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Legal Aspects of the Normalization Process: Selected Issues [and Comments]

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CHAPTER VI.

LEGAL ASPECTS OF THE NORMALIZATION PROCESS: SELECTED ISSUES

*Mark B. Feldman**

The subject of my talk is the Claim/Assets Agreement and the question of termination of treaties, a constitutional issue focusing on the termination of the China Defense Treaty. I shall begin by considering the Claims/Assets Agreement[1] — the Agreement that was initialled by Secretary Blumenthal on March 9, 1979 and signed by past Secretary Kreps on May 11. On the one hand, this was a settlement of claims that American citizens had for the taking of property as a result of the Chinese Revolution, and on the other, of claims that China and its citizens had against the United States arising out of the blocking of Chinese assets in the United States as part of the Treasury Department program that followed the hostilities in Korea. Under the agreement, China agreed to make a payment in cash of $80.5 million in full and final settlement of the property claims. On October 1, 1979, $30 million was to be paid and the balance would be paid in five equal installments of $10.1 million each year thereafter on October 1. The United States, for its part, agreed to unblock by October 1, 1979 all the assets frozen under the China assets program.

To put this agreement into perspective, we started with $192 million in claims adjudicated by the Foreign Claims Settlement Commission[2], settling for $80 million in payment of those claims. From the point of view of American claimants, that does not look very great. It averages about 40¢ on the dollar with no interest payment and no inflation factor. From the Chinese point of view, however, I imagine that looks like a very substantial contribution to normalization. It represents a lot of money for a country that has limited foreign exchange assets. After all, they had no part in the unilateral process by which those claims were adjudicated and told us very firmly that they did not accept those figures at all. From the American view, if one looks at the payment terms — the fact that there is no assignment of

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1. *Agreement Between the Government of the United States of America and the Government of the People's Republic of China Concerning the Settlement of Claims*, 17 INT'L LEGAL MATS. 551 (1979). For text, *see* Appendix-Selected Documents p.131 *infra*.

2. The Foreign Claims Settlement Commission of the United States, a domestic agency created in 1954 by the President's Reorganization Plan No. 1 of 1954, is a permanent body to which there can be assigned jurisdiction over claims of the United States and its nationals under any claims agreement.

assets, that the money is paid in cash over a short period of time compared to other settlements with communist countries in Eastern Europe — the settlement looks quite favorable.

The question naturally arises: why were we able to achieve a settlement as satisfactory as this one? I think the key probably lies in the Chinese analysis. They regarded this issue as a matter of no great significance. The Secretary of the Treasury had made it very clear, however, that although this was not a major matter, it was a matter that had to be settled. Settlement of this question was an absolute precondition to moving forward with the normalization of economic relations between our two countries. The Chinese understood and accepted this as a matter of political reality. They felt that this settlement would not be significant over a long term compared with the benefits of technology, capital and trade that they would receive through normalized relations.

There is one last point I would like to discuss on the Claims/Assets Agreement, and that is the only other commitment we made. The United States has agreed to try to collect certain information and to provide assistance to the Chinese in identifying their blocked assets to the extent we can do so, consistent with U.S. law and policy. This is not an open-ended undertaking, but we will do the best we can under the circumstances. The legal problems facing the holders of assets and those who try to collect the assets will be substantial.

I would like to turn now to the termination of the Defense Treaty with the Republic of China.[3] On Wednesday, June 6, 1979, Judge Gasch issued a decision on the Government's motion to dismiss the complaint, and the Senate of the United States also took action on the same issue. The Judge concluded that Senator Goldwater, and the other congressional and senatorial plaintiffs associated with him, lacked standing at this time to bring the action challenging the legality of the President's notice of termination. He concluded that they had not demonstrated the necessary injury in fact to establish standing because they had an alternative remedy which had not been exhausted in the Senate and in the Congress of the United States. The opinion has a lengthy discussion of the facts and of standing. Then, in a very very brief paragraph, Judge Gasch intimated that he believed that the power to terminate treaties is a power shared by the political branches of this government, namely the President and the Congress. Since the plaintiffs' rights were derivative from the institutional interests of the Senate and the Congress as a whole, and the Congress had not yet asserted its prerogatives in this particular context, plaintiffs had to seek a remedy in Congress. If the

3. Mutual Defense Treaty Between the United States of America and the Republic of China, [1954]. 6 U.S.T. 433, T.I.A.S. No. 3178.

Congress or the Senate were to ratify, in effect, the termination, the case would be moot. On the other hand, the judge implied that if they took measures falling short of that, then the issue would be ripe for judicial disposition.[4]

Since the decision was based on the lack of standing the opinion does not address many of the difficult issues. First, there is no discussion of the political question doctrine which occupied a large portion of the briefs on both sides. There is no discussion of diplomatic recognition or presidential power incident thereto. There is no analysis — not even a mention — of the substantial question relating to the differences or similarites between the law-making power and treaty-making power. In addition, the treatment of the precedents, which is extremely brief, does not address the issues developed in the briefs.

In the meantime, the Senate Foreign Relations Committee, with the help of Professor Henkin, reported out a resolution, which was a very sophisticated, comprehensive treatment of the subject of treaty termination. Among other things, it recognized that there is a large area of executive responsibility in treaty termination with which the Congress could not effectively compete. Such situations include an executive judgment as to the continued validity of a treaty because of changed circumstances, material breach, some change in the character of the parties, or other reasons which would result in the suspension or abrogation of treaty obligations without formal termination of the treaty.[5] The proposed resolution asserted, on the other hand, the Senate's prerogative, disputed by the Executive branch, to attach to any particular treaty a reservation or condition requiring advice and consent of the Senate to treaty termination. That does not do full justice to the resolution, but it gives an idea of its scope and thrust.

Senator Harry Byrd moved to substitute his original resolution which stated the belief of the Senate that its advice and consent is required to terminate any mutual defense treaty. That motion to substitute the original resolution for the one reported by the Committee was carried by a very substantial majority, 59–35. Although this action was not the final vote, certain concerns were raised, both with respect to Judge Gasch's opinion and the whole problem of normalization of relations with the People's Republic of

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4. For a discussion of the Goldwater v. Carter decision, *see* p. 68 infra.

5. The Restatement of Foreign Relations Law suggests that an international agreement may be terminated in accordance with provisions included for that purpose in the agreement, by consent of the parties, by hostilities between the parties, by violation of the agreement, or by the disappearance of a state. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 159–63 (Proposed Official Draft, 1962).

China. Senator Church then introduced an amendment to the Byrd resolution which would exclude from the scope of the resolution any notice of treaty termination transmitted prior to the adoption of the resolution. That amendment was not voted on; it will be voted on on Monday and then the resolution itself will be brought to a vote. The case in the District Court might turn on the action that the Senate takes. We are confident, however, that whatever action the Senate takes on Monday, Presidential power to terminate the Defense Treaty with Taiwan will be confirmed on appeal.

I would like to discuss very briefly some of the main lines of the argument. The Constitution is silent on the question of treaty termination. There is no constitutional history that is very helpful. There are no adjudicated cases that dispose of the issue. So the main sources of legal argument, apart from constitutional exegesis, are the views of the commentators and treaty practice. The authorities who had written on this subject at the time the President had to make his decision were almost unanimous in support of presidential power in this area.[6]

Even though the Constitution is silent on this issue, it is striking how small a problem it has been in the development of our political democracy. In some ways the issue is not nearly as important constitutionally as some people make it out to be. We have had, by plaintiff's count, fifty-odd incidents of treaty termination out of thousands of international agreements made over the years. By our count we have had half that many. The difference is because, in one case, a statute forced the termination, effectively, of twenty-five treaties based on one legislative action. Of the twenty-five incidents that we count, twelve were taken by executive action without any authorization by Congress or by the Senate. Ten of the twelve occurred in the twentieth century beginning with President Coolidge and several treaties were terminated in the Roosevelt administration.

So we think the treaty practice, such as it is, supports our position. I find it difficult to understand how the Supreme Court could reach a different conclusion on that point. There are, however, other considerations that are more compelling in this particular case and in terms of treaty termination generally. It is uncontested that the President in his constitutional authority for the conduct of U.S. foreign relations has unqualified power to determine questions of recognition and diplomatic relations.[7] If there is any area of

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6. *Id.* at § 167. *See also* the various works of Professor Myres S. McDougal, Sterling Professor of Law, Yale Law School.

7. U.S. CONST. art. II, § 3.

Presidential power which is exclusively that of the President, it is that area. As you all know, the Supreme Court in the *Belmont*[8] and *Pink*[9] cases, following the resumption of diplomatic relations with the Soviet Union and the *Litvinov* assignment, concluded that the recognition power extended to the point of authorizing an executive agreement which overrode Fifth Amendment property interests and the public policy of New York State respecting the extraterritorial applications of foreign expropriation decrees.

Although the State Department believes those cases are good law, we do not have to prove so much in this case. This treaty is a defense treaty. Termination does not involve any property interests; it does not involve questions of state law; it does not involve any self-executing provisions affecting private rights. It involves a political issue at the heart of the foreign affairs and defense powers of the President. Moreover, the treaty in Article X provides for termination on one year's notice by either party. Therefore, our view is that when the Senate gave its advice and consent to ratification, it understood that the treaty could be terminated in the normal way treaties had been terminated in this century — by Presidential action. The President is reponsible for executing the law; he administers and implements treaties. One aspect of treaty administration ought to be providing the notice of termination as authorized by Article X of the treaty.

Of course, there is another side to the question. The basic thrust of the argument on the other side is that the President cannot terminate legislation without the consent of the law-making body. Therefore, he should not be able to terminate treaties without the consent of the body that participated with him in making the treaty. The argument becomes a little difficult because the plaintiffs have the burden of showing how the Senate can take any legal action without participation of the House except as expressly provided in the U.S. Constitution. Some people think the better procedure is action by a joint resolution of both houses, signed into law by the President, but the House has no constitutional role in treaty making and can claim none in treaty termination.

There is a more basic analysis. Treaty power and law-making power are two very different functions under the Constitution. Congress is the primary actor in the law-making power. The President has only the veto which Congress can override. In the case of treaties, it is the other way around. The President decides when to negotiate and when to conclude a treaty. Once the advice of the Senate is given, it is the Presdient who decides whether to proceed to ratification and when to do so. In our view he also has the authority to terminate the treaty.

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8. United States v. Belmont, 301 U.S. 324 (1937).
9. United States v. Pink, 315 U.S. 203 (1942).

There is a further question — a distinction that can be made between this treaty and other treaties. It is conceivable that there might be a treaty which is the supreme law of the land in the sense of Article VI of the U.S. Constitution that establishes private rights which affect property interests and other private rights. Those considerations are not relevant here where you have a treaty which operates only in the international sense. It is ironic that some of those who now question the President's authority to terminate a defense treaty are the very people who question the Congress' power to limit the President's ability to make war.

COMMENTS

*Senator Bob Dole**

Any westerner attempting to understand China is confronted with a culture and philosophy far different from his own. Seemingly routine questions become complex issues and for this reason, China remains an enigma to the West.

Though difficult, understanding and dealing with China has been crucial to the United States ever since we began to look beyond our own borders over a century ago. Having tried to ignore the People's Republic of China (P.R.C.), we have isolated ourselves from one quarter of the world's population. The time has come to direct our energies to seizing every opportunity for building constructive U.S.-Chinese relations. It is imperative that this involve both the P.R.C. and Taiwan; this is the only way by which we can incorporate all the global realities with which we must deal, and which are vital to our national interests.

The Administration made the mistake of muddling together the two separate issues of normalization of relations with the P.R.C. and our continued relationship with Taiwan. While properly recognizing the benefits of normalization, President Carter failed to take into account the consequences of breaking off relations with Taiwan. Congress was left to do what it could to rectify the errors made by the President. In order to see the separate issues involved, I would first like to discuss normalization and then the Taiwan issue. I will follow with an outline of how the Congress was able to

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* Republican Senator representing the State of Kansas.

make the best of the resulting situation, concluding with a reflection on the lessons learned in the process.

Normalization of relations with the P.R.C. is highly desirable, but it is neither a panacea for our problems with the Soviets, nor a guarantee of stability in Asia. While normalization has much to recommend, a frank discussion must also address the limitations of its merits.

One of the often cited benefits of normalization is the value of this U.S.-China "alliance" in strengthening our bargaining position with the USSR. Normalization does give us added flexibility in dealing with the Soviets, but it would be foolhardy to use this "alliance" as the cornerstone of our policy towards the USSR. There are two factors which must be considered when estimating the worth of the "China card." The first of these is the instability of Chinese politics, evidenced by the repeated purging of Deng Xiaoping, the architect of normalization. The second factor which must not be forgotten is that our interests will not always coincide with those of the Chinese, nor will they necessarily be in opposition to those of the USSR.

Given these factors, it would be prudent to recognize that the "China card" is an "ace in the hole" only occasionally and is dependent on the game in play. The "China card" should be utilized as effectively as possible, but we must remain cognizant that at any time it could become inoperative.

A second welcome benefit of normalization is the increased opportunity for U.S.-China trade and the concomitant understanding between our peoples that more frequent interaction will bring. The Chinese market offers tremendous long-range potential deriving from two sources. The Chinese market is both huge (one quarter of the world's population) and desperately in need of western technology. While cultivating the P.R.C. market, however, we must not lose the Taiwan market, currently seven times larger than the former.

While the benefits of normalization are indeed considerable, President Carter's decision to sever diplomatic relations with the Republic of China (R.O.C.) has some far-reaching consequences. Perhaps the worst part of the Administration's China move was the manner in which it was done. Last year I introduced the Dole-Stone amendment along with Senator Stone of Florida. This amendment, which passed the Senate by a vote of 94–0 and was subsequently signed into law,[1] expressed the sense of the Congress that the executive branch should consult with the Senate prior to any policy changes affecting the Mutual Defense Treaty of 1954 with the Republic of China.[2] By conducting the negotiations with the P.R.C. and agreeing to terminate the

1. Pub. L. No. 95–384, 92 Stat. 746 (1978).
2. [1955] 6 U.S.T. 433, T.I.A.S. No. 3178.

Mutual Defense Treaty without consulting the Congress, the President directly contradicted the will of the Congress and the law of the land.

The repercussions from abandoning a loyal and consistent ally are staggering. The decision to abandon Taiwan seriously undermines our credibility in other countries which are dependent on U.S. support. When this action is coupled with the Administration's lack of resolve in Iran and its plans for withdrawal of troops from Korea, it is no wonder that our allies have begun to question our commitment. We have always tried to honor our agreements, and any nation which conscientiously upholds its agreements with us, as the Republic of China has done, has the right to expect that these agreements will not be terminated unilaterally and without warning. Unilateral termination of this kind hardly befits the leader of the Free World.

Since coming into office, President Carter has repeatedly vowed to protect human rights. By leaving Taiwan in the lurch, he sacrificed the rights of the Taiwanese people for the sake of expediency. Taiwan is a sovereign nation and as such, the rights of the people of Taiwan should be protected. A people who have struggled for thirty years to maintain their freedom deserve strong support from the leader of the Free World.

President Carter received no concessions from the P.R.C. in return for normalization. The terms to which he agreed were available to Presidents Nixon and Ford. Indeed, the President's actions in the normalization are a textbook lesson in how not to negotiate. This refusal to seek significant concessions is made more disturbing by its regularity. The same type of unilateral concession has been seen, vis-à-vis the Soviet Union, in the cancellation of the B–1 bomber, the deferment of the MX missile and neutron bomb, and the decision to withdraw troops from Korea. This error was compounded by not consulting the Congress in contravention of the Dole-Stone amendment and by breaking relations with the R.O.C. when the Congress was not even in session. As a result, Senator Goldwater filed a suit, which is still outstanding, contending that the termination of the Mutual Defense Treaty without the advise and consent of the Senate was illegal[3] While I concur with Senator Goldwater, as evidenced by my introduction of a resolution condemning the President's actions, I chose to pursue a legislative, rather than a judicial remedy.

Presenting the normalization package to Congress, President Carter attempted to convince the legislature that it should not be tampered with. Fortunately, the Congress insisted on several amendments which have

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3. For a discussion of the Goldwater v. Carter decision, *see* p. 68 *infra*. *See also* text of the Feldman article *supra* at 55.

succeeded in making the best of a bad situation. These amendments might not have been necessary if the Senate had been involved in prior consultation. Obviously, the Administration had no idea of the degree of opposition its legislative package would encounter.

The initial Taiwan legislation submitted by President Carter had three major shortcomings: a) it was not clear that we could or would intervene in the event of a threat to the R.O.C.; b) while the P.R.C. indicated it would not use force to unify the mainland and Taiwan in the near term, the inimical effects of economic and political coercion were not recognized; and c) the provisions for governmental relations between the United States and Taiwan were weak and detrimental to our continued relationship in the future.

When the Congress first convened in January, I proposed two bills dealing with Taiwan. The first of these, Senate Resolution 13,[4] made certain security guarantees to the R.O.C. that it would not be abandoned by the United States. The bill expressed the sense of the Senate that:

> 1. The United States does not condone the use or threat of force to unify the P.R.C. and the R.O.C;
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> 2. The United States does not recognize the right of either the P.R.C. or the R.O.C. to use the threat of use of force to subvert the other;
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> 3. The United States should assist the R.O.C. against any act of aggression directed against it by the P.R.C.;
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> 4. The United States should interpret any interference with commercial, cultural, military or economic assistance programs between the United States and the R.O.C. as an unfriendly act and should react accordingly; and
>
> 5. The United States should attempt to prevent the expulsion of the R.O.C. from international organizations.

Though Senate Resolution 13 was never enacted, many of its provisions were incorporated into the Taiwan Enabling Act.[5]

The Congress made it explicit in the Taiwan Enabling Act that we will continue to guarantee the security of Taiwan. While this is not as strong a guarantee as the Mutual Defense Pact, it does provide assurances that Taiwan will continue to be defended against an attack from the mainland. Furthermore, this U.S. guarantee would include attempts by the P.R.C. to

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4. S. Res. 13, 96th Cong., 1st Sess. (1979).

5. S. 245, 96th Cong., 1st Sess. (1979). The House version of the bill was subsequently passed into law. Taiwan Relations Act, Pub. L. No. 96-8, 93 Stat. 14 (1979). *See* Appendix-Selected Documents p. 114 *infra*.

topple the Taiwanese government through economic and political coercion. This ensures that the P.R.C. will not be able to dominate Taiwan by trade boycotts or by excluding it from international organizations vital to its continued relationships and commercial transactions with the rest of the world. The second bill I introduced, Senate Bill 8,[6] would have authorized the President to extend diplomatic privileges and immunities to any principal liaison office established by the R.O.C. in Washington. Again, though this legislation was not enacted, the goals it sought were met. The language regarding U.S.-Taiwan relations was strengthened so that we have official relations in all but name. Though I still am not convinced that President Carter bargained with sufficient diligence on this issue, I do believe that the Congress has made the best of a poor situation. In all, our relations with Taiwan will be conducted much as they once were.

In order to outline the process by which the Foreign Relations Committee's new version of the Taiwan Enabling Act was amended during floor debate by the Senate, I would like to cite some of the amendments I proposed. Some of these were adopted, some were rejected, some were combined with or dropped in favor of similar amendments by others, but all contributed to the process of making an acceptable agreement. Through this process, many members of the Senate were able to substantially alter the terms of the Acts, thereby strengthening ties with Taiwan.

The first of these amendments would have substituted the word "Taiwan" for the words "people of Taiwan" throughout the bill. This amendment would have corrected an unnecessary pretense that we are not dealing with a legal entity or government on Taiwan. The rejection of this amendment does not alter the fact that the government of the Republic of China is a legal entity, for facts cannot be altered merely by being unrecognized.

I merged several of my amendments with similar ones by other Senators. This strategy illustrates how the spirit of compromise works in the legislative process to build a mounting consensus. By lining up support behind worthy amendments, rather than quibbling over irrelevant details, the Senate brought about important changes. Such amendments included specifications that the United States will oppose the use of economic coercion to subvert the R.O.C. and attempts to expel the R.O.C. from international organizations.

I cosponsored with Senator Hollings an amendment which guarantees that "Twin Oaks," the former site of the R.O.C. embassy in Washington, will continue to belong to the R.O.C. The adoption of this amendment ensures the preservation of this living symbol of the friendship between the United States and Taiwan.

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6. S. 8, 96th Cong., 1st Sess. (1979).

In an attempt to provide for Congressional input into the American Institute in Taiwan, I proposed that the Director's appointment be subject to the advice and consent of the Senate. This was proposed with the aim of safeguarding the principles of advice and consent set forth in the Constitution. The tabling of this amendment was indeed unfortunate in view of this Administration's record on Taiwan.

In order to keep the Congress informed on the security of Taiwan, I proposed an amendment requiring the President to report to the Foreign Relations Committee all requests for arms sales from the Taipei authorities. The passage of this amendment guarantees congressional oversight in this vital matter regarding the physical security of Taiwan and our own national security interests.

A final source of concern to me is that the P.R.C. has signed neither the Nuclear Test Ban Treaty[7] nor the Nuclear Non-Proliferation Treaty.[8] I have introduced a bill, which stipulates that any nonmarket-economy nation which has not signed these treaties will not be afforded most-favored nation treatment.[9] China continues as the only nation in the world that engages in atmospheric explosions since France stopped in 1974. Fallout from Chinese nuclear explosions has periodically endangered the health of the people of the United States. Similarly, there is a responsibility to prevent the proliferation of nuclear arms. We in the Congress have an excellent opportunity to express to China and the world our firm resolve and sincere belief in the international efforts towards arms control and nuclear non-proliferation. We should capitalize on this opportunity since a similar one may be long in coming.

Our recent experience in the Chinese arena presents us with a foreign policy lesson but it remains to be seen if it has been learned. The art of compromise calls for concessions from all sides. It is not a good bargaining technique to enter negoitations with a determination to meet your opponent's demands without getting significant concessions in return.

Foreign policy must be perceived as a cohesive whole. Failure to take into account all factors involved can result in grievous errors. On all matters in which the eventual participation of the Congress is requisite, prior consultation can eliminate much controversy and aid in the formulation of better policy. Despite dire warnings to the contrary by the State Department, the Senate insistance on stronger language in our legislative commitment to Taiwan was, in fact, accepted by the People's Republic of China. This

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7. [1963] 14 U.S.T. 1313, T.I.A.S. No. 5433, 533 U.N.T.S. 365.
8. [1968] 21 U.S.T. 483, T.I.A.S. No. 6839.
9. S. 417, 96th Cong., 1st Sess. (1979).

experience has shown how Congressional input may result in better policy, fewer setbacks to Administration goals and greater security for long-term national interests.

COMMENTS

*Senator John Glenn**

When President Carter decided to normalize relations with the People's Republic of China (P.R.C.), neither Senator Glenn nor anyone else in the Senate was consulted. All of the Senators had previously been briefed and consulted on the fact that normalization with the P.R.C. was the U.S. negotiating position. Most of them, including Senator Glenn, agreed with that position, with the provision that the P.R.C. would renounce the use of force against Taiwan. The United States did not, however, ask for the P.R.C. to renounce the use of force in the final negotiations. Senator Glenn was informed about the normalization and this significant provisional change two hours before the announcement by the President. He was *told — not* consulted.

Once that had happened, Senator Glenn took a very pragmatic approach to the treaty. Everyone recognizes the President's role in foreign policy of recognizing governments. At that point, Senator Glenn's whole strategy was to try to get the best treaty that could be obtained after negotiations with the P.R.C. by the executive branch.

From Senator Glenn's perspective on the Committee on Foreign Relations, the treaty was very flawed. The general comment from the lawyers on the committee was that there were great problems with the treaty, especially with the ambiguity of some of its parts. Additionally, it was agreed that the treaty had been drawn up in haste. There were a number of issues, particularly in the economic area, that just had not been covered at all. Everyone on the committee, and particularly Senator Glenn, feels that the lawyers (Victor Li for one, who was brought in as a consultant to the Foreign Relations Committee, as well as a whole host of Washington law firms)

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* Democratic Senator from the State of Ohio. Senator Glenn's presentation was made by Carl Ford who is a professional staff member on the Senate Committee on Foreign Relations.

played a vital role in trying to straighten out what was clearly a difficult problem with the economic sections of the treaty. Examples are the definition of the "people on Taiwan," and a number of other provisions that were written, not by the committee, but by legal scholars and law firms who were brought in by the Committee at the last minute to try to work out some of these problem areas. The most convincing argument was made by a lawyer from Taiwan's Chamber of Commerce, who made a very strong and emotional pitch for the need for refinements and fine tuning in the treaty provisions. Thus, with the help of the legal community, Congress greatly improved the bill.

From the perspective of Senator Glenn's staff, the important role for us now is congressional oversight and to insure that the Taiwan Institute and the American Institute in Taiwan works. There have been similar institutions developed by the Japanese and other countries but the Institute is a new venture for everyone. Many problems will arise that we did not foresee when the Enabling Act[1] came before the Senate and the Congress. Also to be worked out are some economic problems in terms of trying to talk with the Taiwanese. The Senator plans to have hearings and in December or January will probably initiate a Subcommittee[2] investigation of the Institute to see how it is doing so far.

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1. Taiwan Relations Act, Pub. L. No. 96-8, 93 Stat. 14 (1979). *See* Appendix-Selected Documents p. 114 *infra*.

2. Subcommittee on East Asian Affairs.

NOTE: PRESIDENTIAL POWER TO TERMINATE TREATIES WITHOUT CONGRESSIONAL ACTION

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

On December 23, 1978, President Jimmy Carter, through U.S. Deputy Secretary of State Warren Christopher, gave unilateral notice of termination of the 1954 Mutual Defense Treaty[1] with Taiwan [hereinafter referred to as the Treaty], to be effective January 1, 1980. The decision was made without the advice and consent of the Senate or the approval of both Houses of Congress.[2] Consequently, declaratory and injunctive relief was sought by eight members of the Senate, a former Senator[3] and sixteen members of the House of Representatives to bar termination of the Treaty. The plaintiffs contended that President Carter's unilateral notice of termination violated their legislative right to be consulted and to vote on the Treaty's termination, thus impairing the effectiveness of their original votes approving the Treaty.

In an opinion authored by Judge Gasch, the U.S. District Court for the District of Columbia on October 17, 1979 held that the advice and consent of the Senate or the approval of both Houses of Congress was necessary prior to the termination of the Treaty.[4] The Court rejected the President's jurisdic-

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* The following is a summary of the litigation history of Goldwater v. Carter. At the time the Conference was held (June 8–9, 1979), the termination of the Mutual Defense Treaty with Taiwan was a prominent issue. On June 6, 1979 — only a few days prior to the start of the Workshop — the District Court for the District of Columbia denied the plaintiffs' request to bar the termination of the Treaty, finding that the plaintiffs had not suffered the requisite injury in fact to maintain standing. Thereafter, on October 17, 1979, the District Court granted the plaintiffs' motion to alter the June 6th judgment and reversed its earlier decision. This summary will focus upon the October 17th judgment, the subsequent Court of Appeals decision and finally, the U.S. Supreme Court's grant of certiorari.

Editor's Note: This note is not an extensive analysis of Goldwater v. Carter but rather an outline of the major issues involved in the case as well as a description of the events which transpired prior to the U.S. Supreme Court's disposition of the case.

1. [1954] 6 U.S.T. 433, T.I.A.S. No. 3178.

2. U.S. CONST. art. II, § 2: "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 . . ."

3. The District Court ruled that former Senator Curtis did not have standing to be a plaintiff in this suit. Goldwater v. Carter, No. 78–2412, slip op. at 2, n.1 (D.C. Cir. October 17, 1979). Senator Curtis argued that the effectiveness of his prior vote in approving the Mutual Defense Treaty was impaired by President Carter's termination of the Treaty. In ruling otherwise, the Court stated, "An interest in ensuring enforcement or the proper administration of laws for which a legislator has voted is insufficient to confer standing."

4. Goldwater v. Carter, No. 78–2412, slip op. (D.C. Cir. October 17, 1979).

tional challenges before reaching the merits of the case, namely, that the plaintiffs lacked the requisite injury in fact to maintain standing and that the issue of treaty termination is a nonjusticiable, political question.[5]

Ruling that the plaintiffs had standing to bring the suit, the Court noted the criterion for standing[6] and focused on the injury in fact requirement.[7] The Court recognized the rule, established in *Kennedy v. Sampson*,[8] that congressional standing is "based upon the right of each individual legislator to participate in the exercise of the powers of the institution."[9] A member of Congress has suffered an injury in fact if he can show such an injury to the institution of Congress and as a consequence, has been injured as an individual legislator. Applying this rule, the District Court decided that Congress' inability to vote on the termination of the Treaty constituted the requisite injury in fact to the institution and the individual legislators.[10]

The Court then turned to the justiciability challenge and rejected the President's assertion that the termination of the Treaty was a political question within the textual commitment test of *Baker v. Carr*.[11] Since the Constitution is silent as to which branch of government is to terminate treaties, the Court found no "textually demonstrable constitutional commitment" upon which to base an inference that the executive had sole authority to terminate the Treaty.[12]

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5. *Id.* at 3.

6. The requirements for standing are: "1) injury in fact; 2) the interest asserted is within the zone of interest to be protected by the statute or constitutional guarantee in question; 3) the injury was caused by the challenged action; and 4) the injury is capable of being redressed by a favorable decision." Harrington v. Bush, 553 F.2d 190, 213–14 (D.C. Cir. 1977).

7. The President did not claim that the plaintiffs failed to meet the other three standing requirements. *See supra* note 6.

8. 511 F.2d 190 (D.C. Cir. 1974). *See supra* note 4, at 4.

9. *Id.* at 5.

10. *Id.*

11. 369 U.S. 186 (1962). Under the test of Baker v. Carr, a case is held to involve a political question if there is

> 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.

369 U.S. at 217.

12. *Supra* note 4, at 15.

The Court addressed the merits of the case after disposing with the above jurisdictional issues and held that the power to terminate a treaty is not within the executive powers of the President.[13] Rather, the conduct of foreign relations is a power shared by the executive and legislative branches.

> This conclusion is dictated by several constitutional factors: the status of treaties as the supreme law of the land, together with the obligation of the President to faithfully execute those laws; the implications to be derived from the constitutionally delineated role of the Senate in treaty formation; and the fundamental doctrine of separation of powers.[14]

Since a treaty is the supreme law of the land, termination of a treaty becomes equivalent to the repeal of a law, a legislative, not an executive, function. Any attempt by the executive to abrogate a treaty is therefore contrary to the obligation of the executive to "to take care that the laws are faithfully executed."[15]

The District Court also rejected the argument that the President's power to terminate a treaty arises as a necessary adjunct to the power to recognize foreign governments, supported by the landmark cases of *United States v. Belmont*[16] and *United States v. Pink*.[17] *Belmont* and *Pink* involved the propriety of the Litvinov Assignment, an international executive agreement providing that the Soviet claims to Russian assets in the United States would be assigned to the U.S. government and used to settle American claims resulting from Soviet nationalization decrees. Settlement of these claims had become a condition precedent to the establishment of diplomatic relations with the Soviet government. The Supreme Court held that the Litvinov Assignment was valid and superseded New York state laws and policy against confiscation of private property. Mr. Justice Douglas, writing for the Court in *Pink*, ruled that entering into the Litvinov Assignment was a "modest implied power of the President."[18] The District Court ruled that *Belmont* and *Pink* were not applicable to this case.

> The power to terminate a mutual defense treaty cannot be described as a "modest implied power of the President." A holding that the recognition

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13. *Id.* at 20–22.
14. *Id.* at 24–25.
15. U.S. CONST. art. II, § 3.
16. 301 U.S. 324 (1937).
17. 315 U.S. 203 (1942).
18. *Id.* at 229–30.

> power incidentally confers the power to make an executive agreement settling property claims and that such agreement has supremacy over conflicting state laws does not justify an incidental power to terminate treaties without congressional approval. The argument that any executive action becomes constitutional if it is ancillary to an act of recognition is without merit. If limitations imposed by other constitutional provisions exist, the recognition power cannot be used as a "bootstrap" to support the President's unilateral action in terminating the Mutual Defense Treaty with Taiwan.[19]

The Court concluded its decision by finding that congressional participation was required for treaty termination and by offering two alternative procedures to follow. Using as a basis the status of a treaty as the law of the land, the first alternative would require the approval of termination by a majority of both Houses of Congress.[20] The Congress should have the power to pass a statute which superseded an entire treaty since passage of a statute by the Congress which conflicts with an earlier approved treaty supersedes the treaty to the extent of the conflict.[21] The second alternative would require the consent of two-thirds of the Senate, a close analogy to the treaty-making power.[22]

On November 30, 1979, the Court of Appeals for the District of Columbia in a per curiam decision reversed the District Court upon the merits.[23] The Court held that the President had authority to terminate the Treaty in order to facilitate normalized relations with the People's Republic of China. It would have been unreasonable to hold the United States to the Treaty since Taiwan was no longer recognized as the legitimate government of China.[24]

Following the Court of Appeals decision, Senator Goldwater filled a petition for certiorari with the U.S. Supreme Court which the Court granted on December 13, 1979. At that time, the Supreme Court gave a memorandum decision, ordering the Court of Appeals' judgment vacated and remanding the case to the District Court with directions to dismiss.[25] The effective result of dismissal is to permit the action contemplated by the President — termination of the Mutual Defense Treaty with Taiwan.

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19. *Surpa* note 4, at 23.
20. *Id.* at 28.
21. *Id.* at 30, n.70.
22. *Id.* at 29.
23. 48 U.S.L.W. 2388 (D.C. Cir. 1979). In agreement with the District Court, the majority found that the plaintiffs had congressional standing.
24. *Supra* note 23, at 2389.
25. Goldwater v. Carter, 100 S. Ct. 533 (1979).

Mr. Justice Powell, in a concurring opinion, would have dismissed the complaint as not ripe for judicial review since Congress had taken no official action on the notice of termination by the President.[26] In a separate concurring opinion, Mr. Justice Rehnquist, joined by Chief Justice Burger, Mr. Justice Stewart and Mr. Justice Stevens, argued that the action was barred since treaty termination is a political question.[27] Justice Rehnquist used constitutional silence on treaty termination as the basis for finding the issue to be a political one, directly contrary to the District Court ruling that constitutional silence indicated that the issue was not a political question.

Mr. Justice Brennan was the only justice who approved of the President's termination of the Treaty. Supporting the judgment of the Court of Appeals, he stated

> Abrogation of the defense treaty with Taiwan was a necessary incident to Executive recognition of the Peking government, because the defense treaty was predicated upon the non-abandoned view that the Taiwan government was the only legitimate political authority in China. Our cases firmly establish that the Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes. That mandate being clear, our judicial inquiry into the treaty rupture can go no further.[28]

Dissenting in part, Justices Blackmun and White would have set the case for oral argument.[29] No opinion was expressed on the merits of the case.

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26. *Id.* at 533–534. "The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse. . . . If the Congress chooses not to confront the President, it is not our task to do so." *Id.* at 534.

27. *Id.* at 536. "In light of the absence of any constitutional provision governing the termination of a treaty, and the fact that different termination procedures may be appropriate for different treaties, the instant case . . . must surely be controlled by political standards." *Id.* at 537.

28. *Id.* at 539.

29. *Id.*