

# THE LEGISLATIVE ROLE IN TREATY ABROGATION

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## INTRODUCTION

The Constitution, which precisely dictates how a treaty is to be made, is silent as to how a treaty is terminated. Yet historical practice early established a system of joint Executive-Legislative collaboration in the repeal of treaties, by the use of statutes or resolutions authorizing Presidents to give notice to other countries of our intention to denounce or withdraw from certain treaties.

In fact, over the first 189 years of this Republic, at least 40 treaties have been terminated pursuant to legislation passed by Congress or the Senate. All of those treaties were abrogated under joint resolutions or Acts of Congress passed by the Senate and House of Representatives together, but for two which were repealed upon resolutions being approved by two-thirds or more of the Senate present.<sup>1</sup>

Gradually, but steadily, Presidents have eroded the historic tradition of shared responsibility between Congress and the Executive for the abrogation of treaties. It is the premise of this article that Congress as a corporate entity, or at least the Senate, should reaffirm its long-standing role in the treaty termination process at least by declaring its understanding of the method which the Constitution requires for the abrogation of treaties and calling upon the Executive for prompt information of each Presidential action purporting to remove our nation from a treaty obligation.

## CONTEMPORARY RELEVANCE OF TREATY ABROGATION POWER

The question of treaty abrogation has been dormant throughout most of our existence as a nation, except that it has exploded on occasion into a power contest between the two Houses of Congress or a race between the President and Congress to see who can out-position the other. Once, in the mid-1850's, public debate forced the Senate to justify its advice alone as being sufficient to enable the President to annul a treaty without the concurrence of the House.<sup>2</sup> A few years later, Congress collided with a strong President over his attempted withdrawal from a treaty absent the approval of either the Senate or House,<sup>3</sup> and occasional squabbles have taken place over Congressional efforts to order Presidents to furnish notice of termination of certain treaties against their will.<sup>4</sup> But, in general, there has been no controversy within or between

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1. See text accompanying notes 35-160, *infra*.
2. See text accompanying notes 48-52, *infra*.
3. See text accompanying notes 55-59, *infra*.
4. See text accompanying notes 69-71, 94-98, *infra*.

the political branches of our government regarding the right of Congress to participate in decisions to repeal a treaty.

The fact of the matter is that seldom has anyone even considered the question. Those few occasions when it has arisen have slipped out of current memory. In a contemporary environment where a mass media teaches that greatest attention should be given to the happenings of today with little regard or perspective as to what may have occurred in the past, it is not an exaggeration to observe that many Members of Congress and their staffs would be hard pressed to offer an opinion on the subject of the power to terminate treaties.

Yet the real conflict may erupt at any time. A politician's bravado may be just the catalyst for unknowingly igniting it at a moment of crisis. For example, in 1977, Senator Edward M. Kennedy of Massachusetts urged upon Secretary of State Cyrus R. Vance a many-faceted program for improving relations with the People's Republic of China which included tying recognition of the Communist government to abrogation of the Mutual Defense Treaty of 1954<sup>5</sup> between the United States and the Republic of China on Taiwan.<sup>6</sup>

Specifically, the proposal contemplated switching embassies from Taipei to Peking and considering our defense treaty with the ROC as having lapsed. It was apparently assumed by Senator Kennedy that the President can, at his own discretion and without any consultation with or approval from Congress, so decide that a treaty is terminated. The theory upon which the scheme rested is that after the United States should cut diplomatic relations with the ROC there would be no government left for us to deal with.

The fallacy of this notion is discussed below. The importance of Senator Kennedy's trial balloon for present purposes lies in its almost taken-for-granted assumption that the power to repeal treaties resides in the President independent of Congress. This assumption is especially noteworthy when one considers that news reports of the Kennedy speech identified officials of the State Department as having closely advised the Senator in the preparation of his statement.<sup>7</sup>

Thus, there is reason to believe the Kennedy proposal represents the unstated thinking of public officials other than himself, and it is critical that the idea be fully recognized for what it is, a bold assertion of unilateral Executive power. For regardless of what one's views may be on the issue of the nation's China policy, the claim that a President can abrogate a treaty at his discretion alone has implications which stretch far beyond the single issue of Sino-American relations.

If the President can unilaterally break the treaty with ROC, then he can withdraw the United States from the North Atlantic Treaty Organization<sup>8</sup> or any other treaty of his choosing. As we shall see, not even the fact that the proposed treaty denunciation would accompany an exercise of the recognition power gives it constitutional credibility.<sup>9</sup> Rather, the crux of the issue lies in determining where the Constitution has allotted the singular power of terminating treaties, regardless of what peripheral powers may be asserted.

5. 123 Cong. Rec. S 18500 - S 18503 (daily ed. Nov. 2, 1977).

6. Treaty of Dec. 2, 1954, 6 UST 433.

7. E.g., *The Washington Post*, Aug. 16, 1977, at A-1; *The Washington Post*, Aug. 17, 1977, at A-17; *The Boston Globe*, Aug. 16, 1977, at A-1.

8. 4 C. Bevens, *Treaties and other International Agreements of the United States of America* 828 (1970) [hereinafter cited as *Bevens*].

9. See text accompanying notes 211-219, *infra*.

This raises the question, if the President possesses the power to violate any treaty he wishes, what will become of the order and stability in which law is supposed to operate? What effect would it have upon the climate for world peace, for example, if the President of the largest and most powerful free nation should suddenly decide to violate the Outer Space Treaty of 1967,<sup>10</sup> which now prohibits us from placing in orbit around the earth objects carrying nuclear weapons? Or, what impact would it have upon a multitude of private rights if the President, independently of Congress, should attempt to withdraw from the Universal Copyright Convention?<sup>11</sup> These and other questions having a direct bearing on preeminent world political and economic issues arise out of the proposition that the treaty abrogation power is vested in the President unchecked by the Congress or Senate.

### INTENT OF THE FRAMERS

The answer to the basic question of how a treaty may be repealed is found in the text of the Constitution itself and in the construction which historical usage has given it; for, as will be discussed, there are virtually no court cases to speak of that contribute to an analysis of the fundamental issue and none that decide the matter.<sup>12</sup> It is true almost nothing was said at the Constitutional Convention or the state ratifying conventions about how a treaty is to be rescinded. But is well-known that the Framers were concerned with restoring dependability to our treaties and were anxious to gain the respect and confidence of foreign nations.<sup>13</sup> It would hardly instill confidence in other nations if a single officer of our government could abrogate a treaty at will without any check from another branch of government.

It is also beyond dispute that the Framers were worried the treaty power could be exercised to damage sectional interests.<sup>14</sup> Repeated flare-ups occurred at the Constitutional Convention in which various delegates expressed fears that their region might be harmed if treaties could be easily made. Spokesmen for the western settlers were afraid navigation rights on the Mississippi would be given away by a treaty,<sup>15</sup> and George Mason even suggested the treaty-making power could "sell the whole country" by means of treaties.<sup>16</sup> On the other

10. 18 UST 2410.

11. 25 UST 1341.

12. See text accompanying notes 167-186, *infra*.

13. In the preface to his notes on debates in the Constitutional Convention, James Madison deplores the "disheartening condition of the Union" in which "the Fedl. authy had ceased to be respected abroad" and identified several instances where treaties of the Confederation were violated. These depredations are catalogued by Madison among "the defects, the deformities, the diseases and the ominous prospects for which the Convention were to provide a remedy, and which ought never to be overlooked in expounding & appreciating the Constitutional Charter the remedy that was provided." 3 The Records of the Federal Convention of 1787, at 548-549 (M. Farrand ed. 1937) [hereinafter cited as Records]. The want of respect in our treaty relations is also identified as one of the most material defects under the Articles of Confederation in the Federalist Papers: "The treaties of the United States under the present Constitution are liable to the infractions of thirteen different legislatures, and as many different courts of final jurisdiction, acting under the authority of those legislatures. The faith, the reputation, the peace of the whole Union are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed. Is it possible that foreign nations can either respect or confide in such a government?" The Federalist No. 22, at 151. (Rossiter ed. 1961) (A. Hamilton) [hereinafter cited as The Federalist]. See also L. Kaplan, Colonies into Nations 149, 187-189 (1972).

14. For a detailed and thorough exposition of the preoccupation of the Framers with economic and sectional interests when treaty-making was debated in the Convention, see Bestor, Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined, 5 Seton Hall L. Rev. 527, 613-619 (1974).

15. 3 Records 306-307; Bestor, *supra* note 14, at 614-619.

16. 2 Records 297.

hand, many of the framers were preoccupied with the need for advantageous commercial treaties that would open up trade for their regions with other nations.<sup>17</sup> In particular, treaties of commerce, peace and alliance were identified as objects of interest by both groups of Framers.<sup>18</sup>

Thus, the Framers sought to give each section of the country an influence in deciding upon treaties because of their possible effect, either favorable or unfavorable, upon strong domestic economic or political interests in particular States or areas. It is logical to assume the Framers were as interested in protecting these same regional interests by making it difficult to revoke beneficial treaties as they were in protecting those interests by guarding against harmful ones. George Mason alluded to this situation when he warned against allowing one treaty to abridge another by which the common rights of navigation had been recognized to the United States.<sup>19</sup> The concept of having legislative deliberation in determining the issue applies with equal force to making or unmaking a treaty, and absent any specific evidence that the Framers meant to confer an untrammelled power upon the President in repealing treaties, it must be concluded the legislative body continues to have a role in the abandonment of a treaty as it does in making the treaty.

As the scholar-jurist, Supreme Court Justice Joseph Story, wrote in his *Commentaries on the Constitution of the United States* in connection with treaties, "his joint possession of the power affords a greater security for its just exercise, than the separate possession of it by either."<sup>20</sup> Story explains:

[I]t is too much to expect, that a free people would confide to a single magistrate, however respectable, the sole authority to act conclusively, as well as exclusively, upon the subject of treaties . . . there is no American statesman, but must feel, that such a prerogative in an American president would be inexpedient and dangerous.<sup>21</sup>

Story adds, in words having equal bearing upon repealing or making treaties:

The check, which acts upon the mind from the consideration, that what is done is but preliminary, and requires the assent of other independent minds to give it a legal conclusiveness, is a restraint which awakens caution, and compels to deliberation.<sup>22</sup>

One of the most striking features of the Constitution is its provision for checks and balances, including, as Arthur M. Schlesinger, Jr. has so eloquently demonstrated, a balance between presidential power and presidential accountability.<sup>23</sup> It would be remarkable if the Framers, without giving us any clues or

17. Bestor, *supra* note 14, at 613, 618.

18. 2 Records 392-394; 4 Records 44-46, 53.

19. 4 Records 58.

20. 1 J. Story, *Commentaries on the Constitution* §1507, at 360 (1833).

21. *Id.* at 359.

22. *Id.* In a similar vein, James Wilson said at the Pennsylvania ratifying Convention: "Neither the President nor the Senate solely, can complete a treaty; they are checks upon each other, and are so balanced as to produce security to the people." 3 Records 166. The people would lose the security of deliberation upon the subject of unmaking treaties, no less than they would lose security in the making of treaties, if no check were put upon the power of termination. Evidence as to why the Framers meant to offer security in the one instance but not in the other is notably absent in any of the writings by those who claim such a difference exists.

23. A. Schlesinger, Jr., *The Imperial Presidency* 465 (Popular Library ed. 1974).

indication that it was their intent, dropped this system of balance and accountability in a matter of such major importance as casting aside our formal compacts with other sovereign nations.

James Wilson, a signer of the Constitution, one of the original Justices of the Supreme Court and among the first American professors of law, believed faithful adherence to treaties among nations "is both respectability and power."<sup>24</sup> He instructed that a country "which violates the sacred faith of treaties, violates not only the voluntary, but also the natural and necessary law of nations . . ." and added:

As the United States have surpassed others, even other commonwealths, in the excellence of their constitution and government; it is reasonably to be hoped, that they will surpass them, likewise, in the stability of their laws, and in their fidelity to their engagements.<sup>25</sup>

It is difficult to believe the Framers, who regarded violation of "the sacred faith of treaties" as "wicked" and "dishonorable" and contrary to our best interests in gaining respect among other nations, would have made treaties repealable at pleasure of the President alone.<sup>26</sup>

This is not to infer the Framers would have been as excited about a defense treaty with a small republic 6,000 miles away as they were over treaties involving local fishing or boundary rights, but it is to indicate that the 1954 treaty with the ROC and all other U.S. treaties are protected by the same procedural safeguard as those treaties about which the Framers were especially sensitive. Since the text of the Constitution makes no distinction between different groups of treaties—it does not single out commercial or boundary treaties from treaties of alliance—the obvious conclusion is that treaties of whatever nature enjoy the same protective shield of joint executive-legislative deliberation before cancellation. If any one group of treaties is secured against repeal without legislative concurrence, then surely all treaties enjoy the same security absent any textual or historical evidence to the contrary. In other words, all treaties were to be dealt with in the same way.

It is reasonable to conclude the Framers assumed the President would not attempt to break a treaty on his own, since Article II of the Constitution mandates that the President "shall take Care that the Laws be faithfully executed."<sup>27</sup> In other words, the President must uphold the laws because the Constitution tells him to do so. And, Article VI of the Constitution spells out the fact that a treaty is every bit as much a part of "the supreme Law of the Land" as a statute is.<sup>28</sup> Therefore, the Framers would have expected future Presidents to carry out treaties in good faith and not to break them at their pleasure.

24. 1 *The Works of James Wilson* 166 (R. McCloskey ed. 1967).

25. *Id.* at 166-167.

26. *Id.* In the legislative session of South Carolina on calling a convention for considering the U.S. Constitution, C.C. Pinckney, a member of the Federal Convention, made an impassioned plea for maintaining the sacredness of treaties. He said "foreign nations declare they can have no confidence in our government because it has not power to enforce obedience to treaties," J. Elliot, 4 *Debates in the several State Conventions on the Adoption of the Federal Constitution* 278-279, 282 (1861) [hereinafter cited as *Elliot's Debates*]. See also the similar statements by Madison and Hamilton quoted in note 13, *supra*.

27. U.S. Const. art. II §3.

28. U.S. Const. art. VI, cl. 2.

That the Framers foresaw unmaking treaties in the same terms as they contemplated repealing a statute is clear in John Jay's brief analogy in the *Federalist*:

They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them . . . 29

A similar view is expressed in a book that can be found on nearly all Senators' desks, the *Rules and Manual of the Senate*. These rules still include a precedent set forth by Thomas Jefferson, who compiled the first manual of rules and practices of the Senate<sup>30</sup> when he was Vice President of the United States:

Treaties being declared equally with the laws of the United States, to be the Supreme Law of the Land, it is understood that an act of the legislature alone can declare them infringed and rescinded.<sup>31</sup>

The same parallel between laws and treaties was made by James Madison. On January 2, 1791, less than four years after the Constitutional Convention, he wrote a detailed exposition on treaties to Edmund Pendleton in connection with the Treaty of Peace with Great Britain, explaining:

That the Contracting powers can annul the Treaty can not, I presume, be questioned, the same authority, precisely, being exercised in annulling as in making a treaty.<sup>32</sup>

Madison added to this statement his belief:

That a breach on one side . . . discharges the other, is as little questionable; but with this reservation, that the other side is at liberty to take advantage or not of the breach as dissolving the Treaty.<sup>33</sup>

Madison then reached the point of examining what authority has the power to annul a treaty in the particular circumstances, thereby expanding on his earlier general comment that the treaty-making authorities are to exercise the power:

In case it should be advisable to take advantage of the adverse breach, a question may perhaps be started, whether the power vested by the Constitution with respect to Treaties in the President and Senate makes them the competent Judges, or whether, as the Treaty is a law, the whole Legislature are to judge of its annulment, or whether, in case the President and Senate be competent in ordinary Treaties, the Legislative authority be requisite to annul a Treaty of Peace, as being equivalent to a Declaration of War, to which that authority alone, by our Constitution, is competent.<sup>34</sup>

29. The *Federalist* No. 64, at 394 (J. Jay).

30. As to the enduring mark which Jefferson has left on legislative procedure by means of his parliamentary manual, see D. Malone, *Jefferson and the Ordeal of Liberty* 453-458 (1962).

31. Senate Manual, S. Doc. No. 93-1, 93d Cong., 1st Sess. 560 (1973).

32. 1 Letters and other Writings of James Madison 524 (1865).

33. *Id.*

34. *Id.* at 524-525; see entire letter reprinted at 523-526.

It should be noted that, in his careful analysis of the treaty abrogation power, Madison did not once consider the possibility of the President alone terminating a treaty, even where the other side had committed a breach of it, which offers an insight into what the Founding Fathers thought about the subject.

## THE HISTORICAL RECORD

### A. Early Precedents

Historical practice supports Jay, Jefferson and Madison. Far more often than not, the Senate, or the whole Congress, has exercised power to approve the termination of treaties. As a matter of fact, Presidents have usually come to Congress for its approval before giving notice of withdrawing from any treaty.

There are exceptions, but none support a wide open power of the President to annul any treaty he wishes. In particular, the United States has never repudiated a defense treaty with a friendly nation.<sup>35</sup> Nor has any President terminated a treaty that was not breached by the other party, was not in conflict with or supplanted by a later Act of Congress or another treaty, or that did not become impossible to perform due to changed circumstances not of our own making.

It is a little known but significant fact that the first treaties ever declared null and void by the United States were cancelled by Congress alone. These were the four French-American Treaties of 1778-1788.<sup>36</sup> Congress, acting through a public law, deemed them to be no longer binding on this country because they had "been repeatedly violated on the part of the French Government."<sup>37</sup> This step followed attacks by French warships on unarmed American merchant vessels and the infamous XYZ Affair in which the French sought to extract bribes from American peace negotiators.<sup>38</sup>

The abrogating Act of July 7, 1798, was approved by President Adams and to that extent there was Presidential consent. However, the statute did not call upon the President to give notice of abrogation and it appears Congress assumed no further act was necessary on his part. The U.S. Court of Claims later upheld the statute as having terminated both the domestic and international

35. V. Bite, *Precedents For U.S. Abrogation of Treaties* 1 (Cong. Research Service, Library of Cong., Feb. 25, 1974), reprinted in *Hearings on S. Res. 174 Before the Senate Comm. on Foreign Relations*, 93rd Cong., 2d Sess. 95 (1974). The French alliance was terminated in 1798 because of unfriendly and even quasi-war acts against the United States by France.

36. Treaty of Alliance with France, Feb. 6, 1778, 7 Bevans 777 (1971); Treaty of Amity and Commerce with France, Feb. 6, 1778, *id.* at 763; Agreement separate and secret declaring right of accession of King of Spain to treaties between U.S. and France, Feb. 6, 1778, *id.* at 781; Consular Convention with France, Nov. 14, 1788, *id.* at 794. The first three of these agreements were ratified for the United States by the Continental Congress.

37. Act of July 7, 1798, 1 Stat. 578. Congress' powers in the field of defense, commerce, and declaring war supported legislation on the termination of related treaties. The prevailing view in Congress was succinctly expressed by Mr. Sewall: "In most countries it is in the power of the Chief Magistrate to suspend a treaty whenever he thinks proper; here Congress only has that power." 8 *Annals of Congress* 2120 (Gales and Seaton ed. 1851). Mr. Dana agreed, explaining that breach of the treaties by the French "by the law of nations, puts it within the option of the Legislature to decide as a question of expediency, whether the United States shall any longer continue to observe their stipulations." *Id.* at 2123. The Senate vote approving the statute was 14 to 5. *Id.*, 7 *Annals*, at 588. The bill passed the House by 41 to 37. *Id.* 8 *Annals*, at 2127.

38. For virtually a day-by-day account of the XYZ Affair, see L. Baker, John Marshall 233-291 (1974).

aspects of the Franco-American treaties even though no Presidential notice had been given.<sup>39</sup>

This early precedent reveals an obvious recognition by President Adams of the legislative role in the abrogation of treaties, since he signed the law. It also was a concession by the Senate that, in at least some circumstances, the power to void treaties belongs to Congress collectively, and not solely to the President and Senate. And it stands as an indication of the method which Americans only a decade removed from the Constitutional Convention saw as the correct way to abrogate treaties.

The first instance of terminating a treaty by Presidential notice did not occur until 1846, 57 years after the government started operations. The agreement rescinded was the convention allowing Great Britain to share joint occupation with America of the Oregon Territory.<sup>40</sup> In response to strong pressure from the House of Representatives, President Polk recommended to Congress that he be given authority by law to provide notice of the convention's annulment.<sup>41</sup> There was extensive debate lasting several weeks in both the House and Senate, but it consisted mostly of partisan fights over the Oregon territory issue, not the constitutional question. There was some minority opinion that the President together with the Senate as the treaty-making power were the only appropriate authorities to annul a treaty, but it was generally assumed, and certainly endorsed in the votes for passage of a joint resolution, that the abrogation of a treaty is clearly a legislative duty, that cannot be performed constitutionally by any other power than the joint power of both Houses of Congress.<sup>42</sup> And so a joint resolution was enacted granting the requested power.<sup>43</sup>

39. "We are of opinion that the circumstances justified the United States in annulling the treaties of 1778; that the act was a valid one, not only as a municipal statute but as between the nations; and that thereafter the compacts were ended." *Hooper v. U.S.*, 22 Ct. Cl. 404 (1887, 11 AILC 164, 178) (Deak ed. 1975). The question of whether the President or Congress should make the notice was openly debated in the House. Mr. Gordon expressed the general recognition that "if this bill passed into law . . . it will be tantamount to a State declaration to annul a treaty . . ." 8 *Annals of Congress* 2122 (Gales and Seaton ed. 1851). Mr. Harper said he opposed any preamble listing the grounds for annulling the treaties because it is Executive "business to issue State papers." *Id.* at 2125. But Mr. Gallatin responded with the majority position, saying he "knew of no precedent of a Legislature repealing a treaty. It is therefore an act of a peculiar kind, and it appeared to him necessary that Congress should justify it by a declaration of their reasons." *Id.* at 2126. Thus, the majority voting for enactment of the law considered Congress to be the proper authority in the act of law-making to communicate notice.

40. *Convention on Boundaries with Great Britain*, 12 *Bevans* 40 (1974).

41. Message of Dec. 2, 1845, J. Richardson, 5 *A Compilation of the Messages and Papers of the President* 2235, 2242-2245 (1897) [hereinafter cited as Richardson].

42. House debate began on Jan. 5, 1846, and ended on Feb. 9, 1846. Senate debate began on Feb. 10, 1846, and ended on April 16, 1846. A minority report of the House Comm. on Foreign Relations was filed on Jan. 5, 1846, which took the position that only the treaty-making power (both the President and Senate acting together) can terminate a treaty, but it did not argue for Presidential power absent the advice and consent of the Senate. 15 *Cong. Globe* 138 (Blair and Rives ed. 1846). On Jan. 28, Mr. Thurman rebutted the minority report, saying it seemed to him "that nothing could be more clear than that this power was a power to be exercised by the Legislature." *Id.* at 273. Mr. Truman Smith, who signed the minority report, changed his position on Feb. 6, 1846, declaring that treaty termination "belonged to the two Houses of Congress." *Id.* at 331. Mr. Davis was virtually alone in arguing that the "legislative power could not abrogate a treaty any more than it could make one." *Id.* at 335. He was immediately rebuked by Mr. Reid, who asked: "What was a treaty? It was the supreme law of the land. Did the gentleman from Kentucky desire that the President should take into his hands the repeal of a law of the land." *Id.* In the Senate, Senators Mangum and Allen claimed the Senate and President together, not both Houses of Congress, held the power to annul treaties and then only upon a two-thirds vote of the Senate. *Id.* at 635, 680. Senator Berrien concurred with the minority view that the President had been bold in seeking authority from Congress without such a recommendation first having been initiated by advice of the Senate. *Id.* at 511. As Senator Mangum described the affront: "Why change the Senators into machines, to be acted upon by the wire-pulling power of the Executive?" *Id.* at 635. However, the dominant view upholding the power of Congress to legislate the repeal of a treaty by a joint resolution was proven by the favorable votes to pass exactly such a resolution, the vote being 40 to 14 in the Senate and 163 to 54 in the House. *Id.* at 349, 683.

43. H.J. Res. of April 27, 1846; 9 *Stat.* 109, 110.



The third time we withdrew from a treaty it was by a Senate Resolution<sup>44</sup> in 1855 unanimously advising and consenting to remove our commerce from what we believed were burdensome and oppressive duties under a commercial treaty with Denmark.<sup>45</sup> The resolution authorized President Pierce to give Denmark notice, as required in the treaty for its termination, and it was in response to the expressed wish of the President for such power.<sup>46</sup> President Pierce later publicly acknowledged he had given the notice "in pursuance of the authority conferred" by the Senate Resolution.<sup>47</sup>

Curiously, our government had used three different methods the first three times it had withdrawn from or denounced treaties as void. While the measures differed, the significant thing is that each approach required some form of legislative participation in the decision to cancel a treaty. In practice, an Act of Congress would never again be used without anticipating Presidential notice as the means of communicating our intention to the foreign government concerned and a Senate resolution would be used only once more. The joint resolution, followed by Presidential notice to the other country, would become the general vehicle for removing our nation from treaties that we no longer could or wished to enforce. On two occasions, Congress would also consent to adopt and ratify Presidential decisions after they had been proclaimed.

#### B. Senate Foreign Relations Committee Report of 1856

Publicity of the method used in abrogating the treaty with Denmark aroused a storm in Congress. Doubt was even raised in the Senate itself. But the controversy was not waged over whether the Senate had invaded a Presidential prerogative. Rather, the issue was whether the treaty should have been annulled by concurrence of the full Congress.<sup>48</sup>

In response to this debate, the Senate Foreign Relations Committee issued a report on April 7, 1856, strongly claiming for the Senate, acting together with the President, competence to terminate a treaty "without the aid or intervention of legislation" by the House of Representatives.<sup>49</sup> Specifically, the Committee asserted that "where the right to terminate a treaty at discretion is reserved in the treaty itself, such discretion resides in the President and Senate."<sup>50</sup> The Committee reasoned:

44. S. Res. of March 3, 1855, 33d Cong., 2d Sess., reprinted in 8 *Compilation of Reports of the Senate Comm. on Foreign Relations*, S. Doc. No. 231, 56th Cong. 2d Sess. 107 (1901) [hereinafter cited as S. Doc. No. 231]; 9 *Senate Executive Journal* 431 (1887).

45. *Treaty of Friendship, Commerce and Navigation with Denmark*, April 26, 1826, 7 *Bevans* 1 (1971).

46. *Message of Dec. 4, 1854*, 6 *Richardson* 2806, 2812.

47. S. Res. reprinted in S. Doc. 231, at 108; *message of President Pierce of Dec. 31, 1855*, 6 *Richardson* 2860, 2867-68.

48. See generally debates in Senate of May 8, May 10, 1856, 25 *Cong. Globe* 1147-1158 (Rives ed. 1856); and see especially remarks of Senator Sumner, *id.*, at 1147.

49. S. Rep. No. 97, 34th Cong., 1st Sess. (1856), reprinted in S. Doc. No. 231, at 107-108. It should be noted that the Foreign Relations Committee position was not adopted by the full Senate at the time. Senator James Mason, chairman of the committee, was defeated 16 to 20 in moving that the Senate proceed to the consideration of a resolution endorsing the Committee's conclusions. See brief on termination of treaties prepared by Herbert Friedenwald reprinted in *Hearings on Termination of the Treaty of 1832 with Russia before the House Comm. on Foreign Affairs*, 62d Cong., 2d Sess. (1911), at 300. In 1921, the Senate did in effect endorse the Committee's position and reaffirm the procedure it had used in terminating the Danish treaty when it gave its advice and consent to the denunciation of the International Sanitary Convention of 1903. See text accompanying notes 99-101 *infra*.

50. *Id.* at 110.

The whole power to bind the government by treaty is vested in the President and Senate, two-thirds of the Senators present concurring. The treaty in question was created by the will of the treaty-making power, and it contained a reservation by which that will should be revoked or its exercise cease on a stipulated notice. It is thus the will of the treaty-making power which is the subject of revocation, and it follows that the revocation is incident to the will.<sup>51</sup>

The Committee conceded that in certain cases it would be wise to have the concurrence of the House of Representatives in order to make the decision to annul a treaty more impressive upon the other government. Thus, the Committee took the position:

Although it be true, as an exercise of Constitutional power, that the advice of the Senate alone is sufficient to enable the President to give the notice, it does not follow that the joint assent of the Senate and House of Representatives involves a denial of the separate power of the Senate.<sup>52</sup>

In May, 1858, the Foreign Relations Committee boldly reaffirmed its position by changing a joint resolution, authorizing the President to give Hanover notice of termination of the commercial treaty of 1846, to a mere Senate resolution.<sup>53</sup> The treaty does not appear to have been denounced until 1866, however, when Hanover was absorbed into the Prussian Empire.<sup>54</sup>

### C. Congress Rebukes Lincoln

The first time a President openly attempted to terminate a treaty without any prior legislative approval was late in 1864, when President Lincoln notified Great Britain of our withdrawal from the Rush-Bagot Convention<sup>55</sup> regulating naval forces upon the Great Lakes.<sup>56</sup> This episode does not serve as a precedent for unilateral Presidential action because Congress rushed to defend its prerogative by passing a joint resolution based on the principle that Lincoln's conduct was invalid until ratified and confirmed by Congress.<sup>57</sup>

Senate debate was dominated by Senators who argued that the act of the President was wholly invalid until adopted by Congress. The prevailing view was expressed by Senator Garret Davis of Kentucky, who said:

It is indispensably incumbent and necessary, in order to secure the termination of this treaty, that it shall be terminated, not by the action of the President, but by the action of Congress.<sup>58</sup>

51. *Id.* at 111.

52. *Id.*

53. *Id.* at 123-124.

54. S. Crandall, *Treaties: Their Making and Enforcement* 426 (2d ed. 1916).

55. Rush-Bagot Agreement Regarding Naval Forces on the American Lakes with Great Britain of April, 1917, 12 Bevans 54 (1974).

56. *Bite*, *supra* note 35, at 103.

57. H.J. Res. of Feb. 9, 1865; 13 Stat. 568. The Rush-Bagot Agreement originated in notes exchanged between the U.S. and Canada in 1817 in the form of an executive agreement. However, the notes were submitted to the Senate for its advice and consent which was given in 1818, followed by a Presidential Proclamation. Because of this unusual background, some claim the notes are still an executive agreement, which casts further doubt on the significance of Lincoln's purported termination of the agreement as a precedent for Executive annulment of agreements whose character as treaties is unchallenged. See *Rush-Bagot Agreement*, *supra* note 55, at 54; H. Miller, 2 *Treaties and other International Acts of the United States of America* 645-649 (1937).

58. 35 Cong. Globe 313 (Rives ed. 1865).

Senator Charles Sumner of Massachusetts agreed that "the intervention of Congress is necessary to the termination of this treaty . . ." He explained that the legislation embodied the conclusion that since a treaty is a part of the law of the land, it is "to be repealed or set aside only as other law is repealed or set aside: that is by act of Congress."<sup>59</sup>

Congress did not wait long to reaffirm its position. By the joint resolution of January 8, 1865,<sup>60</sup> it charged President Lincoln with the duty of communicating notice of termination of the Reciprocity Treaty of 1854 with Great Britain.<sup>61</sup> Then Congress used the same legislative formula again in June of 1874, when it enacted a law<sup>62</sup> authorizing President Grant to give notice of termination of our Treaty of Commerce and Navigation of 1857 with Belgium.<sup>63</sup> The same law had the effect of terminating the Commercial Convention of 1863<sup>64</sup> with Belgium.<sup>65</sup>

Two years later, the same President sent a curious message to Congress appearing to acknowledge the need for a legislative role in the termination of treaties while asserting power to decline enforcement of a treaty he thought had been abrogated by the other party. Grant's message of June 10, 1876, regarding the extradition article of the Treaty of 1842 with Great Britain,<sup>66</sup> said:

It is for the wisdom of Congress to determine whether the article of the treaty relating to extradition is to be any longer regarded obligatory on the Government of the United States or as forming part of the supreme law of the land.<sup>67</sup>

He added, however:

Should the attitude of the British Government remain unchanged, I shall not, without an expression of the wish of Congress that I should do so, take any action either in making or granting requisitions for the surrender of fugitive criminals under the treaty of 1842.<sup>68</sup>

At most, this is a precedent for Presidential authority to consider a breach of a treaty by the other party as having suspended it by making enforcement impossible, subject to correction of the President's judgment by Congress.

#### D. Hayes Vetoes Law, But Concedes Legislative Role

In 1879, President Hayes recognized the joint power of Congress in terminating treaties, even though it was in the process of vetoing an Act of Congress. The legislature had passed a statute seeking to require him to

59. 35 Cong. Globe 312 (Rives ed. 1865). Actually the agreement was only temporarily suspended because Lincoln's action was subsequently retracted and it continued in force, without further action by Congress. W. McClure, *International Executive Agreements* 17 (1941).

60. 13 Stat. 566.

61. Treaty on Fisheries, Commerce, and Navigation in North America with Great Britain, June 5, 1854, 12 Bevans 116 (1974).

62. J. Res. of June 17, 1874, 18 Stat. 287.

63. Treaty of Commerce and Navigation with Belgium, July 17, 1858, 5 Bevans 454 (1970).

64. Commercial Convention of May 20, 1863, 5 Bevans 468 (1970).

65. U.S. For. Rel. 64-66 (1874).

66. Treaty on Boundaries, Slave Trade, Extradition with Great Britain, Aug. 9, 1842, 12 Bevans 82 (1974).

67. Message of June 20, 1876, 9 Richardson 4324-4327, especially at 4327.

68. *Id.* The provision of the treaty was in fact considered suspended for six months, but then continued in force. Crandall, *supra* note 54, at 464.

abrogate two articles of the Burlingame Treaty of 1868 with China.<sup>69</sup> He vetoed the bill on the ground that the legislation amended an existing treaty by striking out selected provisions of it. The power to amend treaties, he said, is "not lodged by the Constitution in Congress, but in the President, by and with the consent of the Senate . . ."<sup>70</sup>

Hayes also conceded that the "authority of Congress to terminate a treaty with a foreign power by expressing the will of the nation no longer to adhere to it is . . . free from controversy under our Constitution."<sup>71</sup> Thus, he made no claim of power for the Executive to annul a treaty without legislative approval, but rather upheld the traditional joint role of the President and Senate together to make or modify treaties.

In 1883, Congress passed another joint resolution reaffirming a legislative role in the termination of treaties. This law, the Act of February 26, 1883,<sup>72</sup> directed President Arthur to give notice of the termination of several articles of an 1871 Treaty with Great Britain.<sup>73</sup>

#### **E. Presidential Interpretation of Congressional Intent**

Occasionally, Presidents have given notice of our nation's withdrawal from a treaty on the basis of their interpretation of Congressional intent. This occurs when Congress passes legislation in conflict with a prior treaty, but does not specifically direct our withdrawal from the treaty. Since the President cannot enforce two equally valid laws which are in conflict, he is compelled to select the one which reflects the current will of Congress.<sup>74</sup> While the President may seem to be using his own power, he actually is fulfilling his duty to faithfully execute the laws by enforcing the latest expression of Congress on the subject.

An interesting example of this principle in practice is found in the events leading up to denunciation of certain parts of the 1850 Commercial Convention with Switzerland.<sup>75</sup> Following enactment of the Tariff Act of July 24, 1897,<sup>76</sup> the United States had entered into a reciprocity agreement with France under authority specifically granted to the President by that law. The Swiss government promptly claimed a right under the most-favored nation clause of the convention to enjoy the same concessions for Swiss imports as we had given French products.<sup>77</sup>

We responded that it was our long-continuing policy not to construe the most-favored nation clause as entitling a third government to demand benefits of a special trade agreement purchased by another party with equivalent concessions. In other words, we told the Swiss they could not receive something for nothing. If we made an exception in their case, it would embarrass us in relations with all other trading partners.<sup>78</sup>

69. Treaty of Peace, Amity, and Commerce, July 28, 1868, 6 Bevens 680 (1971).

70. Message of March 1, 1897, 9 Richardson 4466-4472.

71. *Id.* at 4470.

72. 22 Stat. 641.

73. Amity Treaty with Great Britain, May 8, 1871, 12 Bevens 170 (1974).

74. Presidential Amendment and Termination of Treaties: The Case of the Warsaw Convention, 34 U. Chi. L. Rev. 580, 592 (1967).

75. Convention of Friendship, Reciprocal Establishments, Commerce, and Extradition with Switzerland, Nov. 25, 1850, 11 Bevens 894 (1974).

76. 30 Stat. 151.

77. 5 Miller, *supra* note 57, at 902; U.S. Foreign Relations 740-757 (1899).

78. U.S. Foreign Relations, *id.*, at 740-741, 749, 750, 754-756.

Moreover, the 1897 Tariff Act had reaffirmed this historic policy. Section 3 specifically provided that the President is to negotiate commercial agreements "in which reciprocal and equivalent concessions may be secured in favor of the products and manufactures of the United States."<sup>79</sup> The President lacked authority to conclude agreements in which the other country made no concessions, and if he had yielded to the Swiss demand it would have been out of line with the clear policy of the law.

Thus, in the face of Switzerland's refusal to renegotiate the contested articles of the agreement, the State Department notified her that the provisions were arrested.<sup>80</sup> Although the State Department would later claim this action served as a precedent for independent Presidential power,<sup>81</sup> it would have been inconsistent with the trade policy set by Congress in the 1897 law and with unbroken precedents if Switzerland had been granted privileged treatment without making any compensating concessions.<sup>82</sup> In any event, President McKinley did not act in the total absence of any pertinent supporting statute.

#### F. Taft Seeks Ratification

Another action mistakenly asserted in support of Executive treaty-breaking is the effort of President Taft to head off passage by Congress of what he considered an inflammatory resolution calling for abrogation of the Commercial Treaty of 1832 between the United States and Russia.<sup>83</sup> Disputes had arisen with Russia as early as then over the treatment of Americans of Jewish faith,<sup>84</sup> and on December 13, 1911, the House of Representatives passed a strongly-worded joint resolution demanding termination of the treaty.<sup>85</sup> In order to beat action by the Senate, President Taft informed Russia on December 15 of our intention to terminate the treaty.<sup>86</sup>

On December 18, the President dutifully gave notice of his action to the Senate "as a part of the treaty-making power of this Government, with a view to its ratification and approval."<sup>87</sup> He openly recognized the need for the Senate and the President to act together in order to end an existing treaty and made no claim that his diplomatic notice would have any validity without legislative approval.

Both Houses of Congress passed a joint resolution, which the President signed on December 21, just three days after his message to the Senate.<sup>88</sup> The House vote was 301 to 1 and the Senate vote was unanimous, proving that the President's advance notice to Russia was a concession to recognized Congressional power, rather than a sign of independent authority of the President.<sup>89</sup>

Moreover, under the terms of the treaty, the nationals of both countries were entitled to reside and travel in the territory of each other to engage in

79. 30 Stat. 203.

80. The United States denounced the Swiss treaty by giving notice on March 23, 1899. U.S. Foreign Relations 756 (1899).

81. See text accompanying notes 109-113.

82. U.S. Foreign Relations 747 (1899).

83. Treaty of Commerce and Navigation with Russia, Dec. 18, 1832, 11 Bevans 1208 (1974).

84. See generally the catalogue of complaints of discrimination against American citizen Jews by Russia in Hearings on Termination of the Treaty of 1832 between the United States and Russia before the House Comm. on Foreign Affairs, and before the Senate Comm. on Foreign Relations, respectively, 62d Cong., 2d Sess. (1911).

85. H.J. Res. 166, 62d Cong., 2d Sess., 48 Cong. Rec. 353 (1911).

86. G. Hackworth, 5 Digest of International Law 320 (1943).

87. *Id.*

88. 37 Stat. 627.

89. Hackworth, *supra* note 86, at 320.

commercial activities. By imposing restrictions on Jews, Russia had violated the treaty. Thus, the case is an example of a President seeking legislative ratification even in the narrow situation where there is a breach by the other party.

#### G. Wilson and Harding Insist on Clear Congressional Intent

Congress again asserted its power in the Seamen's Act of March 5, 1915.<sup>90</sup> This law ordered President Wilson to notify several countries of the termination of all articles in treaties and conventions of the United States "in conflict with this act."<sup>91</sup> The notices were duly given and the authority of Congress to impose this obligation on the President was upheld by the Supreme Court in a case discussed below.<sup>92</sup> According to Wallace McClure, twenty-five treaties were affected.<sup>93</sup>

Then, in the Merchant Marine Act of 1920,<sup>94</sup> Congress directed President Wilson to give blanket notice of the termination of all provisions in treaties which imposed any restriction on the right of the United States to vary its duties on imports, depending upon whether the carrier vessels were domestic or foreign.<sup>95</sup> This time President Wilson rebuffed the legislature by announcing that he must distinguish between the power of Congress to enact a substantive law plainly inconsistent with entire treaties and the power to piecemeal call for the violation of parts of treaties. This law was not an effort to terminate treaties, he contended, but to modify them, which Congress could not do.<sup>96</sup> A memorandum prepared by Secretary of State Hughes for President Harding in October, 1921 also conceded the power of Congress to terminate entire treaties but only if it so provided in clear and unambiguous language. While Congress had called only for a partial termination in the Merchant Marine Act, the law would have had the practical effect of a total termination. If Congress actually intended to abrogate entire treaties, Hughes reasoned, it must say so in plain language.<sup>97</sup>

Presidents Wilson and Harding had refused to impute an intention by Congress that they should violate numerous treaties outright. There was no Presidential denial of the power of Congress to legislate the abrogation of treaties when "its intention is unequivocally expressed,"<sup>98</sup> and entirely absent was any claim for the Presidency of a power to terminate treaties without the shared responsibility of the Congress. Evidence of President Wilson's recognition of the essential role of Congress in the treaty annulment process is found in the fact that he first sought the advice and consent of the Senate before attempting to withdraw from the International Sanitary Convention of 1903.<sup>99</sup> Only after two-thirds of the Senate present had resolved to "advise and consent to the denunciation of the said convention" in May, 1921,<sup>100</sup> by

90. 38 Stat. 1164.

91. See §16, *id.* at 1184.

92. See text accompanying notes 170-173, *infra*.

93. McClure, *supra* note 59, at 23; Hackworth, *supra* note 86, at 309-317.

94. Known as the Jones Act, 41 Stat. 988.

95. 41 Stat. 1007, §34.

96. See position of President Wilson set forth in a Department of State press release of Sept. 24, 1920, reprinted in Hackworth, *supra* note 86, at 323-324. The Department of States believed at least 32 treaties would be violated, explaining the Executive reluctance to interpret the statute broadly. *Id.*

97. See memorandum prepared by Secretary Hughes for President Harding, Oct. 8, 1921, reprinted in Hackworth, *id.* at 324-326.

98. So conceded Secretary of State Hughes, see Hackworth, *id.* at 325.

99. Convention of Dec. 3, 1903, 1 Bevans 359 (1968).

100. S. Res. of May 26, 1921, 61 Cong. Rec. 1793.

which time Harding had become President, did the United States give notice of its intention to withdraw.<sup>101</sup>

### H. Modern Practice

This brings us up to more recent practice, some of which at first impression may appear to break with the almost universal prior practice of terminating treaties, and giving notice of intent to terminate, only following legislative approval or ratification. Starting in 1927, there are nine instances in which Presidents have given notice of the termination of treaties without receiving accompanying Congressional authority or seeking ratification.

Upon close examination, however, the recent record does not support an untrammelled power of the President to annul any treaty he wishes. In two instances the notice of termination was withdrawn and the United States did not denounce the treaties. Two other treaties were abrogated because they were inconsistent with more recent legislation of Congress, and one was plainly superseded by our obligations under a later treaty. The remaining four appear to have been annulled or suspended after it became impossible effectively to carry them out. In addition, there are five recent instances where notice has been given pursuant to Acts of Congress.

The following treaties are involved: In 1927, President Coolidge gave notice that the 1925 Convention for Prevention of Smuggling with Mexico<sup>102</sup> was terminated.<sup>103</sup> At the time, United States relations with Mexico were the subject of emotional debate in Congress regarding alleged religious persecution and the confiscation of American-owned private and oil lands in Mexico.<sup>104</sup> In the disruptive situation of the period, it appears to have been impossible to implement the Convention.

In 1933, President Franklin D. Roosevelt gave notice of termination of an extradition treaty with Greece.<sup>105</sup> But the notice was withdrawn and the treaty was not abrogated. The incident was triggered because Greece had refused to extradite an individual accused of fraud.<sup>106</sup> Thus, the President's proposed action was based on the fact the treaty had already been voided by breach of the other party.

Also in 1933, President Roosevelt terminated the 1927 Tariff Convention<sup>107</sup> as having a restrictive effect on the National Industrial Recovery Act of 1933.<sup>108</sup> Then, in 1936, he terminated the 1871 Treaty of Commerce with Italy<sup>109</sup> because its provisions would limit the President's ability to carry out the Trade Agreements Act Of 1934.<sup>110</sup> Citing as a precedent the termination

101. See Hackworth, *supra* note 86, at 322.

102. Convention of Dec. 23, 1925, 9 Bevans 949 (1972).

103. See Hackworth, *supra* note 86, at 329.

104. E.g., the Congressional Record of 1927 is replete with emotional speeches and inserts of materials discussing the unsettled situation in Mexico. See especially 68 Cong. Rec. 1645-1653, 1692-1701, 1880. In fact, President Coolidge claimed Mexico was smuggling arms and ammunition to the revolutionists in Nicaragua. *Id.* at 1873.

105. Treaty of Extradition with Greece, May 6, 1931, 8 Bevans 353 (1971).

106. McClure, *supra* note 59, at 17-18.

107. Convention on Abolition of Import and Export Prohibitions and Restrictions, Nov. 8, 1927, 2 Bevans 651 (1969).

108. 48 Stat. 195. The U.S. Government notice gave as the reason for withdrawal the fact that other nations had already withdrawn thus raising a fundamental change in circumstances as an additional ground for termination. See notice reprinted in McClure, *supra* note 59, at 18. That the provisions of the Recovery Act, which related to licensing imports and imposing embargoes, were clearly instrumental in moving the President to act is shown in the pertinent diplomatic papers. See U.S. Foreign Relations 784-786 (1933).

109. Treaty of Commerce and Navigation with Italy, Feb. 26, 1871, 9 Bevans 82 (1972).

110. Act of June 12, 1934, 48 Stat. 943.

of the Swiss commercial treaty in 1898, the State Department advised President Roosevelt he could withdraw from the treaty of 1871 "without seeking the advice and consent of the Senate or the approval of Congress to such action."<sup>111</sup> But his action arose directly out of and was tied to the 1934 trade law. The President would not have had a plausible claim of authority to act in the absence of the statute.

That law authorized the President to suspend beneficial duties to imports from any country discriminating against our exports. Since American commerce was being subjected to what the State Department described as "highly prejudicial treatment" by the trade control measures of Italy, the Department warned the President he "would be placed in the position of having to choose between the execution of the act and observance of the treaty."<sup>112</sup> In order to avoid being either forced to breach the treaty or ignore the statute, the State Department advised the President to notify Italy of our intention to terminate the treaty in compliance with its provisions. In this manner, he could and did comply with the trade law and the treaty at the same time.<sup>113</sup>

Each of the two preceding incidents represent examples of treaties which became inconsistent with prevailing legislation. The next occasion of Presidential initiative involved a treaty becoming inconsistent with another treaty. This was the case in 1939, when President Roosevelt terminated the Commercial Treaty of 1911 with Japan.<sup>114</sup> Although the Department of State had now expanded its justification of Presidential authority by advising President Roosevelt broadly that "the power to denounce a treaty inheres in the President of the United States in his capacity as Chief Executive of a sovereign state,"<sup>115</sup> President Roosevelt's authority clearly stemmed out of changed conditions resulting from acts of war by Japan toward allied nations. In fact, it was persuasively argued in the Senate that the President was *compelled* to denounce the 1911 Treaty with Japan because of our obligations under a later treaty, the Nine Power Agreement,<sup>116</sup> committing the United States to respect the territorial integrity of China. After the invasion of China by Japan, we would have aided in the violation of that obligation by adhering to the Japanese treaty.<sup>117</sup>

On October 3, 1939, the State Department gave notice of our intention to suspend operation of the London Naval Treaty of 1936.<sup>118</sup> Our stated reason was the changed circumstances resulting from the earlier suspension by several other parties to the treaty. In view of the state of war then existing in Europe and suspension of the treaty by several other nations, it was impossible to carry out a treaty that was supposed to limit naval armaments and promote the exchange of information concerning naval construction.<sup>119</sup> The same ground of changed conditions was exercised in August, 1941, when the International Load Line Convention<sup>120</sup> governing ocean shipping was suspended by President Roosevelt.<sup>121</sup> He relied on the opinion of Acting Attorney General

111. See memorandum by Acting Secretary of State Moore to President Roosevelt, Nov. 9, 1936, reprinted in Hackworth, *supra* note 86, at 330-331.

112. *Id.* at 330.

113. *Id.* at 331.

114. Treaty of Commerce and Navigation with Japan, Feb. 21, 1911, 9 Bevans 416 (1972); Hackworth, *Id.* at 331.

115. See memorandum of the Department of State reprinted in Hackworth, *id.*

116. Treaty on Principles and Policies Concerning China, Feb. 6, 1922, 2 Bevans 375 (1969).

117. See especially remarks of Senator Schwellenback, 84 Cong. Rec. 10750-10787 (1939).

118. Treaty for Limitation of Naval Armament, March 25, 1936, 3 Bevans 257 (1969).

119. See the pertinent diplomatic papers reprinted in U.S. Foreign Relations 558-561 (1939).

120. Convention of July 5, 1930, 2 Bevans 1076 (1969).

121. See M. Whiteman, 14 Digest of International Law 483-485 (1970).



Biddle, who wrote that fundamental changes in circumstances created an impossibility of performance.<sup>122</sup> Accordingly, Roosevelt suspended the convention for the duration of the war emergency because of aggression then being waged by Germany, Italy, Japan and the Soviet Union.<sup>123</sup>

It is interesting that the opinion of the Acting Attorney General declared:

It is not proposed that the United States denounce the convention . . . , nor that it be otherwise abrogated. Consequently, action by the Senate or by the Congress is not required . . . It is merely a question of a declaration of the inoperativeness of a treaty which is no longer binding because the conditions essential to its continued effectiveness no longer pertain.<sup>124</sup>

From this, it is obvious the incident cannot be considered as support for independent Presidential action. To the contrary, it is an admission by the Acting Attorney General that some legislative approval is normally required for the abrogation of a treaty.

A recent, but not the latest, assertion of the abrogation power by Congress occurred in 1951. In that year, Congress enacted the Trade Agreements Extension Act instructing President Truman to terminate trade concessions to Communist countries.<sup>125</sup> Most of them were granted by executive agreements, but two, those with Poland and Hungary, involved formal treaties.<sup>126</sup> The required notices were promptly given by President Truman.<sup>127</sup>

A fundamental change in circumstances resulting in an actual impossibility of performance was again invoked by the United States in announcing our withdrawal in 1955 from the 1923 Convention on Uniformity of Nomenclature for the Classification of Merchandise.<sup>128</sup> The U.S. notice specifically observed that the convention had been "rendered inapplicable" since a fundamental component, the Brussels nomenclature of 1913, had itself "become outdated."<sup>129</sup>

An aborted incident occurred in November, 1965, when the United States announced its planned withdrawal from the Warsaw Convention, relating to recovery of damages by international air passengers who suffer death or personal injury.<sup>130</sup> One day before the effective date of the withdrawal, the United States withdrew its notice.<sup>131</sup> At least two legal commentators reacted with publication of articles strongly condemning the power grab by President Johnson as unconstitutional.<sup>132</sup>

Next, we furnished notice of terminating the 1902 commercial convention with Cuba.<sup>133</sup> This step was an integral part of the U.S. economic embargo of Castro Cuba, declared on February 2, 1962, in which we were joined by

122. *Id.* at 485.

123. *Id.*

124. See Hackworth, *supra* note 86, at 338-339.

125. 65 Stat. 72, §5.

126. Treaty of Friendship, Commerce, and Consular Rights with Hungary, June 24, 1925, 8 Bevans 1117 (1971); Treaty of Friendship, Commerce, and Consular Rights with Poland, June 15, 1931, 11 Bevans 237 (1974).

127. See Whiteman, *supra* note 121, at 454-456.

128. Convention on uniformity of nomenclature for the classification of merchandise, May 3, 1923, 2 Bevans 410 (1969).

129. Unpublished notice of withdrawal by United States, May 24, 1954.

130. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 2 Bevans 983 (1969).

131. J. Riggs, Termination of Treaties by the Executive Without Congressional Approval: The Case of the Warsaw Convention, 32 J. Air L. & Com. 526-527 (1966).

132. *Id.* at 534; Presidential Amendent of Treaties, *supra* note 74, at 615-616.

133. Commercial Convention with Cuba, Dec. 11, 1902, 6 Bevans 1106 (1971).

the Organization of American States.<sup>134</sup> The notice, given August 21, 1962, preceded President Kennedy's naval blockade of Cuba by only eight weeks.<sup>135</sup>

The President acted under provisions of the Foreign Assistance Act of 1961<sup>136</sup> and the Export Control Act of 1948.<sup>137</sup> Also, he had ample authority to impose a trade embargo under the Trading With The Enemy Act<sup>138</sup> and Mutual Assistance Act of 1954,<sup>139</sup> known as the Battle Act. Under these circumstances, notice of terminating the commercial convention was a mere formality mandated by a national policy authorized and sanctioned by Congress. Termination of the convention also was in accordance with the Punta del Este Agreement of January, 1962, by which the Ministers of Foreign Affairs of most American nations resolved, in application of the Inter-American Treaty of Reciprocal Assistance of 1947,<sup>140</sup> to embargo trade with Cuba in arms and implements of war of every kind, and study extending the embargo to other items.<sup>141</sup> Article 8 of the 1947 treaty specifically contemplated such a "partial or complete interruption of economic relations."<sup>142</sup> Finally, Congress may have ratified the decision in September, 1962, if any ratification were needed, by enacting the joint resolution known as the Cuban Resolution.<sup>143</sup> This legislation recognized broad authority in the President to take whatever means may be necessary to prevent Cuba from exporting its aggressive purposes" in the hemisphere and to prevent establishment of a Soviet military base.<sup>144</sup> Thus, the termination was at one and the same time ratified and authorized by legislation and in accordance with a treaty.

The most recent incidents of treaty termination followed enactment of the Fishery Conservation and Management Act of 1976.<sup>145</sup> This law establishes a 200-mile-limit fishery conservation zone within which we shall exercise exclusive management authority over nearly all fish and extends our exclusive authority beyond the zone.<sup>146</sup> Section 202(b) of the law directs the Secretary of State to initiate the renegotiation of any treaty which pertains to fishing within these management areas and is "in any manner inconsistent with the purposes, policy, and provisions."<sup>147</sup> The section also declares "the sense of Congress that the United States shall withdraw from any such treaty, in accordance with its provisions, if such treaty is not so renegotiated within a reasonable

134. 13 CQ Almanac 295-298, 331, 333 (1962).

135. Unpublished notice communicated for the United States by the Swiss Embassy in Havana, Aug. 21, 1962; as to Cuban missile crisis, see 13 CQ Almanac 331-340 (1962).

136. 75 Stat. 424, 444.

137. 50 USC App. 2021 *et seq.*

138. 50 USC App.1 *et seq.*

139. 22 USC 1934.

140. Rio Treaty of Sept. 2, 1947, 4 Bevans 559 (1970).

141. See Punta del Este agreement reprinted in Hearings on Situation in Cuba before the Senate Foreign Relations Comm., 87th Cong., 2d Sess. 94, 101 (1962).

142. 4 Bevans, *supra* note 140, at 562.

143. S.J. Res. 230, 76 Stat. 697 (1962).

144. *Id.*

145. 16 USC 1801. A recent example of legislative abrogation of a U.S. treaty commitment, if not actual repeal of a treaty provision, is the Byrd Amendment of 1971, which provided that Rhodesian chrome could be imported into the United States notwithstanding a 1968 United Nations Security Council resolution imposing an embargo on such imports. 85 Stat. 427, §503. The amendment was upheld as a valid exercise of Congressional power to abrogate "one aspect of our treaty obligations under the U.N. Charter." *Diggs v. Shultz*, Civil No. 773-71 (D.D.C. 1972), 470 F.2d 461 (D.C. Cir. 1972), cert. denied 411 U.S. 931 (1973). In 1977, Congress authorized President Carter to restore the trade ban as to imports from Rhodesia. H.R. 1746, 95th Cong., 1st Sess., P.L. 95-12.

146. 16 USC 1811, §101.

147. 16 USC 1822.

period of time after such date of enactment."<sup>148</sup> Pursuant to this express statement of national policy by Congress, the Department of State has given notice of our withdrawal from the 1949 International Convention for the Northwest Atlantic Fisheries<sup>149</sup> and the 1952 International Convention for the High Seas Fisheries of the North Pacific Ocean.<sup>150</sup> Notice regarding the former convention was given on June 22, 1976, and notice regarding the latter agreement was made on February 1, 1977.<sup>151</sup> These two annulments, the latest on record, may fairly be classified as having occurred pursuant to specific Congressional authorization.

In addition, a number of other treaties have been terminated by ratification of new treaties on the same subject. This form of treaty abrogation does not have bearing on purported Executive independence, except that it obviously follows affirmative action by the Senate. Examples of this method of termination include the 1928 Pan American Convention on Commercial Aviation<sup>152</sup> which was superseded by the 1944 Chicago Convention on International Civil Aviation;<sup>153</sup> the 1929 Convention for Safety of Life at Sea<sup>154</sup> which was revised by the Convention of June 10, 1948,<sup>155</sup> and the 1949 Convention with Mexico for the establishment of an international commission for the scientific study of tuna<sup>156</sup> which was supplanted by the Convention for the Inter-American Tropical Tuna Commission in 1965 after Mexico became a party to the latter agreement.<sup>158</sup> None of this type of treaty, usually covering technical subjects, has been included in the above listing and they are mentioned here only to prevent confusion from arising out of a failure to identify them.<sup>159</sup> In these cases, the Senate in effect advises and consents to the termination of one treaty and its substitution by another in the very act of agreeing to ratification of the new treaty. Even if a specific abrogation provision is left out of the new treaty, it is well settled diplomatic practice that the later treaty supersedes or revises the earlier one on the same subject.<sup>160</sup>

148. *Id.*

149. International Convention for the Northwest Atlantic Fisheries, Feb. 8, 1949, 1 UST 477.

150. International Convention for the High Seas Fisheries of the North Pacific Ocean, May 9, 1952, 4 UST 380.

151. Unpublished notice by Department of State given to the respective Contracting and Depository Governments.

152. Convention of Feb. 20, 1928, 2 Bevans 698 (1969).

153. Convention of Dec. 7, 1944, 3 Bevans 944, 965 (1969), *see* article 80.

154. Convention of May 31, 1929, 2 Bevans 782 (1969).

155. Convention for the Safety of Life at Sea, June 10, 1948, 4 UST 2956. The United States notice denouncing the 1929 Convention expressly observed that the 1948 Convention was designed to replace the earlier one.

156. Convention of Jan. 25, 1949, 1 UST 513.

157. Convention of May 31, 1949, 1 UST 230.

158. Another group of treaties which have been terminated, but have no bearing upon the respective powers of the President and Congress, are those for which notice of termination is given by the other party, not by the United States. Examples of these treaties and conventions include the agreement of Nov. 10, 1845, with Belgium, 5 Bevans 448 (1970); Dec. 12, 1828, with Brazil, 5 Bevans 792 (1970); May 16, 1832, with Chile, 6 Bevans 518 (1971); March 3, 1849, with Guatemala, 8 Bevans 461 (1971); Feb. 8, 1868, with Italy, 9 Bevans 70 (1972); April 5, 1831, with Mexico, 9 Bevans 764 (1972); July 10, 1868, with Mexico, 9 Bevans 831 (1972); Feb. 25, 1862, with the Ottoman Empire, 10 Bevans 628 (1972); Sept. 6, 1870, with Peru, 10 Bevans 1038 (1970); Jan. 20, 1836, with Venezuela, 12 Bevans 1038 (1974); and Aug. 27, 1860, with Venezuela, 12 Bevans 1068 (1974).

159. The general rule that a treaty can supersede a previous one on the same subject may be limited by Article IV, Section 3 of the Constitution. Some writers, including the present one, believe this provision grants Congress exclusive power to dispose of federal territory or property. *Report of the Senate Subcomm. on Separation of Powers to the Comm. on the Judiciary, The Panama Canal Treaty and the Congressional Power to Dispose of United States Property*, 95th Cong., 2d Sess., 38-47 (Statement by Raoul Berger), 48-52 (Statement by Charles E. Rice) (1978).

160. Whiteman, *supra* note 121, at 437.

## THE LESSONS OF HISTORY

The historical usage described above upholds the conclusion of the late Professor Edward Corwin, one of this century's foremost authorities on the Constitution, who wrote:

[A]ll in all, it appears that legislative precedent, which moreover is generally supported by the attitude of the Executive, sanctions the proposition that the power of terminating the international compacts to which the United States is party belongs, as a prerogative of sovereignty, to Congress alone.<sup>161</sup>

A clarification that might be added to Professor Corwin's statement is that the abrogation of a treaty also can be made by the exercise of the treaty-making power itself, meaning the President together with two-thirds of the Senate, or possibly if Congress approves, by prompt Congressional ratification of a Presidential initiative. On the other hand, history also instructs that the President may, at least in the absence of Congressional disapproval, determine whether or not a treaty (1) has been superseded by a later law or treaty inconsistent with or clearly intended to replace an earlier one; (2) has been abrogated by breach of the other party, or (3) has been terminated or suspended because conditions essential to its continued effectiveness no longer exist and the change is not the result of our country's own action.

The failure to distinguish between the termination of a treaty as a substantive policy decision and the interpretation of laws or events which have already replaced a treaty or made it voidable leads Louis Henkin to a different conclusion. In *Foreign Affairs and the Constitution*, Henkin observes:

In principle, one might argue, if the Framers required the President to obtain the Senate's consent for making a treaty, its consent ought to be required also for terminating it, and there is eminent dictum to support that view.<sup>162</sup>

But Henkin rejects this reasoning by adding:

In any event, since the President acts for the United States internationally he can effectively terminate or violate treaties, and the Senate has not established its authority to join or veto him.<sup>163</sup>

It is true the President could, under his power of general control over foreign policy, effectively weaken the credibility of our national commitment under a defense treaty, such as NATO, by ordering a withdrawal of most American military forces from the foreign area involved, but he cannot unilaterally destroy the international legal obligations of our country under a formal treaty without the consent of the Senate or Congress. Indeed Henkin does not claim the President can *legally* terminate or violate treaties. He only writes that the President has ability to "effectively" breach treaties. This distinction would be

161. E. Corwin, *The President's Control of Foreign Relations* 115 (1917).

162. L. Henkin, *Foreign Affairs and the Constitution* 169 (1972).

163. *Id.* Henkin acknowledges "the President has the duty to see that the laws, including treaty-law, are faithfully executed," but makes the unsupported, boot-strap type claim that the "duty presumably ceases to exist when the treaty ceases to exist because the President acted under his constitutional authority in another capacity to destroy it." *Id.*, at 168 note. No statements by the Framers or court cases are cited as the source of Henkin's opinion regarding the supremacy of the President's implied foreign affairs power over the specific constitutional directive that he faithfully execute the laws. With all their emphasis on a balance of powers and accountability, it is dangerous to presume, as Henkin does, that the Framers tossed these principles aside by vesting unchecked power in the President to break the sacred faith of the nation as expressed in its treaty commitments, whenever he pleases.

of critical importance in any impeachment proceedings instituted by a Congress which considered the President to have violated the limits of his constitutional discretion. It also would have overriding weight in any judicial action challenging the legal validity of the President's purported denunciation or abrogation of a treaty.

In observing that the Senate has not "established its authority" to join or veto the President, Henkin is no more than restating the fact that there has not been a definitive court decision squarely settling a conflict between the Executive and Senate in the Senate's favor. Henkin would agree, it is presumed, that it is for the judiciary to say what the law is, not for the President to create law by fiat until the courts speak.<sup>164</sup> And, if the Senate has not established its power over treaty abrogation, nor is there any basis for claiming the opposite side of Henkin's argument. For there is no support in historical practice for the belief that the President has established his authority to denounce or abrogate treaties without legislative participation in his decision. To the contrary, the overwhelming weight of the precedents supports a role for the Senate or Congress in terminating treaties.

Another commentator has attempted to justify Presidential control over the termination of treaties by arguing that just as the power of removing executive officers who have been appointed by and with the advice and consent of the Senate is implied from the need for Presidential direction over those who act under him, so the power of terminating treaties may be implied from the need for Presidential management of foreign policy.<sup>165</sup> But the notion of equating international agreements between sovereign nations with the relationship between the President and subordinate officials is ludicrous.

A treaty pledges the solemn word of our people and creates a binding obligation upon the country. A treaty is elevated to the same constitutional rank as a law and, in view of its international character, would presumably be secured by at least the same guarantee of fidelity and permanence as is a law. Treaties are made between two or more contracting parties among sovereign states; they are not a device for more effectively operating the mechanics of our own government.<sup>166</sup>

In other words, the removal power is simply not comparable to the abrogation power. That the President has the power of removing officials who are placed under his direction is not surprising. The power aids in the smooth performance of his constitutional duty to execute the laws without potential sabotage of his program by inferior officers. That he could break a formal compact with another nation, which under a specific provision of the Constitution he is bound to uphold as a law, is doubtful. Here the implied power would not be used to carry out the law; it would be exercised to thwart and overturn the law, just the opposite of his constitutional duty.

164. "Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury v. Madison*, 1 Cranch 137 (1803), that 'it is emphatically the province and duty of the judicial department to say what the law is.'" *U.S. v. Nixon*, 418 U.S. 683, 703 (1974).

165. R. Nelson, *The Termination of Treaties and Executive Agreements by the United States: Theory and Practice*, 42 Minn. L. Rev. 878, 883-888 (1958).

166. See the views of James Wilson concerning the hope the United States would uphold its treaties and thereby gain the respect of other nations, which contradicts the position of commentators who in effect claim the Framers meant for treaties to be easily broken by Presidential directive alone. Wilson, *supra* note 22. The pin-pointing by James Madison and Alexander Hamilton of the unfaithful adherence to treaties by the United States under the Articles of Confederation as being one of the material defects remedied by the Constitution also runs counter to assumptions the Framers were not concerned about breaking treaties. See Madison, Jay, *supra* note 13.

## LACK OF JUDICIAL PRECEDENTS

To this point, the discussion has emphasized the logic of the Constitution itself and the lessons to be drawn from historical usage. Judicial precedents have not been cited because there simply are no court holdings squarely deciding a conflict between the President and the Senate or Congress over the treaty abrogation power.

What few related cases exist can be discussed briefly. First, there is a 1931 Supreme Court decision, *Charlton v. Kelly*,<sup>167</sup> which some commentators argue supports a discretion for the President to interpret whether a treaty is void in circumstances where the other party violates it.<sup>168</sup> There the President gave notice to Italy that a pre-World War II extradition treaty was still in force even though Italy refused to comply with it. The case has no application to a situation where the President, without legislative approval, declares a treaty void which has not been violated by the other party. Moreover, *Charlton* involved a treaty which neither the Executive, not Congress, wanted to void.<sup>169</sup> Since the treaty was not denounced, the case is not even a decisive ruling for the single situation where a breach occurs.

A second case is *Van der Weyde v. Ocean Transport Company* in 1936.<sup>170</sup> Here, the Supreme Court decided that since Congress had directed the President by the Seamen's Act of 1915<sup>171</sup> to give notice of the termination of treaty provisions in conflict with that act, "it was incumbent" upon him to determine the inconsistency between the law and a treaty with Norway.<sup>172</sup> The Court expressly avoided any question "as to the authority of the Executive in the absence of congressional action, or of action by the treaty-making power, to denounce a treaty . . ."<sup>173</sup> But it did appear to recognize the power of Congress to require the President to interpret whether a treaty is inconsistent with a statute.

A third case involving treaty abrogation is *Clark v. Allen*,<sup>174</sup> where the Supreme Court examined the question of whether the outbreak of war necessarily suspends or abrogates treaties. On its face, this 1947 case involved a construction of national policy expressed in an Act of Congress, the Trading with the Enemy Act.<sup>175</sup> Although it is *dicta*, the pertinent part of the opinion for our analysis comes from the favorable use by the Court of a statement made by then New York State Court of Appeals Judge Cardozo:

[The] President and Senate may denounce the treaty, and thus terminate its life. Congress may enact an inconsistent rule, which will control the action of the courts.<sup>176</sup>

By favorably quoting Cardozo's interpretation of the treaty abrogation power,

167. 229 U.S. 447 (1913).

168. E.g., McClure, *supra* note 59, at 20; Presidential Amendment and Termination of Treaties, *supra* note 74, at 593.

169. See Nelson, *supra* note 165, at 901-902.

170. 297 U.S. 114 (1936).

171. See text accompanying notes 90-93 *supra*.

172. 297 U.S., *supra* note 170, at 118.

173. *Id.*

174. 331 U.S. 503 (1947).

175. *Id.* at 508.

176. *Id.* at 509. A lower Federal court has also affirmed the need for legislative action. In *Teti v. Consolidated Coal Co.*, 217 F. 443, 450 (D.C.N.Y. 1914), the court said: "This treaty is the supreme law of the land, which congress alone may abrogate . . ."

the Supreme Court seems to have approved the proposition that either the Senate or Congress must participate in the annulment of a treaty.

Two other voices from the bench add weight to the power of Congress in this field. In an opinion he published with the case of *Ware v. Hylton* in 1796,<sup>177</sup> Supreme Court Justice Iredell twice emphasized his belief that Congress alone has "authority under our Government" of declaring a treaty vacated by reason of the breach by the other party.<sup>178</sup> Although his statements were *dicta* to the Court's decision, they are significant as an 18th Century understanding of the annulment power by one of the original members of the first Supreme Court. Similarly, in his *Commentaries on the Constitution*, Justice Story declared that the treaty power "will be found to partake more of the legislative, than of the executive character."<sup>179</sup> He also explained it is essential treaties "should have the obligation and force of a law, that they may be executed by the judicial power, and be obeyed like other laws. This will not prevent them from being cancelled or abrogated by the nation upon grave and suitable occasions; for it will not be disputed, that *they are subject to the legislative power, and may be repealed, like other laws, at its pleasure.*"<sup>180</sup> (Emphasis added.)

Also, on several occasions, the courts have declared that the provisions of an act of Congress "if clear and explicit" must be upheld by the judiciary, "even in contravention of express stipulations in an earlier treaty."<sup>181</sup> All of these cases take the position that by the Constitution a treaty is placed on the same footing with an act of legislation and "if the two are inconsistent, the one last in date will control the other."<sup>182</sup>

So in the *Head Money Cases*, the Supreme Court reasoned the Constitution gives a treaty "no superiority over an act of Congress," which the Court noted "may be repealed or modified by an act of a later date."<sup>183</sup> "Nor," the Court stated, "is there anything in its essential character or in the branches of the government by which the treaty is made, which gives it the superior sanctity."<sup>184</sup>

The Court added:

A treaty is made by the President and the Senate. Statutes are made by the President, the Senate and the House of Representatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the other two. If there be any difference in this regard, it would seem to be in favor of an act in which all three of the bodies participate.<sup>185</sup>

177. 3 U.S. (3 Dallas) 199 (1796).

178. *Id.* at 260, 261.

179. Story, *supra* note 20, §1513 at 366. Hamilton also wrote of the treaty power, "if we attend carefully to its operation it will be found to partake more of the legislative than of the executive character . . . ." The Federalist No. 75, at 450.

180. *Id.* §1832 at 695.

181. *E.g.*, See *Fong Yue Ting v. U.S.*, 149 U.S. 698, 720 (1893); *La Abra Silver Mining Co. v. U.S.*, 175 U.S. 423, 460 (1899).

182. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

183. 112 U.S. 580, 599 (1884). The Court added: "In short, we are of opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such Acts as Congress may pass for its enforcement, modification, or repeal." *Id.* at 599.

184. *Id.* at 599.

185. *Id.*

This line of decisions appears to decide the power of the Congress by legislation to terminate a treaty at least so far as domestic law is concerned. And if the President approves the law and furnishes diplomatic notice of our intention to annul a treaty to the other party, his action would appear to settle the question of whether or not a law can effectively end our international obligations under a treaty.<sup>186</sup>

Unfortunately, none of the above cases fully settles the question of a conflict between the President and Congress over the issue of terminating a treaty or answers the question of whether the President can abrogate a treaty without any action on the part of the legislature. The strong parallel which courts have repeatedly drawn between laws and treaties, however, supports the principle of treaties having equal sanctity with statutes under the constitutional provision requiring the President to faithfully execute the laws. Thus, the few pertinent cases may be summed up as providing no basis for Executive power over treaty abrogation, and some, but not definitive, support for Congressional power.

## EXCEPTIONS TO LEGISLATIVE ROLE IN TREATY TERMINATION

### A. Impossibility of Performance

It has been noted above that limited exceptions exist where Presidents have historically exercised power to denounce or suspend treaties without legislative approval.<sup>187</sup> Obviously, some occasions will arise when a decision is demanded for interpreting whether changed conditions have made it impossible to implement the original design of a treaty. Or a law or treaty adopted later in time may conflict with or replace an earlier treaty on the same subject. The President

186. Henkin writes that acts of Congress do not literally "repeal" a treaty. He explains a statute inconsistent with earlier treaty obligations "does not affect the validity of the treaty and its abiding international obligations, though it compels the United States to go into default." Henkin, *supra* note 162, at 164. Henkin appears to mean the obligations of our nation under international law do not expire so far as the other treaty party is concerned. The treaty is voidable by the other party, not automatically void. An interesting precedent occurred to illustrate this point involving China. In 1888 Congress enacted the Chinese Exclusion Act in clear violation of a Sino-American treaty regarding the entry and residence of Chinese nationals in the United States. Our government recognized that China would be justified in terminating the treaty due to our violation. However, China declined to denounce the treaty, and it remained in effect. B. Sinha, *Unilateral Denunciation of Treaty Because of Prior Violations of Obligations By Other Party* 129-130 (1966); U.S. Foreign Relations 115-150 (1889). Similarly, the French government did not consider the Franco-American treaties of 1778-1790 terminated by the unilateral action of Congress in enacting the statute of July 7, 1798, which declared such treaties annulled. The matter was finally resolved by the convention of Sept. 30, 1800, in which France renounced her claims under the earlier treaties. *Id.* Sinha, at 106-109; Bite, *supra* note 35, at 96; Gray v. U.S., 21 Ct. Cl. 340, 387 (1886). In contrast, U.S. courts have occasionally made reference to the power of Congress to affect international obligations. So in *Hooper v. U.S.*, *supra* note 39, the Court of Claims stated that the Act of July 7, 1798, annulling the French treaties "was a valid one, not only as a municipal statute but as between the nations . . ." In *Ropes v. Clinch*, a similar view was expressed of Congress' power to denounce treaties: "There are three modes in which congress may practically yet efficiently annul or destroy the operative effect of any treaty with a foreign country. They may do it by giving the notice which the treaty contemplates shall be given before it shall abrogated, in cases in which, like the present, such a notice was provided for; or, if the terms of the treaty require no such notice, they may do it by the formal abrogation of the treaty at once, by express terms; and even where . . . there is a provision for the notice, I think the government of the United States may disregard even that, and declare that 'the treaty shall be from and after this date, at an end.'" (C.C.S.D.N.Y. 1871) Fed. Cas. No. 12,041.

187. See text accompanying notes 161-162 *supra*.



is the officer whom historical practice under the Constitution has entrusted, at least in the first instance, a power of making these decisions.<sup>188</sup>

However, there are definite boundaries to the Presidential discretion to determine when a treaty has been voided, suspended or replaced. A better understanding of these limitations can be gained by examining his authority in the context of a live contemporary issue, the proposed abrogation of the defense treaty with ROC. Actually, none of the exceptions apply to our treaty relations with Taiwan, but it will be instructive to consider the 1954 treaty in the light of possible claims which may be theoretically presented on behalf of Presidential independence of action.

First, the defense treaty cannot be voided on the ground of a breach by the other party because the ROC has faithfully adhered to the spirit and letter of the treaty, and has not given us any reason to consider it void. Nor would the impossibility of performance be available as a reason. For one thing, as will be discussed in part B, it is possible to have treaty dealings with a nonrecognized government. For another reason, we would be the party at fault, since it is contemplated that the break in treaty relations with the ROC would follow our recognition of the mainland regime. The basis for annulment of the treaty would thereby be our own voluntary action in breaking diplomatic ties with a faithful ally, the ROC. But it is clear that international law forbids our government from raising a change in circumstances as the ground for terminating a treaty where the change results from an action of the party invoking it. This is spelled out in the 1969 Vienna Convention on the Law of Treaties, which the United States has signed, but not yet ratified.

Article 61 of that Convention reads:

Impossibility of performance may not be invoked as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility

188. See text accompanying notes 74-82, 103-129 *supra*. It may be expedient at times to withdraw swiftly from a treaty. For example, it was suggested by the late Senator Hubert H. Humphrey during hearings on the Nuclear Test Ban Treaty that the Soviets may commit a serious violation of the treaty which compels us to resume testing outside the terms of the treaty. He asked Secretary of State Rusk if the United States could respond immediately or would have to wait until the 90 days withdrawal period prescribed in the treaty had lapsed. Secretary Rusk replied "we would not have to wait 90 days because the obligation of the Soviet Union not to test in the prohibited environment is central to the very purposes and existence of this agreement, and it is clearly established through precedents of American practice and international law over many decades that where the essential consideration in a treaty or agreement fails through violation on the other side that we ourselves are freed from those limitations." *Hearings before the Senate Comm. on Foreign Relations on the Test Ban Treaty*, 88th Cong., 1st Sess. 37 (1963). The Humphrey-Rusk exchange did not settle the question of who is the proper authority to decide for the United States whether or not to withdraw from or suspend the treaty swiftly in case of a possible Soviet violation, although Senator William Fulbright, Chairman of the Foreign Relations Committee, indicated during the lengthy Senate Floor debates on the treaty that his Committee understood a majority vote of Congress was required for withdrawal. 109 Cong. Rec. 16880. However, as Secretary Rusk indicated, a serious breach of the treaty by the Soviets would fall within a classic situation where the innocent party is freed from obligations under the treaty at its option. In these circumstances, based upon past precedents, it would appear that if the President determines a preeminent national interest demands our immediate withdrawal from or suspension of the treaty and circumstances do not permit time for him to consult with and obtain advance authority from the Senate or Congress, he may act independently and ask for legislative ratification of his decision as soon as possible after his action. It is believed that the exceptions noted above, breach of treaty by the other party, impossibility of performance and fundamental change of conditions, not of our making, would allow sufficient flexibility of action for Presidents to handle any dire emergency where unilateral action is required. But in these and all similar situations where the President may act without legislative approval, his action would remain subject to being overturned by Congress, thereby continuing our obligations under the treaty, if the other party considered it as remaining in effect, or to the check of impeachment, should Congress decide to contest his decision or his exercise of unilateral power.

is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.<sup>189</sup>

Article 62 of that same Convention also provides that a "fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty. . . . if the fundamental change is the result of a breach by the party invoking it . . . ." <sup>190</sup>

Thus, it would not only be a dishonor to the United States and violation of a constitutional discretion if the President should unilaterally break our treaties with Taiwan, but it may be a violation of the international law as well. In the words of the Department of State itself at an earlier time in our history, when honor was a cherished value:

Such a course would be wholly irreconcilable with the historical respect which the United States has shown for its international engagements, and would falsify every profession of all belief in the binding force and the reciprocal obligation of treaties in general.<sup>191</sup>

## B. Treaties With Nonrecognized Governments

Another question that arises out of the proposed scheme for annulling the treaty with the ROC is whether an exception can be founded upon the fact that the Nationalist Chinese government on Taiwan would no longer receive diplomatic recognition from the United States. If we should break relations with the authorities on Taiwan, can we still have treaties with them? Both the past international experience of our own and other governments would answer the question in the affirmative.

Although we have never before withdrawn recognition from any friendly country,<sup>192</sup> we have on several occasions had dealings with powers whom we did not officially recognize, but whom we acknowledged as possessing practical control over a definite area. As to foreign practice, the Netherlands recognized the government of Spain while simultaneously entering into treaties with the government of the Franco regime in 1938.<sup>193</sup> And, in the 1950's, Egypt concluded several treaties with East Germany and Communist China without recognizing those countries.<sup>194</sup>

As to United States practice, we not only currently have a liaison office in the PRC, but we dealt with the Communist regime once to negotiate the Armistice in Korea and again during the 1954 Geneva Conference on the reunification of Korea.<sup>195</sup> Also, in 1962, the United States concluded an international agreement on Laos to which the PRC was an official party.<sup>196</sup> Other precedents involving the United States include the Postal Conventions of 1924 and 1929 to which both we and the Soviet Union became parties, even though the United States did not then recognize the USSR.<sup>197</sup> We also invited the Soviets to become a party to a well-known political treaty, the Briand-Kellogg Pact of 1929 for the renunciation of war, while still not

189. See text of Article 61, reprinted in Whiteman, *supra* note 121, at 471.

190. *Id.* at 482-483.

191. See Department of State press release, Sept. 24, 1920, reprinted in Hackworth, *supra* note 86, at 323.

192. V. Li, *De-Recognizing Taiwan: The Legal Problems* (Carnegie Endowment for Int'l. Peace 1977).

193. B. Bot, *Nonrecognition and Treaty Relations* 73 (1968).

194. *Id.* at 77.

195. *Id.* at 123.

196. *Id.* at 112. Although an executive agreement, it had the status of a treaty in international law.

197. *Id.* at 109-110.

recognizing the Communist government.<sup>198</sup> We even went so far as to send Russia a diplomatic note reminding her of Russian obligations under the Pact, again prior to having diplomatic relations with her.<sup>199</sup> Another precedent is the Nuclear Weapons Test Ban Treaty of 1963,<sup>200</sup> which appoints three depositories for new members in order to enable the PRC, the ROC and East Germany, to become parties to the multi-lateral treaty along with nations that do not recognize them.<sup>201</sup> The United States, which does not recognize the PRC, extended an invitation to it to come into the agreement.<sup>202</sup>

The question of having dealings with a nonrecognized power was examined in the context of our China policy by Stanford University law professor Victor Li in a 1977 study sponsored by the Carnegie Endowment for International Peace.<sup>203</sup> Professor Li concluded that there are no legal impediments to considering the PRC as the *de jure* government of China, while the Taiwan authorities are regarded as being in *de facto* administrative control of the territory and population of Taiwan.<sup>204</sup> If the Taiwan authorities were regarded as having practical power over a territorial entity, whether or not it is called a state, writes Professor Li, international law contemplates the possibility "that treaties applying to territory actually controlled by Taiwan would remain in force even after withdrawal of *de jure* recognition."<sup>205</sup>

Professor Li concludes his paper by specifically declaring:

International law does not *require* that treaties affecting only the territories controlled by the Taiwan authorities must lapse. On the contrary, there is strong support for protecting on-going relations, especially those involving commercial affairs and private rights.<sup>206</sup>

In his authoritative book on the subject in 1968, *Nonrecognition and Treaty Relations*, Dr. Bernard R. Bot agrees that derecognition of a government does not automatically suspend or terminate treaties previously entered into by that government.<sup>207</sup> To the contrary, he finds:

198. *Id.* at 110-111.

199. *Id.* at 111.

200. Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water, Aug. 5, 1963, 14 UST 1313.

201. Bot, *supra* note 193, at 116-118.

202. *Id.* at 122.

203. Li, *supra* note 192.

204. *Id.* at 11, 36.

205. *Id.* at 33.

206. *Id.* at 34.

207. Bot, *supra* note 193, at 210, 240. In 1818, Secretary of State John Quincy Adams took the position that not even a change in a state entity terminated a treaty, the decision being a political one to make, akin to the "voidable," not "void" principle, attached to violations of a treaty by the other party. During the Napoleonic wars, the United Netherlands, with which we had a commercial treaty dating back to 1782, was absorbed into the French Empire, entirely disappearing as a separate nation. After the war, it was reformed together with other areas. According to Crandall: "The state thus formed, although in general considered the successor to, differed in name, territory, and form of government from, the state which had entered into the treaty of October 8, 1782 with the United States." Crandall, *supra* note 54, at 429. In 1815, after the creation of the new state of the Netherlands, their government claimed the commercial treaty had terminated and they proposed a new treaty. Secretary of State Monroe's reply included a passage commenting that the treaty having been annulled by the Napoleonic Wars, President Madison had agreed to make the ancient treaty the basis of a new one. However, in 1818, during negotiations for settlement of spoliation claims, Secretary of State John Q. Adams, speaking on behalf of now President Monroe, insisted that the 1782 treaty was not annulled, apparently treating Secretary Monroe's comment about annulment as merely being a statement of his understanding of the Dutch position without conceding it. Since Monroe was then President, he clearly accepted the interpretation of Adams that the treaty was still obligatory on the Dutch. U.S. Foreign Relations 722 et seq. (1873). In 1831, the Supreme Court of North Carolina accepted Adams view and enforced the treaty as law. *University v. Miller*, 14 N.C. 188, 193. If not even a change in name, territory, and government terminated a treaty, but merely left it voidable at our option, then surely an act of derecognition, which left the same governmental authorities in control over the same territory, would not automatically cause a treaty to lapse.

A nonrecognized state can be a party to international agreements provided that its *de facto* authorities carry on, even if only as agents, the external relations and can avail themselves of the resources of the territory and control the population if necessary, for the purpose of observing treaty obligations assumed.<sup>208</sup>

Moreover, Dr. Bot finds "that nonrecognition of states and governments does not necessarily impede the latter's capacity to conclude bilateral treaties."<sup>209</sup> He adds "it becomes increasingly clear that the criterion for participation in multilateral treaties is no longer the recognition status, but the issue of political desirability."<sup>210</sup> It may therefore be concluded that no impediments exist in international law which would prevent the United States from dealing both with the PRC as the legally recognized government of China and with the Nationalists on Taiwan as the separate authorities in control of a portion of the Chinese state.

### C. The Recognition Power

Another question presented by the China proposal is whether the recognition power itself may give the President the power to terminate treaties. Alexander Hamilton once argued that in special circumstances it would. In the course of his famous debates with James Madison over the constitutionality of President Washington's proclamation of neutrality among warring France and Britain in 1793, Hamilton, writing as *Pacificus*, claimed:

The right of the executive to receive ambassadors and other public ministers . . . includes that of judging, in the case of a revolution of government in a foreign country, whether the new rulers are competent organs of the national will, and ought to be recognized, or not; which, where a treaty antecedently exists between the United States and such nation, involves the power of continuing or suspending its operation. For until the new government is *acknowledged*, the treaties between the nations, so far at least as regards *public* rights, are of course suspended.<sup>211</sup>

Hamilton was writing, however, of a situation where only one government, that of the rebels, survived a revolution. He did not consider the situation where two competing powers exist both demanding recognition, one representing the former legitimate authorities and the other the insurrectionists. In particular, Hamilton made no reference to a setting in which the United States, after a revolution, had continued recognition of the original authorities and entered into a treaty with that same government, as is true in the case of the ROC. Far from this being an instance where all treaties between the nations were suspended, as in Hamilton's supposition, here the Mutual Defense Treaty with Taiwan was concluded years after the revolution. The same authorities exist now who were present when the treaty was ratified. For us to denounce that treaty by switching recognition after a quarter of a century's adherence to it would be a new development of our own making, not an immediate and unavoidable result of a revolution. Thus, Hamilton's argument is inapplicable to present Sino-American relations.

208. *Id.*, Bot, at 208.

209. *Id.* at 104.

210. *Id.* at 123.

211. Reprinted in McClure, *supra* note 59, at 305-306.

As discussed above, should the United States now decide to drop relations with the ROC, the question of whether treaties and other international agreements with her would continue in effect would be left up to mutual agreement between the United States and the still *de facto* government of Taiwan.<sup>212</sup> Thus, it is clear that should we switch embassies from Taipei to Peking, no rule or tradition of domestic or international law would require the President to consider treaties with the authorities on Taiwan as having lapsed. Rather this would become a political decision to be determined by political reasons, not by legal theory or grounds. And since, as we have seen, the Constitution demands a legislative role in such a political decision, a Presidential act of derecognition could not annul those treaties absent the separate, concurring decision of Congress or the Senate.

If the sweeping dicta expressed by Justice Douglas in *United States v. Pink*<sup>213</sup> were law, the President could do virtually anything he wants if it furthers the restoration of relations between the United States and another country. But the decision in *Pink* involved only the power of President Roosevelt to conclude an executive agreement settling claims of our nationals incidental to his policy in recognizing Russia.<sup>214</sup> The case did not in any way involve the termination of a treaty. The narrow facts of the case were limited to a question of the validity of an international agreement entered into by the President without the consent of the Senate, exactly the opposite of a situation where it is proposed he break a treaty which has been ratified after he has received the advice and consent of the Senate. That agreement was the so-called Litvinov Assignment, which assigned certain Soviet claims to the United States.<sup>215</sup> The actual holding in the case was that the United States was entitled to the New York assets of an insurance company that had been nationalized by Russian decrees as against the corporation and its foreign creditors. By protecting claims it held, the U.S. sought to protect claims of its nationals.<sup>216</sup>

Justice Douglas' reasoning in upholding Executive power to make the Litvinov compact as part of the government policy in recognizing Russia is broad, but it does not justify Presidential cancellation of formal treaties. In explaining the basis of the Court's decision, he said:

Power to remove such obstacles to full recognition as settlement of claims of our nationals . . . certainly is a modest implied power of the President who is the 'sole organ of the federal government in the field of international relations.' . . . Effectiveness in handling the delicate problems of foreign relations requires no less. Unless such a power exists, the power of recognition might be thwarted or seriously diluted. No such obstacle can be placed in the way of rehabilitation of relations between this country and other nations, unless the historic conception of the powers and responsibilities of the President in the conduct of foreign affairs (see Moore, *Treaties and Executive Agreements*, 20 Pol. Sc. Q. 385, 403-417) is to be drastically revised.<sup>217</sup>

It would stretch this reasoning past the breaking point to argue from it that the President can abrogate treaties in furtherance of his recognition power. First, it would not be a "modest" power, as Douglas described claims settlement,

212. See text accompanying notes 203-210, *supra*.

213. 315 U.S. 203 (1941).

214. *Id.* at 210-213, 227.

215. *Id.* at 211-213.

216. *Id.* at 227, 234.

217. *Id.* at 229-230 (citation omitted).

but a major action having the gravest international consequences and impact if the United States should break a defense treaty or other formal compact with a friendly ally.

Second, it would be a total departure from past history for the President alone to consider a treaty voided in circumstances where the other party has given no cause and conditions do not make it impossible to perform. Douglas specifically tied his opinion to evidence that it was common practice for Presidents to conclude executive agreements and he relied on the Court's recognition in an earlier case that the Litvinov Assignment was such an executive agreement which did not require the participation of the Senate.<sup>218</sup> Here there is no historical record indicating that Presidents have commonly abrogated treaties on their own power and no prior case recognizing such a power as belonging to the President. In contrast to the facts of the *Pink* case, there simply is no historic conception of the President as possessing an independent power of abrogating treaties without the participation of the Senate or Congress.

Third, unlike the *Pink* case, here there is a specific injunction in the Constitution that the President shall faithfully execute the laws, of which a treaty is a part. As discussed above, the President does not have power to set aside a law of the United States<sup>219</sup> and it would be a true drastic revision of the historic concept of his powers were he to be now recognized as having such authority. An obstacle in the way of rehabilitation of relations it may be, but the obstacle is the Constitution itself which prevails over any interest the Executive may have in effectiveness in conducting foreign affairs. The President may lose flexibility of action; but the people would lose the security of his accountability if there were no check on his conduct.

#### D. Treaty Provision Authorizing Withdrawal

Another question arising out of the defense treaty with the ROC, which applies with equal relevance to almost every treaty this nation has ratified, is whether legislative consent to Presidential power can be inferred from the presence in the treaty text of a provision specifically authorizing both parties to denounce the treaty after a certain interval following notice. Specifically, does the fact that article X<sup>220</sup> of the 1954 treaty states that either "Party may terminate it one year after notice has been given to the other Party" confer authority upon the President alone to give such notice?

The question must be answered from an interpretation of the term "Party" and the legislative history of the treaty. On the basis of both approaches, it is clear the provision offers no source of increased power to the President. In the first place, the provision does not authorize termination after notice given

218. *Id.* at 229.

219. See text accompanying notes 27-28, *supra*. It is true the President is "the sole organ of the nation in its external relations, and its sole representative with foreign nations." *U.S. v. Curtiss-Wright Export Corp.*, 229 U.S. 304, 319-320 (1936), quoting John Marshall as a Member of the House of Representatives in 1800. At most, however, this means it is the President who must communicate the message terminating a treaty, not that he alone can make the decision to annul the treaty. Even this much was rejected by the 5th Congress, which enacted the statute annulling the French treaties without providing for notice by the President. See text accompanying notes 36-39 *supra*. The idea is also rejected by statements in at least two court cases. Hooper, *supra* note 39; Ropes, *supra* note 186. Absent specific direction to the contrary in the Constitution or in the proceedings of the Constitutional Convention and State ratifying conventions, it must be assumed the Constitution itself controls the question by specifically requiring that the President faithfully execute the laws and by including treaties among those laws. Surely the President's implied control over foreign relations does not give him power to repeal other express provisions of the Constitution.

220. 6 UST 437.

by "the President" or "Executive" of either Party. It only uses the term "Party."<sup>221</sup> This term in a treaty obviously means the government of the state or international entity involved, which requires a reference to the constitutional processes of that government in order to determine, first, what authority shall make the decision to give notice and second, after that decision has been made, what authority shall give the notice. In our case, this necessarily brings us back to the fact that under the Constitution, regardless of what authority may communicate the notice to another nation, the power to make the initial decision is a joint one shared by the President and Senate or Congress. A duration provision in a treaty may offer support for an interpretation that it is the President who will act as the message bearer conveying notice to other nations of our intended withdrawal from that treaty since he is the officer who traditionally represents the nation in its foreign relations; but his capacity as a diplomatic organ in no way infers or conveys a power of making the threshold policy decision required preceding delivery of the notice. Congress or the Senate must share a role in making that decision.

Perhaps the legislative branch can delegate its authority to participate in the decision-making to the President, although that is doubtful because it would defeat the constitutional expectation of greater deliberation upon an important political decision. In any event, there is a complete lack of legislative history indicating any such purpose or willingness by the Senate or Congress to waive its constitutional power in the case of the ROC treaty. And, it must be remembered that the defense treaty with Taiwan does not stand alone. Nearly every bilateral and multilateral treaty the United States has with other governments contains a provision similar to the one set forth in our treaty with the ROC.

For example, NATO,<sup>222</sup> the Test Ban Treaty,<sup>223</sup> the Statute of the International Atomic Energy Agency,<sup>224</sup> the Nuclear Nonproliferation Treaty,<sup>225</sup> the Biological Weapons Convention,<sup>226</sup> the Universal Copyright Convention,<sup>227</sup> and the Outer Space Treaty<sup>228</sup> each contain provisions expressly laying down agreed ways they can be terminated upon one year's or less notice having been given to the other parties. If the language in the Taiwan defense treaty were interpreted as allowing the President alone to provide such notice, each of the above treaties would equally be hostage to the sole discretion of the Executive. This news would undoubtedly come as a surprise to the Senate which had advised and consented to each of these documents without being informed of any such design.

Imagine the uproar in the Congress, for example, should any President assert power unilaterally, without giving an opportunity for prior deliberation in the Senate or Congress, to violate the Nonproliferation Treaty by transferring nuclear warheads to South Africa. The truth is that the potential implications of Presidential discretion to void treaties has not been considered, publicly at least, by proponents of the concept; and it appears likely that many of the same advocates of terminating the treaty with the ROC would be among the

221. *Id.*, article X.

222. Article 13, 4 Bevans 831 (1970).

223. Article IV, 14 UST 1319.

224. Article XVIII, 8 UST 1093, 1111.

225. Article X, 21 UST 493.

226. Article XIII, 26 UST 591.

227. Article XIV, 25 UST 1366.

228. Article XVI, 18 UST 2420.

first to condemn, as an abuse of constitutional discretion, an attempt by a President unilaterally to denounce a treaty they favor.

Moreover, an examination of each of the treaties described above which have been denounced or terminated by the United States in the past reveals that all but five included provisions allowing withdrawal upon notice.<sup>229</sup> The fact that Presidents have generally so interpreted treaty provisions regarding duration as requiring them to seek Congressional or at least Senatorial approval before giving notice to the other party proves that inclusion of such a provision in a treaty does not change the domestic constitutional arrangement of powers between the Executive and Congress. As shown above, Congress has heretofore collaborated in the termination of over 40 treaties by enacting a joint resolution, agreeing to a Senate resolution or by Act of Congress.<sup>230</sup> Congress obviously believed it retained a role in the treaty abrogation process in each of these instances, nearly all of which involved the annulment of treaties having duration provisions. There is no record to the contrary showing that the existence of such provisions in treaties has any relation to the powers of the President and Congress.

### CONCLUSION

In conclusion, no President acting alone can abrogate, or give notice of the intention to abrogate, formal treaties. It is the clear instruction of history that the President cannot give valid notice of an intention to withdraw from a treaty, let alone void a treaty in violation of the formalities required by any provision it may contain regarding duration, without the approval or ratification of two-thirds of the Senate or a majority of both Houses of Congress.

Any President who would seek to thwart this constitutional mandate runs the risk of impeachment. For the check of impeachment is clearly one of the safeguards provided by the Founding Fathers against political offenses, such as an irresponsible abuse by a President of a constitutional discretion.<sup>231</sup> In fact, a study of the abrogation of treaties made by the Library of Congress in 1974 expressly concludes by observing that where a conflict arises between the President and the Senate or Congress over the question of abrogation of a treaty, and the President acts contrary to the wishes of the Senate or Congress, the President "might be impeached."<sup>232</sup>

This answers the too clever reasoning of the Legal Adviser of the Department of State, which surfaced in a 1936 memorandum to President Roosevelt.<sup>233</sup> His argument contended that the failure of the Congress or the Senate to approve the action of the President in giving notice of intention to terminate a treaty would be of no avail because once the notice is given, the foreign government concerned may decline to accept a withdrawal of such a notice. What the argument failed to note is that even if the foreign government is entitled and

229. There was one treaty in which the provisions of the process-verbal of the deposit of ratification conferred the right of denunciation, the International Sanitary Convention of 1903. Hackworth, *supra* note 86, at 322. The other four treaties which lacked any provision for withdrawal were the 18th Century French treaties. The Senate Foreign Relations Committee later used this distinction in reasoning that action by both Houses of Congress was appropriate to abrogate the French treaties instead of action by the Senate and President alone. See S. Doc. No. 231, *supra* note 44, at 109-110.

230. See text accompanying notes 35-151 *supra*.

231. Several delegates to the state conventions on adopting the Constitution argued the President was liable to impeachment from abuse of the treaty power. 3 Elliot's Debates, *supra* note 26, at 240 (Nicholas), 516 (Madison); 4 Elliot's Debates, *id.*, at 124 (Spaight), 276 (E. Rutledge), 281 (C.C. Pinckney).

232. Bite, *supra* note 35, at 107.

233. Hackworth, *supra* note 86, at 328.



wants to rely on such a notice without inquiring into the constitutional authority of the President,<sup>234</sup> this does not change the domestic constitutional situation of the President in relation to the Senate or Congress. The President is still answerable to the Constitution and accountable to the Congress and people.

It should be clarified that this study is not addressed to executive agreements, international agreements other than formal treaties. The above conclusions apply only to treaties in the constitutional sense of compacts between nations or other international entities, which have been formally signed, submitted for advice and consent to the Senate and ratified after having received the necessary two-thirds approval by the Senate. Actually, Congress normally retains a close check on the vast majority of executive agreements by specifying that it may at any time terminate by concurrent resolution those agreements which have been concluded pursuant to legislative authority.<sup>235</sup> Since almost 99% of all executive agreements are made under authority granted in acts of Congress, this procedure preserves for the legislature a strong role, although not necessarily an exclusive one, in the unmaking as well as the making of such agreements.<sup>236</sup>

While different principles apply to the two types of international agreements, the Senate could, if it wished, reaffirm the traditional legislative role in terminating treaties by adopting a procedure somewhat similar to that used in the case of executive agreements, when giving its advice and consent to the ratification of formal treaties. For instance, the Senate could approve ratification of a treaty with a reservation declaring that the sole way the treaty may be terminated or suspended as to the United States shall be upon notice given to the other party after authority therefor has been conferred upon the President by concurrent resolution of Congress.

Another less dramatic, but positive means of demonstrating its continued claim of power and interest in decisions regarding the abrogation of treaties would be enactment by Congress of a law requiring prompt notice to the Foreign Relations Committee of the Senate and International Relations Committee of the House of any decision by the President leading toward the intended termination of a treaty. Such a law should logically cover notices regarding the cancellation of executive agreements as well as treaties.<sup>237</sup>

Curiously, the files of the Senate Foreign Relations Committee contain no regular record of treaty abrogation notices made by the Department of State. There is no systemized or unofficial practice of communications by the Executive

234. Of course, in the context of the Republic of China, it may be presumed the authorities on Taiwan would choose not to exercise their option to treat the defense treaty as void, thereby holding the United States accountable under international law for a violation of our commitment and preserving the opportunity for reviving the treaty. Once before the Chinese declined to denounce a treaty violated by the United States, the Treaty of Immigration, Nov. 17, 1880, 6 Bevans 685 (1971). That treaty remained in force until it was superseded in 1946. *Id.* at 761.

235. Nelson, *supra* note 165, at 893.

236. See compilation by U.S. Department of State in *Hearing on S.3475 before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92nd Cong., 2d Sess. at 416 (1972).

237. A logical vehicle for such a proposed law would be an amendment to the Case Act which requires that Congress shall be notified of the existence of executive agreements. 1 USC 112b There is a long forgotten precedent for such explicit reports. In 1889 the Department of State published a volume listing all the treaties and conventions, except postal agreements, ratified by the United States, a publication which was somewhat similar to the current *Treaties in Force* series. However, unlike the present compilations and in response to the specific direction of a Senate Resolution approved January 5, 1885, the earlier compilation also identified "such treaties or conventions, or such parts of treaties or conventions, as having been changed or abrogated." The affected agreements were clearly indicated in the printed edition by a footnote at the beginning of each treaty or convention, with a reference to the notes where an explanation was given as to the manner and extent of their abrogation, suspension, or amendment. U.S. *Treaties and Conventions 1776-1887* (U.S. Department of State 1889), preface at iv-v.

Branch to Congress informing it of treaties which the President considers as having been or about to be terminated. The other country receives prompt notice of our intention to withdraw from or suspend a treaty, but the Congress itself is left in the dark about unilateral Presidential actions purporting to repeal or suspend our solemn international commitments. It is true the Congress may find out about the purported termination or suspension of a treaty by eventually observing that it has disappeared from publication in the annual State Department paperback, *Treaties in Force*, but this delayed method leaves Congress entirely out of the decision when its influence may still have affected events.

Even if Congress were given copies of the actual notices delivered to foreign governments, it would often remain ignorant of the reasons for denouncing treaties. Many of the notices contain no more than a bare recital of our intention to withdraw from particular treaties in accordance with the provisions thereof.<sup>238</sup> No explanation of why the United States is discarding the treaty is set forth in the notice. Thus, to be effective, the proposed law should mandate that Congress immediately be informed whenever notice has been transmitted to another government regarding termination of a treaty, and be given a detailed explanation of the reasons and authority for pulling out of the treaty. The Senate or Congress could then respond with whatever counteraction it may choose to initiate to ratify or block the President's action.

Or Congress might, in addition to or in the alternative, adopt a concurrent resolution expressing its sense of the rules and conditions which apply to the termination and suspension of a treaty. Since no full scale hearings have been held on the subject of treaty abrogation in Congress during this century,<sup>239</sup> just the scheduling of hearings on such a concurrent resolution by committees in both Houses of Congress, at which witnesses from the Executive Branch are called upon to testify, may help produce a clarification and mutual understanding of the respective positions held by the President and Congress on the subject. Hopefully, the hearings would also result in improved cooperation and consultation between the two political branches on matters involving the possible termination or suspension of treaties.

Whatever procedure may recommend itself to Congress, it would appear prudent for the legislature to reaffirm its constitutional role in making the

238. *E.g.*, the notice conveying our intention to withdraw from the convention with Mexico for the scientific study of tuna merely recites that the agreement is being terminated "by common accord". In fact, it was replaced by another convention, but no one would learn this from reading the notice. See text accompanying notes 156-157 *supra*.

239. The conclusion is based on inquiries with the staff of the Senate Foreign Relations Committee and the House International Relations Committee and an examination of the several volumes of the Index of Congressional Committee Hearings and Cumulative Index of Congressional Committee Hearings. It is true hearings were held on termination of the treaty of 1832 with Russia before the then House Committee on Foreign Affairs and the Senate Foreign Relations Committee in 1911, but only one witness, Mr. Louis Marshall, presented any detailed and documented analysis of the constitutional question, hardly qualifying the hearings as a full-scale, comprehensive study of the issue. See Hearings on termination of Treaty of 1832 with Russia, *supra* note 84, House hearings at 41-50, Senate hearings at 31-32.

In 1977, Congressional hearings, with four witnesses, were held on certain legislative and legal problems involved in recognizing Peking, but the constitutional question of the necessity for legislative approval of the abrogation of the U.S.-ROC defense treaty, as demanded by Peking, was addressed only in a cursory way and was not the primary focus of the hearings. Hearings before the Subcomm. on Asian and Pacific Affairs of the House Comm. on International Relations, 95th Cong., 1st Sess. at 114-15, 119. A likely candidate for in depth hearings precisely on the constitutional power issues is a Senate concurrent resolution to be introduced by Senator Barry M. Goldwater in the 96th Congress "to uphold the separation of powers between the Executive and Legislative Branches of Government in the termination of treaties."

important decision of withdrawing our country from its formal international compacts before the Executive asserts even greater power of independent action in this field. Congressional apathy over the growing assumption of unilateral power by the President can only encourage further aggrandizement of his claimed prerogatives. It may even create a crisis of confrontation between the two branches at a moment in history when united and prompt governmental action is demanded. By identifying and resolving any differences that might exist between them now, when no grave treaty abrogation problem is currently facing the nation, but at least one major contest between Congress and the President can be anticipated regarding the nation's China policy, the country would be better prepared to meet its future responsibilities with resolve and confidence.