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**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 Treaty¹ 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 Senator³ 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-

* 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 standing⁶ 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

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

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.

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. *Surpa* 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.*