

Sec. 2—Powers, Duties of the President Cl. 2—Treaties and Appointment of Officers

derlying legal circumstances.³⁹⁰ Apparently, President Lincoln was the first to give notice of termination in the absence of prior congressional authorization or direction, and Congress shortly thereafter by joint resolution ratified his action.³⁹¹ The first such action by the President, with no such subsequent congressional action, appears to be that of President McKinley in 1899, in terminating an 1850 treaty with Switzerland, but the action may be explainable as the treaty being inconsistent with a subsequently enacted law.³⁹² Other such renunciations by the President acting on his own have been similarly explained and similarly the explanations have been controverted. Although the Department of State, in setting forth legal justification for President Carter's notice of termination of the treaty with Taiwan, cited many examples of a President's acting alone, many of these are ambiguous and may be explained away by, for example, conflicts with later statutes, changed circumstances, or the like.³⁹³

No such ambiguity accompanied President Carter's action on the Taiwan treaty,³⁹⁴ and a somewhat lengthy Senate debate was provoked. In the end, the Senate on a preliminary vote approved a "sense of the Senate" resolution claiming for itself a consenting role in the termination of treaties, but no final vote was ever taken and the Senate thus did not place itself in conflict with the President.³⁹⁵ However, several Members of Congress went to court to contest the termination, apparently the first time a judicial resolution of the question had been sought. A divided Court of Appeals, on the merits, held that presidential action was sufficient by itself to termi-

³⁹⁰ Compare, e.g., *Treaty Termination: Hearings Before the Senate Committee on Foreign Relations*, 96th Congress, 1st Sess. (1979), 156–191 (memorandum of Hon. Herbert Hansell, Legal Advisor, Department of State), with *Taiwan: Hearings Before the Senate Committee on Foreign Relations*, 96th Congress, 1st Sess. (1979), 300–307 (memorandum of Senator Goldwater). See CRS Study, *supra* at 164–66.

³⁹¹ 13 Stat. 568 (1865).

³⁹² The treaty, see 11 C. BEVANS, *TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA* 894 (1970), was probably at odds with the Tariff Act of 1897. 30 Stat. 151.

³⁹³ Compare the views expressed in the Hansell and Goldwater memoranda, *supra*. For expressions of views preceding the immediate controversy, see, e.g., Riesenfeld, *The Power of Congress and the President in International Relations*, 25 CALIF. L. REV. 643, 658–665 (1937); Nelson, *The Termination of Treaties and Executive Agreements by the United States*, 42 MINN. L. REV. 879 (1958).

³⁹⁴ Note that the President terminated the treaty in the face of an expression of the sense of Congress that prior consultation between President and Congress should occur. 92 Stat. 730, 746 (1978).

³⁹⁵ Originally, S. Res. 15 had disapproved presidential action alone, but it was amended and reported by the Foreign Relations Committee to recognize at least 14 bases of presidential termination. S. REP. NO. 119, 96th Congress, 1st Sess. (1979). In turn, this resolution was amended to state the described sense of the Senate view, but the matter was never brought to final action. See 125 CONG. REC. 13672, 13696, 13711, 15209, 15859 (1979).