.* §§ 3-10 to -17.

former position,⁵⁴ and in response Professor Herbert Wechsler took the latter.⁵⁵ They consequently reached different conclusions about whether the Court was free to decline to decide matters properly brought before it meeting the case-controversy requirement, Hand finding the Court could decline decision⁵⁶ and Wechsler finding it could not.⁵⁷ Professor Alexander Bickel sided with Hand, describing the Court's devices for nondecision as "passive virtues."⁵⁸ Professor Gerald Gunther sided with Wechsler⁵⁹ and others joined the fray.⁶⁰ The modern "political question" doctrine, which calls for exempting some issues from judicial review,⁶¹ has received special attention and has been denounced in strong terms.⁶² Professor Louis Henkin has asserted that no such doctrine exists and has called for its dismantling.⁶³ In his 1976 discussion, Henkin asserted that after the broadest statements of the "political question" doctrine had been made by Justice Frankfurter⁶⁴ and Justice Black,⁶⁵ "judicial review . . . [had] had a new birth, its character and content reformed, and its place established as a hallmark of American political life, even a birthright of every inhabitant."⁶⁶ Given *Goldwater v. Carter*, Henkin may have spoken too soon.

The Supreme Court plurality concluded that the issue in *Goldwater* was a "political question" outside judicial review "because it involves the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate

54. L. HAND, *supra* note 34, at 10-11, 27-30.

55. Wechsler, *supra* note 34.

56. L. HAND, *supra* note 34, at 15. Even Hand, however, did not suggest the power of review should be declined when the issue was whether "the statute or order was outside the grant of power to the grantee." *Id.* at 66.

57. "[T]he only proper judgment that may lead to an abstention from decision is that the constitution has committed the determination of the issue to another agency of government than the courts." Wechsler, *supra* note 34, at 9. Wechsler quoted these words of John Marshall: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." *Id.* at 10 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)).

58. A. BICKEL, *supra* note 47, at 111-98; Bickel, *The Supreme Court, 1960 Term—Foreward: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

59. Gunther, *supra* note 34.

60. See, e.g., Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966); Tigar, *supra* note 34.

61. See Henkin, *supra* note 38, at 598.

62. Tigar, *supra* note 34; Henkin, *supra* note 38.

63. Henkin, *supra* note 38. See notes 86-90 and accompanying text *infra*.

64. *Colegrove v. Green*, 328 U.S. 549, 552, 554-56 (1946) (minority opinion).

65. *Coleman v. Miller*, 307 U.S. 433, 456-60 (1939) (Black, J., concurring).

66. Henkin, *supra* note 38, at 625.

the action of the President,"⁶⁷ and reasoned by analogy⁶⁸ to *Coleman v. Miller*,⁶⁹ in which the issue raised also encountered constitutional silence. In *Coleman*, the question presented was whether initial rejection by the Kansas legislature of a federal constitutional amendment rendered ineffective a later vote to ratify the amendment.⁷⁰ The Court found the Constitution spoke only of ratification, not of rejection, and declined to pass upon the effect of the earlier rejection.⁷¹ As Justice Powell pointed out, however, *Coleman* was not apposite to *Goldwater*, since the real reason for judicial abstention in *Coleman* was that deciding the issue there presented would have involved the Court in regulating the procedure by which its decisions are overruled.⁷² Additionally, in *Coleman*, as in almost all "political question" cases, the Court actually did address and resolve what Justice Brennan in *Goldwater* referred to as the "antecedent question whether a particular branch has been constitutionally designated as the repository of political decisionmaking power."⁷³ *Coleman* found that the power to regulate the amendment process resided with Congress rather than with the Court, and since Congress had imposed no limitations on that process, none existed.⁷⁴

As originally developed, the "political question" doctrine involved a requirement that the Court abstain from reviewing the decisions which it found to be constitutionally committed to the political branch making them, but required the Court to decide all other cases properly before it.⁷⁵ This has been described as the "classical" view of the doctrine⁷⁶ and is drawn from the dicta of *Marbury* and the decision in *Luther v. Borden*.⁷⁷ *Luther* held that the question of which of two competing state governments was the constitutionally guaranteed republican form of government was a question committed for resolution to Congress rather than to the Court.⁷⁸

67. 444 U.S. at 1002 (Rehnquist, J., concurring).

68. *Id.* at 1002-03 (Rehnquist, J., concurring).

69. 307 U.S. 433 (1939). A more apt analogy would have been the President's power to remove those executive officers whose appointment requires the advice and consent of the Senate. See notes 175-79 and accompanying text *infra*.

70. 307 U.S. at 450.

71. *Id.*

72. 444 U.S. at 1001 n.2 (Powell, J., concurring). See *Coleman v. Miller*, 307 U.S. at 435 n.1.

73. 444 U.S. at 1007 (Brennan, J., dissenting).

74. See Henkin, *supra* note 38, at 613.

75. See generally Wechsler, *supra* note 34.

76. L. TRIBE, *supra* note 50, § 3-16, at 71 n.1. Tribe terms the other views of the doctrine the "prudential" view (Bickel's; see A. BICKEL, *supra* note 47) and the "functional" view (Scharpf's; see Scharpf, *supra* note 60).

77. 48 U.S. (7 How.) 1 (1849).

78. *Id.* at 42. See *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912) (also holding that enforcement of the "guarantee clause" was committed

In the 1962 case of *Baker v. Carr*,⁷⁹ the Supreme Court undertook a review of the "political question" doctrine. Speaking for the Court, Justice Brennan seemed to adhere to the "classical" view of the doctrine:

The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the "political question" label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.⁸⁰

Justice Brennan distilled from the cases these principles:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

. . . The courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority.⁸¹

In the course of his review of the "political question" cases, Justice Brennan discussed the application of the doctrine in the area of foreign affairs, noting that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."⁸² In *Goldwater*, however, the plurality's first reason for declining to address the separation of powers question was that it involved foreign affairs.⁸³ Both Justice Powell⁸⁴ and Judge Gasch⁸⁵ carefully reviewed the principles identified in

exclusively to the political branches); Henkin, *supra* note 38, at 607-09. *But see* *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608 (1937) (finding in the facts presented no violation of the republican form of government requirement, but as an alternative ground finding the issue nonjusticiable).

79. 369 U.S. 186 (1962).

80. *Id.* at 210-11.

81. *Id.* at 217.

82. *Id.* at 211.

83. *See* note 67 and accompanying text *supra*.

84. 444 U.S. at 998-1001 (Powell, J., concurring).

85. 481 F. Supp. at 956-58.

Baker v. Carr and concluded from them that *Goldwater* did not present a "political question." In concluding the case did present such a question, the plurality neither cited nor discussed *Baker v. Carr*.

In asserting that there is no such thing as a "political question" doctrine, Henkin stated:

The cases which are supposed to have established the political question doctrine required no . . . extra-ordinary abstention from judicial review; they called only for the ordinary respect by the courts for the political domain. Having reviewed, the Court refused to invalidate the challenged actions because they were within the constitutional authority of President or Congress. In no case did the Court have to use the phrase "political question," and when it did, it was using it in a different sense, saying in effect: "We have reviewed your claims and we find that the action complained of involves a political question, and is within the powers granted by the Constitution to the political branches. The act complained of violates no constitutional limitation on that power, either because the Constitution imposes no relevant limitation, or because the action is amply within the limits prescribed. We give effect to what the political branches have done because they had political authority under the Constitution to do it."⁸⁶

Henkin found no case refusing to consider whether the President had exceeded his constitutional authority.⁸⁷ His theme, like Brennan's in *Baker v. Carr*, was that the so-called "doctrine" was misleading.⁸⁸ He called for breaking it into its component parts, which he listed as:

1. The courts are bound to accept decisions by the political branches within their constitutional authority.
2. The courts will not find limitations or prohibitions on the powers of the political branches where the Constitution does not prescribe any.
3. Not all constitutional limitations or prohibitions imply rights and standing to object in favor of private parties.
4. The courts may refuse some (or all) remedies for want of equity.
5. In principle, finally, there might be constitutional provisions which can properly be interpreted as wholly or in part "self-monitoring" and not the subject of judicial review. (But the only one the courts have found is the "guarantee clause" as applied to challenges to state action, and even that interpretation was not inevitable.)⁸⁹

86. Henkin, *supra* note 38, at 601.

87. *Id.* at 612.

88. "The 'political question' doctrine, I conclude, is an unnecessary, deceptive packaging of several established doctrines that has misled lawyers and courts to find in it things that were never put there and make it far more than the sum of its parts." *Id.* at 622.

89. *Id.* at 622-23.

Henkin emphasized that "these propositions do not include any basis for refusing to consider . . . an allegation that the political branches have acted unconstitutionally."⁹⁰

The Court has repeatedly addressed claims that one branch of government has invaded the proper sphere of another branch and on several occasions has ruled such invasions unconstitutional. Thus, in *Myers v. United States*,⁹¹ the Court declared unconstitutional statutes purporting to require the President to obtain the advice and consent of the Senate before removing officers who had been appointed with the Senate's advice and consent. In *The Steel Seizure Case*,⁹² the Court ruled unconstitutional, as an invasion of the legislative sphere, President Truman's seizure of the nation's steel mills during the Korean War when a strike was imminent. In *United States v. Nixon*,⁹³ the Court held that it, not the President, had the final say about the President's claim of a constitutional executive privilege and denied him the exercise of such a privilege under the facts presented. The Court found an improper invasion of the judiciary's role in the President's assertion that he could determine whether this "executive privilege" could be invoked.⁹⁴ In *Buckley v. Valeo*,⁹⁵ the Court found that Congress had infringed impermissibly on executive power by establishing the Federal Election Commission because in so doing Congress had attempted to vest in itself power to appoint officers of the United States and to delegate to its own agency some enforcement powers, which powers of appointment and enforcement were committed by the Constitution to the Executive.⁹⁶

The question, then, of who, as between the President and Congress, has the constitutional power to terminate a treaty is a justiciable one within established doctrine.⁹⁷ Since this power necessarily resides somewhere

90. *Id.* at 623.

91. 272 U.S. 52 (1926). *See also* Powell v. McCormack, 395 U.S. 486 (1969) (holding that Congress lacked constitutional authority to exclude Representative Adam Clayton Powell); The Pocket Veto Case, 279 U.S. 655 (1929) (holding that congressional rules could not infringe the President's power by deviating from the constitutional provision regarding "pocket vetoes").

92. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

93. 418 U.S. 683 (1974). In the course of this unanimous decision, the Court dealt with issues of justiciability. It declared that, in so doing, it should look behind names which symbolize parties to determine whether a justiciable case or controversy exists. *Id.* at 693. The Court found it had the power to pass upon the President's claim of a constitutionally based executive privilege, *id.* at 703, and was not deterred by the Constitution's silence on the issue, *id.* at 705.

94. *Id.* at 707.

95. 424 U.S. 1 (1976).

96. *Id.* at 140-42.

97. Another Supreme Court tradition resembling the "political question" doctrine, or perhaps an aspect of that doctrine, also limiting the Court's power of judicial review, is that the Court will give effect to acts of the political branches

within the federal government, locating it falls clearly within the Supreme Court's well-established role of saying what the law is. In arguing otherwise, the plurality in *Goldwater* either "profoundly misapprehends" the Court's "political question" doctrine, as Justice Brennan asserted,⁹⁸ or attempts to expand greatly that doctrine and restrict the Court's availability as an arbiter in allocation of power questions. To the extent that the "political question" doctrine is susceptible to such stretching, doing so is ill-advised because, in Justice Powell's words, it raises the "spectre of the Federal Government brought to a halt because of the mutual intransigence of the President and the Congress."⁹⁹ If locating the treaty termination power is indeed a matter capable of being performed only through the political processes, the Supreme Court may not act to banish the spectre. Furthermore, the political weapons available to Congress in such a dispute are unwieldy, and the President has a decided advantage.¹⁰⁰ Fortunately, a majority of the Court did not say it was incapable of acting should this spectre materialize.

IV. RIPENESS AND STANDING: THE CONGRESS' POWER TO SUE

Although ripeness and standing usually are treated as distinct elements of the constitutional justiciability doctrine, with ripeness focusing

within their constitutional power, even though they may violate international law. See, e.g., Chief Justice Marshall's opinion for the Court in *Brown v. United States*, 12 U.S. (8 Cranch) 110, 128 (1814), declaring such a power in the President. But see the dissent of Justice Story in the same case. *Id.* at 153 (Story, J., dissenting). Thus, it long has been established that Congress may supersede a treaty by passing an inconsistent statute, see *The Chinese Exclusion Case*, 130 U.S. 581, 600 (1889); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888), although the reasoning to this conclusion is infirm, see L. HENKIN, *supra* note 34, at 163-64. In *Mitchell v. United States*, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1967), the defendant was denied the defense that his resistance to the Viet Nam war was based upon the illegality of the war under international law. For a brief discussion of similar Viet Nam war cases, see Henkin, *supra* note 38, at 623.

In *Goldwater*, however, no violation of international law was alleged. To the contrary, international law supported the President's power to terminate the Mutual Defense Treaty and the Senate Foreign Relations Committee would have so recognized. See S. REP. NO. 96-119, 96th Cong., 1st Sess. 9-10 (1979); notes 206-19 and accompanying text *infra*.

The Supreme Court also has developed an approach similar to the "political question" doctrine where religious questions are involved. See *Jones v. Wolf*, 443 U.S. 595 (1979); *Constitutional Guidelines for Civil Court Resolution of Property Disputes Arising from Religious Schism*, 45 MO. L. REV. 518 (1980).

98. 444 U.S. at 1006 (Brennan, J., dissenting).

99. *Id.* at 1001 (Powell, J., concurring).

100. See note 34 *supra*; notes 140 & 141 and accompanying text *infra*.

on the status of the case¹⁰¹ and standing focusing on the status of the litigants,¹⁰² the issues often become intermingled.¹⁰³ Both ripeness and standing involve constitutional and prudential considerations.¹⁰⁴ In *Goldwater*,

101. See L. TRIBE, *supra* note 50, § 3-13. For recent judicial statements of the ripeness doctrine, see *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 81-82 (1978); *Buckley v. Valeo*, 424 U.S. 1, 113-18 (1976); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 136-49 (1974). Ripeness is peculiarly a question of timing. *Id.* at 140. Its goals are to avoid premature decision on constitutional issues when they are still hypothetical or speculative and to delay decision until a better factual record is available. *Id.* at 143.

102. See *Flast v. Cohen*, 392 U.S. 83, 99 (1968); L. TRIBE, *supra* note 50, §§ 3-17, -20, at 79-80, 90. For a recent statement by the Court of the standing doctrine, see *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72-81 (1978). The Court summarized thus: "[A] litigant must demonstrate . . . injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury to satisfy the 'case or controversy' requirement of Art. III." *Id.* at 79. The district court in *Goldwater* used a four-step analysis:

A legislator must satisfy the same basic requirements for standing as any other litigant: (1) that he has suffered injury in fact; (2) that the interests being asserted are within the zone of interests to be protected by the statute or constitutional guarantee in question; (3) that the injury is caused by the challenged action; and (4) that the injury is capable of being redressed by a favorable decision.

481 F. Supp. at 951 (citing *Harrington v. Bush*, 553 F.2d 190, 204-05 n.68 (D.C. Cir. 1977)). The second item in this list may not be necessary. See *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 78-80 (1978).

103. L. TRIBE, *supra* note 50, § 3-13, at 60 n.1. See *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 81 (1978) (holding that when the constitutional requirements of standing were met, so were those of ripeness); *Buckley v. Valeo*, 424 U.S. 1, 117-18 (1976) (in a case where standing was found, the Court acceded to congressional desire to obtain adjudication on constitutionality over an arguably well-founded claim that the issues were unripe).

104. L. TRIBE, *supra* note 50, §§ 3-13, -17 to -18, at 60, 79-81. Both doctrines are grounded in the case-controversy requirement of article III of the Constitution. *Id.* See note 51 *supra*.

The standing doctrine, like the "political question" doctrine, has been vigorously criticized. In the context of a discussion of suits by legislators, one commentator said:

Standing should not be treated as a separately articulated threshold inquiry going to the basic jurisdiction of the federal courts. So treated, it is an awkward and ill-used concept that is particularly inappropriate as a mechanism for shaping and controlling judicial responses to the difficult, and frequently political, issues raised in legislators' suits. Standing as an independently considered threshold obstacle should be eliminated altogether, and should instead be considered only as part of the merits in the context of the whole case for purposes of molding judicial remedies.

Note, *Standing to Sue for Members of Congress*, 83 YALE L.J. 1665, 1688 (1974).

Justice Powell spoke in terms of ripeness while Chief Judge Wright had spoken in terms of standing, but they both were addressing the same question:¹⁰⁵ under what circumstances may Congressmen *qua* Congressmen litigate a claim that the Executive has usurped congressional power?¹⁰⁶

Justice Powell found the treaty termination power issue in *Goldwater* unripe for three "prudential" reasons: (1) differences between the President and Congress are commonplace and usually turn on political rather than legal considerations; (2) for the Court to decide the case would encourage small groups or individual Congressmen "to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict"; and (3) Congress had taken no official action to confront the executive branch.¹⁰⁷ Chief Judge Wright had found a lack of standing under prior cases involving legislators, reasoning that the plaintiffs suffered no "injury in fact" because Congress had suffered no injury until its expressed will had been thwarted by the Executive. Finding Congress had not yet spoken unequivocally, Wright concluded the plaintiffs could have suffered no derivative injury.¹⁰⁸ The court of appeals majority, by contrast, found standing by focusing on the specific claim made by the plaintiffs, assuming it to be valid (as required by standing doctrine¹⁰⁹), and determining that "no conceivable senatorial action . . . could likely prevent termination of the Treaty."¹¹⁰ The plaintiffs were alleging that one-third of the Senate plus one could prevent termination of the treaty,¹¹¹ so

Tribe noted that threshold doctrines such as standing and ripeness are susceptible to manipulation and are not treated with analytical rigor by the courts. L. TRIBE, *supra*, § 3-13, at 60 n.1. Ripeness appears to partake heavily of prudential concerns. See authorities cited note 103 *supra*.

105. Chief Judge Wright in a footnote recognized that the issue he called "standing" could be cast as a "ripeness" issue. 617 F.2d at 716 n.25 (Wright, C.J., concurring). For commentaries on this general question, see Note, *supra* note 35; Comment, *Congressional Standing to Challenge Executive Action*, 122 U. PA. L. REV. 1366 (1974); Note, *supra* note 104.

106. Although ripeness and standing developed as parts of the justiciability doctrine and thus are usually thought of as defining the courts' power, they also may be seen as defining the power of those who seek to litigate. One who has no standing or whose case is found to be unripe lacks power to have it adjudicated. This section attempts to focus on these elements of justiciability more from the vantage point of Congress than from that of the Court.

107. 444 U.S. at 997-98 (Powell, J., concurring).

108. 617 F.2d at 712 (Wright, C.J., concurring). Chief Judge Wright reviewed the career of Senate Resolution 15 and the Dole-Stone Amendment, but did not consider the possible effect of the Taiwan Relations Act on the plaintiffs' claim to standing. *Id.* at 712-15 (Wright, C.J., concurring). See notes 7-9 and accompanying text *supra*; notes 135 & 136 and accompanying text *infra*.

109. See *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

110. 617 F.2d at 703.

111. *Id.*

the court of appeals majority found that to require even passage of a resolution was to require an unnecessary, "useless" act in terms of standing analysis.¹¹²

The Supreme Court never has addressed the question of when a member of Congress should be granted standing to sue.¹¹³ No case of *Congress v. President* has been pursued in the Supreme Court, and it is unclear whether such a case would be heard.¹¹⁴ Most of the law in this area has been developed in the District of Columbia Circuit.¹¹⁵ The leading case is *Kennedy v. Sampson*,¹¹⁶ in which Senator Edward Kennedy was granted standing to challenge a purported "pocket veto" by President Nixon when Congress had recessed rather than adjourned. Standing was granted on the theory that, if the "veto" were unconstitutional, Kennedy's vote for passage of the statute had been nullified improperly. The court specifically ruled that under the standing doctrine the congressional litigant needed only to be among the injured, not be the only one injured, and therefore it was not necessary for Congress as a body or representatives designated by Congress to bring the suit, nor was it necessary under the circumstances for Senator Kennedy to await some further action by Congress.¹¹⁷

The court of appeals majority in *Goldwater* read *Kennedy* and other cases as allowing standing for congressional litigants asserting as an injury

112. *Id.*

113. Henkin, *supra* note 8, at 648-49. The only case in which the Supreme Court has extended standing to sue to legislators suing *qua* legislators is *Coleman v. Miller*, 307 U.S. 433 (1939). In *Coleman*, a group of Kansas legislators was given standing to contest the method of ratification of a constitutional amendment because they had a "plain, direct and adequate interest in maintaining the effectiveness of their votes." *Id.* at 438. Nevertheless, the Court held the issue to be a nonjusticiable political question, so the legislators were denied power to litigate the issue anyway. See notes 68-72 and accompanying text *supra*.

114. Henkin says such a case probably would fail because Congress' interest is political, not "personal." Henkin, *supra* note 8, at 648. The United States Court of Appeals for the District of Columbia, however, stated in 1976: "It is clear that the House as a whole has standing to assert its investigatory power, and can designate a member to act on its behalf." *United States v. American Tel. & Tel. Co.*, 551 F.2d 384, 391 (D.C. Cir. 1976). See also *Kennedy v. Sampson*, 511 F.2d 430, 435 (D.C. Cir. 1974); Note, *supra* note 35, at 1632 n.5.

115. See *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); *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974); *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973); *Nader v. Bork*, 366 F. Supp. 104, 106 (D.D.C. 1973); note 114 *supra*. See also *Harrington v. Schlesinger*, 528 F.2d 455, 459 (4th Cir. 1975); *Brown v. Ruckelshaus*, 364 F. Supp. 258, 264 (C.D. Cal. 1973); note 97 *supra*.

116. 511 F.2d 430 (D.C. Cir. 1974).

117. *Id.* at 435-36.

the loss of a right to vote in the future.¹¹⁸ Chief Judge Wright argued that only nullification of a past vote should suffice for standing¹¹⁹ and asserted that any injury suffered by plaintiffs was inflicted not by the President, but by their colleagues' failure to take additional steps to confront the President.¹²⁰ In conformity with the majority's position, it has been asserted that only in the pre-enactment stage of legislation do congressional plaintiffs have a better argument for standing than do ordinary citizens.¹²¹ A distinction has been drawn between those suits by Congressmen seeking to enforce only their personal, private rights¹²² and those where they seek to enforce rights derived from their status as Congressmen, called derivative or participatory suits.¹²³

Participatory suits by Congressmen present special problems. Besides those mentioned by Justice Powell,¹²⁴ other concerns are that such suits would cut off political debate prematurely and would subject the courts to manipulation for partisan purposes.¹²⁵ For these reasons it has been recommended that such suits which are not authorized by Congress be found nonjusticiable.¹²⁶ Where Congress has authorized a suit, however, none of these reasons for the courts to abstain is present.¹²⁷ Presumably, Congress would authorize a suit only for noncommonplace "legal" issues;¹²⁸ if so, no encouragement would be given to suits by small groups of Congressmen;¹²⁹ Congress would have chosen a method for confronting the President;¹³⁰ political debate would have run its course;¹³¹ and the danger of partisan politics corrupting the courts would be lessened.¹³²

118. "To be cognizable for standing purposes, the alleged diminution in congressional influence must amount to a disenfranchisement, a complete nullification or withdrawal of a voting opportunity . . ." 617 F.2d at 702.

119. *Id.* at 712 n.5 (Wright, C.J., concurring).

120. *Id.* at 712 (Wright, C.J., concurring).

121. See Note, *supra* note 35, at 1639-40.

122. *E.g.*, Buckley v. Valeo, 424 U.S. 1, 7-8, 12 (1976); Powell v. McCormack, 395 U.S. 486 (1969); cases cited note 91 *supra*.

123. See Note, *supra* note 35, at 1634; cases cited note 115 *supra*. Cf. Flast v. Cohen, 392 U.S. 83, 119-20 (1968) (Harlan, J., dissenting) (distinguishing "Hohfeldian" (personal, proprietary, traditional) plaintiffs from "non-Hohfeldian" (public, representative) plaintiffs).

124. See text accompanying note 107 *supra*.

125. Note, *supra* note 35, at 1649-50.

126. *Id.* at 1655.

127. *Id.* at 1647-48. See United States v. American Tel. & Tel. Co., 551 F.2d 384, 391 (D.C. Cir. 1976).

128. See text accompanying note 107 *supra*.

129. See text accompanying note 107 *supra*.

130. See text accompanying note 107 *supra*. "[T]he wiser course would be for the courts to defer to the collective judgment of Congress as to the choice of remedy." Note, *supra* note 35, at 1648.

131. See Note, *supra* note 35, at 1647-48.

132. *Id.*

In *Goldwater*, Judge Gasch found specifically that Congress had given no indication it disapproved of the suit.¹³³ In fact, he accepted the argument that the preliminary vote on Senate Resolution 15 and the Dole-Stone Amendment were endorsements of the view presented by the plaintiffs.¹³⁴ Furthermore, the plain wording of the Taiwan Relations Act seems to be at least an authorization to proceed with the suit, if not a confrontation with the President.¹³⁵ Neither the majority in the court of appeals, nor Chief Judge Wright, nor Justice Powell dealt with the possibility that this Act was sufficient to grant standing to the plaintiffs, although Chief Judge Wright acknowledged that such authorizations by Congress theoretically were a "possible basis of standing."¹³⁶ Rather, all three views emphasized a need for some extreme occurrence before the courts should consent to hear the case. The court of appeals majority spoke of a "complete disenfranchisement,"¹³⁷ and found such. Chief Judge Wright required a finding that the Executive had "thwarted the will" of Congress,¹³⁸ and did not find such. Justice Powell spoke of Court action only if the government were "brought to a halt" by a confrontation,¹³⁹ and, of course, this had not occurred.

Such requirements of cataclysm are inappropriate. As one commentator has observed:

Even if the Congress were to act, . . . the only remedies available to it would be to cut off funds . . . or to initiate impeachment proceedings. . . . The disruption of government services and functions entailed by such actions would be so severe, the remedy so drastic in proportion to the injury, as to preclude resort to such solutions in all but the most egregious cases.¹⁴⁰

As to the consequences of such requirements when an important issue of the scope of presidential power is involved, Professor Tigar stated:

A refusal to decide in such a case, or a delay which obviates the

133. 481 F. Supp. at 955. Compare the discussion of *Kennedy v. Sampson* in Note, *supra* note 35, at 1650-51.

134. See notes 7-9 and accompanying text *supra*. It should be noted that this is in the nature of a factual determination, which ordinarily would be beyond the review of appellate courts unless "clearly erroneous." See *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74 n.19 (1978).

135. For a portion of the text of the Act, see note 9 *supra*. Apparently, however, the defendants had argued passage of this Act indicated congressional approval rather than disapproval of the President's action. This argument was rejected by Judge Gasch. 481 F. Supp. at 954 n.18.

136. 617 F.2d at 712 n.6 (Wright, C.J., concurring).

137. *Id.* at 702 (majority opinion).

138. *Id.* at 712 (Wright, C.J., concurring).

139. 444 U.S. at 1001 (Powell, J., concurring).

140. Note, *supra* note 35, at 1648. Congress shared these concerns in *Goldwater*. See notes 194-97 and accompanying text *infra*.

need to decide, suggests to the alleged offender that the challenged exercise of power is worth the risk again since there is no practical restraint upon it.¹⁴¹

Although the core issue in both the ripeness and the standing analyses performed in *Goldwater* appeared to be the existence of an injury in fact to the plaintiffs,¹⁴² in previous appropriate cases even this requirement has been softened by the Court. Thus, in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,¹⁴³ very attenuated reasoning was necessary to find an injury to the plaintiffs.¹⁴⁴ Requiring a more concrete injury in that case would have prevented the claims from being litigated until a nuclear reactor had exploded.¹⁴⁵ In *Buckley v. Valeo*,¹⁴⁶ full adjudication of the issues was allowed in the interest of preventing multiple suits.¹⁴⁷ Both of these cases should have weighed in favor of reaching a decision on the merits in *Goldwater*. Requiring a large political explosion before consenting to hear a case operates to deny an opportunity to litigate just as effectively as does the "political question" doctrine, and in this case, in effect, gives the power to the President anyway,¹⁴⁸ while keeping everyone unsure about whether he has the power.¹⁴⁹ An additional consideration is that such gaping holes in the Constitution as the one at issue in *Goldwater* are unlikely to be discovered often, and when they are, the political branches, rather than private persons, would be more, not less, appropriate parties to bring the suit, being the real parties in interest.¹⁵⁰ It is clear that if a private person were injured by the President's termination of a treaty, the

141. Tigar, *supra* note 34, at 1148-49 (speaking of The Steel Seizure Case, 343 U.S. 579 (1952)). See also note 34 *supra*.

142. Judge Gasch found this was the only element of standing in dispute. 481 F. Supp. at 955-56.

143. 438 U.S. 59 (1978).

144. In a separate opinion in *Duke Power*, Justice Stevens remarked: "The string of contingencies that supposedly holds this litigation together is too delicate for me." *Id.* at 102 (Stevens, J., concurring). He would have found neither ripeness nor standing in that case. *Id.* at 103 (Stevens, J., concurring).

145. *Id.* at 78 n.23 (majority opinion).

146. 424 U.S. 1 (1976).

147. *Id.* at 113-18. The Court in so doing also acceded to a congressional desire to obtain adjudication on as many issues as possible. *Id.* at 117.

148. See text accompanying notes 33 & 34 *supra*; note 34 *supra*; notes 140 & 141 and accompanying text *supra*.

149. Such a result runs counter to the concerns expressed in the "political question" cases that the Court should avoid "multifarious pronouncements by various departments on one question," *Baker v. Carr*, 369 U.S. 186, 217 (1962), and that the Court should yield when there is an "unusual need for unquestioning adherence to a political decision already made," *id.* For the context of these quotations, see text accompanying note 81 *supra*.

150. See Henkin, *supra* note 8, at 648.

private person could litigate the separation of powers issue.¹⁵¹ Requiring more of Congress is anomalous.¹⁵² Even leaving aside the factual disputes about whether Congress had either authorized the suit or adequately confronted the President, there are strong prudential reasons the Court should have reached the merits in *Goldwater*.

In most congressional suits which seek adjudication of separation of power questions, it would be appropriate to require some formal approval of the suit by Congress. It is arguable that such approval was given in *Goldwater*. Requiring a cataclysmic confrontation is inappropriate, even as a general rule. Where, as in *Goldwater*, the claim presented is that a minority of one house has certain rights, requiring even majority approval of the suit before it can be heard is inappropriate, as the court of appeals found. To the extent ripeness and standing are based on prudential concerns, factors present in *Goldwater* weighed in favor of a finding that these preliminary requirements were met.

V. DOMESTIC ALLOCATION OF FOREIGN AFFAIRS POWERS AND THE INTERNATIONAL CONTEXT: THE PRESIDENT'S POWER

The merits question in *Goldwater*, whether the President acting alone had the power to terminate the Mutual Defense Treaty, upon which the Supreme Court did not rule and the lower courts reached opposite conclusions,¹⁵³ has both a domestic constitutional component and an international component. Had he chosen to present the international argument, the President likely would have cast it in terms of another branch of justiciability doctrine: "mootness."¹⁵⁴ Probably for political reasons, however, this argument was not pursued by the President,¹⁵⁵ although it was raised in an amicus brief before the court of appeals,¹⁵⁶ which declined to address it.¹⁵⁷ Both domestic and international law regarding allocation of treaty termination power will be discussed briefly here, and an effort will be made to separate them.

Although the domestic allocation of foreign affairs powers is a complex matter,¹⁵⁸ most scholars agree that the President has the power to termi-

151. See *The Steel Seizure Case*, 343 U.S. 579 (1952); *Myers v. United States*, 272 U.S. 52 (1926); Henkin, *supra* note 8, at 648.

152. Note, *supra* note 35, at 1646.

153. See notes 16-24 and accompanying text *supra*.

154. See Henkin, *supra* note 8, at 647 n.6.

155. *Id.* See also Scheffer, *supra* note 3, at 937-44.

156. Brief for Amici Curiae, International Law Institute of the Georgetown University Law Center et al., *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979) [hereinafter cited as Georgetown Brief].

157. 617 F.2d at 699 n.2.

158. See generally L. HENKIN, *supra* note 34, at 3-123.

nate treaties.¹⁵⁹ A variety of statements on this issue has been made throughout the nation's history, and a variety of actions taken, with prestigious men taking opposing sides.¹⁶⁰

The proper textual interpretation of the Constitution's separate provisions granting power to Congress and to the President has been the subject of debate from shortly after the Constitution was adopted until the present. Article I gives to Congress "[a]ll legislative Powers herein granted,"¹⁶¹ while article II states that "[t]he executive Power shall be vested in a President of the United States of America."¹⁶² Alexander Hamilton read these words to mean the grant of power to the legislative department was limited to those areas listed in article I, while the Executive was given all "executive" power, the list in article II being merely examples.¹⁶³ This construction was adopted by the Supreme Court in 1926 in *Myers v. United States*,¹⁶⁴ in an opinion by Chief Justice Taft, but failed to win endorsement in 1952 in *The Steel Seizure Case*.¹⁶⁵ The court of appeals majority in *Goldwater* adhered to Hamilton's argument, without attributing it to him.¹⁶⁶ Under this reading of the Constitution, power to terminate treaties would inhere in the Executive because this power is not among those given to the Congress.¹⁶⁷

Another inquiry made by the Supreme Court in determining to which branch of government power is allocated is whether the challenged power relates to external or to domestic affairs. In *United States v. Curtiss-*

159. Henkin, *supra* note 8, at 651. See also Nelson, *supra* note 34, at 890, 906. But see Riggs, *Termination of Treaties by the Executive Without Congressional Approval*, 32 J. AIR L. & COM. 526, 533-34 (1966); Scheffer, *supra* note 3, at 966-67, 977-1005; *Presidential Amendment and Termination of Treaties: The Case of the Warsaw Convention*, 34 U. CHI. L. REV. 580 (1967).

160. For a brief summary, see L. HENKIN, *supra* note 34, at 417-19.

161. U.S. CONST. art. I, § 1 (emphasis added).

162. *Id.* art. II, § 1.

163. 7 A. HAMILTON, WORKS 76, 81 (Hamilton ed. 1851).

164. 272 U.S. 52, 116, 118 (1926). But see *id.* at 177 (Holmes, J., dissenting); *id.* at 178-239 (McReynolds, J., dissenting); *id.* at 240-95 (Brandeis, J., dissenting).

165. 343 U.S. 579 (1952). This argument was rejected in the opinion of the Court by Justice Black, *id.* at 587, in the separate opinion of Justice Douglas, *id.* at 632, and in the separate opinion of Justice Jackson, *id.* at 640-41. Three Justices in dissent subscribed to Hamilton's view. *Id.* at 681-82 (Vinson, C.J., dissenting).

166. 617 F.2d at 704-05. "We note . . . that the powers conferred upon Congress in Article I of the Constitution are specific, detailed, and limited, while the powers conferred upon the President by Article II are generalized in a manner that bespeaks no such limitation upon foreign affairs powers." *Id.* at 704.

167. Also apparently unaware of the history of this view, the plaintiffs in *Goldwater* claimed it was "an unprecedented feat of construction." Petitioners' Petition for Certiorari at 17.

Wright Export Corp.,¹⁶⁸ the Court, with only one dissent,¹⁶⁹ identified sovereignty as an extra-constitutional source of federal power in the area of external affairs.¹⁷⁰ Regarding allocation of this power, Justice Sutherland for the Court said:

Not only . . . is the Federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate, and manifold problems, the President alone has the power to speak or listen as a representative of the nation.¹⁷¹

Justice Sutherland referred to the President's authority to act in this area as "the very delicate, plenary and exclusive power . . . as the sole organ of the Federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress."¹⁷² This analysis, like that of Hamilton, would lodge in the President those powers inherent in sovereignty which are not otherwise distributed.¹⁷³ Thus, this analysis would also result in a finding that the power to terminate treaties belongs with the executive branch.¹⁷⁴

A close analogy may be made to another clause of the Constitution. Just as article II, section 2 gives the President, with the advice and consent of the Senate, power to make treaties, but does not provide for their termination, the immediately following clause of the same section gives him, with the advice and consent of the Senate, power to appoint "Officers of the United States," but does not provide for their removal.¹⁷⁵ In *Myers*,¹⁷⁶ Chief Justice Taft found the dicta in *Marbury*¹⁷⁷ unpersuasive and concluded that the power to remove executive officers is vested in the President and is not subject to regulation by Congress.¹⁷⁸ If this analogy is

168. 299 U.S. 304 (1936).

169. The dissent by Justice McReynolds was one sentence. *Id.* at 333 (McReynolds, J., dissenting).

170. *Id.* at 315-16.

171. *Id.* at 319.

172. *Id.* at 320.

173. L. HENKIN, *supra* note 34, at 43.

174. Justice Sutherland's statements in *Curtiss-Wright* have been widely criticized, but the opinion remains authoritative doctrine. *See id.* at 19-27. *See also* 617 F.2d at 734-36 (MacKinnon, J., concurring and dissenting).

175. U.S. CONST. art. II, § 2.

176. *See* note 164 and accompanying text *supra*.

177. *See* notes 44-49 and accompanying text *supra*.

178. *Myers v. United States*, 272 U.S. 52, 176 (1926). This holding was modified later so as not to apply to an appointee who was not a purely "executive" officer, whose term was set by statute. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 627-28 (1935).

apt,¹⁷⁹ *Myers* is authority for the proposition that the President alone may terminate treaties.

The grant of the treaty power itself has provided an argument in favor of presidential power to terminate treaties. The court of appeals argued that because the grant of power appears in the executive article (article II) rather than the legislative article (article I) of the Constitution, and because it is the President who makes treaties and he remains free to refuse to ratify the treaty even after obtaining the Senate's consent,¹⁸⁰ the treaty termination power is outside the legislative sphere.¹⁸¹

Since John Marshall first described the President as "sole organ of the nation in its external relations,"¹⁸² that phrase has come to designate, if not create, broad substantive powers possessed by the President.¹⁸³ Thus, without the approval of the Senate, he may hire agents for negotiating with foreign countries;¹⁸⁴ he alone communicates with foreign countries and Congress is barred from doing so;¹⁸⁵ he has the power to conclude "executive agreements" without Senate or congressional approval;¹⁸⁶ he has the power to interpret, implement, and react to the violation of treaties;¹⁸⁷

179. In *Goldwater*, the court of appeals relied on this analogy, 617 F.2d at 703, while Judge MacKinnon, *id.* at 737-38, and Judge Gasch, 481 F. Supp. at 960, rejected it, concluding that the respective powers were fundamentally different. Judge MacKinnon was harsh. He referred to the analogy as "absurd." 617 F.2d at 738 (MacKinnon, J., concurring and dissenting).

The appointment clause retains vitality as a source of presidential power. See discussion of *Buckley v. Valeo* in text accompanying note 95 *supra*.

It has been suggested that, as a result of President Carter's action in terminating the Mutual Defense Treaty, the Senate may routinely attach conditions to their advice and consent, requiring consultation before termination. Brief for Amici Curiae, Myres S. McDougal and W. Michael Reisman at 6, *Goldwater v. Carter*, 444 U.S. 996 (1979). Just such a condition to an appointment was what was ruled unconstitutional in *Myers*.

180. See L. HENKIN, *supra* note 34, at 130, 136.

181. 617 F.2d at 705.

182. 10 ANNALS OF CONG. 613 (1800).

183. *E.g.*, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). See L. HENKIN, *supra* note 34, at 45, 300 n.18.

184. L. HENKIN, *supra* note 34, at 46.

185. *Id.* at 45, 47.

186. *Id.* at 176-84. See *United States v. Belmont*, 301 U.S. 324, 330-31 (1937). It would be possible for a President to vitiate a requirement that he obtain congressional or Senate consent before terminating a treaty by concluding more agreements as executive agreements. Scheffer, *supra* note 3, at 1007 n.280. Such agreements already cover the same subject matter and are employed to accomplish the identical purposes for which treaties are used. II B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: THE POWERS OF GOVERNMENT 150 (1963). And they clearly may be terminated by the President acting alone. See note 34 *supra*.

187. L. HENKIN, *supra* note 34, at 167-71.

and he has the power to recognize and withdraw recognition from foreign governments.¹⁸⁸ Other constitutional sources of presidential foreign affairs power include his designation as Commander-in-Chief¹⁸⁹ and his obligation to "take Care that the Laws be faithfully executed."¹⁹⁰ The President also possesses a wide range of other foreign affairs powers,¹⁹¹ and although the total conglomeration of his powers is of less-than-certain constitutional derivation, its existence is clear.¹⁹² The nature of the office of President as it has evolved, therefore, provides a strong argument that treaty termination power resides there.¹⁹³ Indeed, the Senate Foreign Relations Committee did not question the effectiveness of President Carter's notice of termination, but sought only to influence future actions,¹⁹⁴ and dispute about whether Senate Resolution 15 would apply to the Mutual Defense Treaty is what prevented that resolution's adoption.¹⁹⁵ The presence of article X in the Mutual Defense Treaty, empowering the United States to terminate the treaty,¹⁹⁶ coupled with the President's broad powers as "sole organ," may be seen as sufficient to give him effective power to terminate this particular treaty.¹⁹⁷

188. *Id.* at 93. Justice Brennan felt this single power was sufficient to support the President's action of terminating the Mutual Defense Treaty. 444 U.S. at 1006-07 (Brennan, J., dissenting).

189. U.S. CONST. art. II, § 2. *See generally* L. HENKIN, *supra* note 34, at 50-54.

190. U.S. CONST. art. II, § 3. *See generally* L. HENKIN, *supra* note 34, at 54-56. Rather than a source of presidential power, this clause, in combination with the "supreme law" clause, U.S. CONST. art. VI, *see* note 12 *supra*, was claimed by the plaintiffs in *Goldwater* to be a restraint on presidential power. Brief for Appellees at 43-47, *Goldwater v. Carter*, 617 F.2d 697 (1979). Their argument was accepted by Judge MacKinnon. 617 F.2d at 736 (MacKinnon, J., concurring and dissenting). This argument, according to Henkin, plays with words. He terms it "ludicrous" and points out that "termination of a treaty by the President is not 'repeal' of a 'law'; it is an international act terminating an international legal obligation of the United States." Henkin, *supra* note 8, at 653.

191. *See* L. HENKIN, *supra* note 34, at 48-49, 56-65.

192. *Id.* at 44.

193. Henkin, *supra* note 8, at 651-52.

194. S. REP. NO. 96-119, 96th Cong., 1st Sess. 14 (1979). "It would have been easy for the Committee . . . to report a resolution matching the Executive's assertion of power with equally sweeping claims by the Senate. But it seemed to the Committee undesirable to precipitate a constitutional shouting match." *Id.* at 6.

195. *See* note 8 *supra*.

196. For the text of article X, *see* note 13 *supra*.

197. In the list of factors found persuasive by the court of appeals, the existence of article X in the treaty was said to be "of central significance." 617 F.2d at 708. Besides the factors discussed in the text in this section, the court of appeals also used an analysis of the nature of treaties, *id.* at 705, and practical considerations that if the claim of the plaintiffs were granted, the President's effectiveness would be severely curtailed, *id.* at 705-06.

Arguments for congressional power are harder to make.¹⁹⁸ In a brief *amici curiae*, it was asserted that treaty termination is not a single act but a sequence of acts, and that for each act constitutional practice had established "different configurations of competence."¹⁹⁹ The details of this theory were not elucidated, however. It has been argued that, contrary to the above, in foreign affairs and elsewhere, the President is "only the executive agent of Congress."²⁰⁰ The plaintiffs in *Goldwater* relied primarily on their argument that if the President lacks power to enter a treaty, so should he lack power to terminate one.²⁰¹ Although this argument was rejected as "sterile symmetry" by the court of appeals, it was founded on eminent dicta.²⁰² The plaintiffs also relied on their analysis of historical practice in treaty termination, but they read history differently than did the defendants, and both lower courts found past practice to be inconclusive.²⁰³

Perhaps the greatest weakness in the plaintiffs' case in *Goldwater* was in the formulation of their claim. The Senate resolution they invoked made a distinction, on no apparent constitutional grounds, between mutual defense treaties and other treaties.²⁰⁴ Also, the plaintiffs claimed the anomalous right for a minority of the Senate to keep the nation committed to a treaty, even if the President and a majority of the Senate wished it terminated.²⁰⁵

The United States is bound by international law. In *The Paquete Habana*, the Supreme Court said, "International law is a part of our law, and must be ascertained and administered by the courts . . . as often as questions of right depending upon it are duly presented for their determination."²⁰⁶ The courts, however, will not entertain allegations that a particular branch of the federal government has acted outside international law.²⁰⁷ Because no such claim was presented in *Goldwater*, the quoted general rule is applicable.

198. Henkin, *supra* note 8, at 652.

199. Brief for Amici Curiae, Myres S. McDougal and W. Michael Reisman at 3, *Goldwater v. Carter*, 444 U.S. 996 (1979).

200. See L. HENKIN, *supra* note 34, at 81-84.

201. See 617 F.2d at 703.

202. See *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 8 (1821) (Story, J.); *Techt v. Hughes*, 229 N.Y. 222, 243, 128 N.E. 185, 192 (Cardozo, J.), *cert. denied*, 254 U.S. 643 (1920).

203. See 617 F.2d at 706. See also note 35 *supra*. The plaintiffs also presented an argument based on the treaty being "the supreme Law of the Land." See note 190 *supra*.

204. See 617 F.2d at 707; S. REP. NO. 96-119, 96th Cong., 1st Sess. 7-8 (1979); Henkin, *supra* note 8, at 652.

205. See 617 F.2d at 703, 705-06; Henkin, *supra* note 8, at 653.

206. 175 U.S. 677, 700 (1900).

207. See note 97 *supra*.

The Vienna Convention on the Law of Treaties,²⁰⁸ which is not yet in force as a treaty, nevertheless has been recognized by the International Court of Justice²⁰⁹ and by courts of the United States as an accurate statement of customary international law.²¹⁰ It was so recognized by the Senate Foreign Relations Committee in its report on Senate Resolution 15,²¹¹ and was used as the basis for that committee's recommendation of the grounds upon which the President validly could terminate a treaty.²¹² The careful

208. *Opened for signature* May 23, 1969, U.N. Doc. A/CONF. 39/27 (1969), reprinted in 63 AM. J. INT'L L. 875 (1969) [hereinafter cited as Vienna Convention].

209. Fisheries Jurisdiction Cases, [1974] I.C.J. 175, [1973] I.C.J. 3; Appeal Relating to the Jurisdiction of the ICAO Council, [1972] I.C.J. 46.

210. Day v. Trans World Airlines, Inc., 528 F.2d 31, 33, 36 (2d Cir. 1975), cert. denied, 429 U.S. 890 (1976); United States v. Cadena, 585 F.2d 1252, 1261 (5th Cir. 1978).

211. S. REP. NO. 96-119, 96th Cong., 1st Sess. 9-10 (1979).

212. To summarize the provisions of . . . [the Vienna Convention], a state has the right to terminate treaties under one or more of the following circumstances:

- (1) in conformity with the provisions of the treaty;
- (2) by consent of all the parties after consultation with the other contracting states;
- (3) where it is established that the parties intended to admit the possibility of denunciation or withdrawal;
- (4) where a right of denunciation or withdrawal may be implied by the nature of the treaty;
- (5) where it appears from a later treaty concluded with the same party and relating to the same subject matter that the matter should be governed by that treaty;
- (6) where the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time;
- (7) where there has been a material breach by another party;
- (8) where the treaty has become impossible to perform;
- (9) where there has been a fundamental change of circumstances;
- (10) where there has been a severance of diplomatic or consular relations and such relations are indispensable for the application of the treaty;
- (11) where a new peremptory norm of international law emerges which is in conflict with the treaty;
- (12) where an error was made regarding a fact or situation which was assumed by that state to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound;
- (13) where a state has been induced to conclude a treaty by the fraudulent conduct of another state; and
- (14) where a state's consent to be bound has been procured by the corruption or coercion of its representatives or by the threat or use of force.

Id. at 10.

draftsmen of the Convention included provisions identifying both who has power to conclude a treaty²¹³ and who has power to terminate a treaty.²¹⁴ The latter provision states in part:

Any act . . . terminating . . . a treaty pursuant to the provisions of the treaty . . . shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.²¹⁵

The instrument communicating the United States' notice of termination pursuant to the Mutual Defense Treaty was signed by Warren Christopher as Acting Secretary of State.²¹⁶

Under international law, therefore, the binding force of the Mutual Defense Treaty was at an end.²¹⁷ Seeking to maintain it in force was an effort to preserve a nontreaty with a nongovernment.²¹⁸ If indeed international law is a part of our law, the Vienna Convention presents the interesting phenomenon of international law operating to influence the domestic allocation of power among the branches of our government.²¹⁹

VI. CONCLUSION

The question of who may terminate treaties presented by *Goldwater v. Carter* was uniquely suited for resolution by the institution which our Supreme Court has become. The Court's failure to answer the question represents a retreat from the Court's historic role as expounder of the law, deepens the morass of justiciability law, effectively forecloses reasoned resolution of the specific substantive issue, and misses an opportunity to bring our domestic law in line with that of the community of nations.

213. Vienna Convention, *supra* note 208, art. 7.

214. *Id.* art. 67, para. 2.

215. *Id.*

216. Telephone interview with Mary Brandt, Office of the Assistant Legal Adviser for Treaty Affairs, Department of State (Sept. 26, 1980).

217. See Vienna Convention, *supra* note 208, art. 70. It is also possible to argue, as did a brief submitted by amici to the court of appeals, that under article 63 of the Vienna Convention the treaty was already dead because of events preceding the notice of termination, especially the change in recognition from the Republic of China to the People's Republic of China. Georgetown Brief, *supra* note 156, at 9-14. See also Henkin, *supra* note 8, at 647-48 n.6. Administration officials, however, testified before the Senate Foreign Relations Committee that they considered the treaty binding until January 1, 1980. Petitioners' Petition for Certiorari at 28-29.

218. Henkin, *supra* note 8, at 647 n.6, 654.

219. Other novel aspects of the relationship between the United States and the "two Chinas" are discussed in Scheffer, *supra* note 3, at 944-66.

If a President again acts to terminate a treaty without consulting Congress, and Congress wishes to have the issue decided in an orderly fashion, Congress should vote to authorize a suit. The courts should not insist on some counterproductive confrontation, but should allow the authorization of Congress to suffice for a finding of justiciability. The courts also should conclude that the President has the power to terminate treaties, under both domestic law and international law.

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