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Foreword

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FOREWORD

Eugene V. Rostow*

I

All four articles in this issue of *Yale Studies in World Public Order* concern an episode of singular importance to the constitutional law and the foreign policy of the United States: President Carter's announcements on December 15 and December 23, 1978, that on January 1, 1980, the United States would abrogate the Mutual Defense Treaty of 1954 between the United States and the Republic of China in accordance with its termination clause.¹ The President attempted this action without seeking or obtaining the consent either of the Senate or of Congress as a whole. Later, the Senate passed a Resolution stating that under the circumstances the President could not terminate any Mutual Defense Treaty without the consent of the same two-thirds Senate majority required before the President ratifies it.²

It is hard to imagine questions more momentous to the future of the United States than those discussed in this symposium. The Constitution makes treaties, like statutes, "the supreme law of the land." Can it be constitutional for the President to abrogate treaties

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1. Joint Communique on the Establishment of Diplomatic Relations Between the United States of America and the People's Republic of China--January 1, 1979, 14 Weekly Comp. of Pres. Doc. 2264 (Dec. 18, 1978).

2. The Senate Resolution adopted on June 6, 1979, provided "that it is the sense of the Senate that approval of the United States Senate is required to terminate any mutual defense treaty between the United States and another nation." 125 Cong. Rec. 57038-39 (June 6, 1979). When *Goldwater v. Carter* came before the Supreme Court, Justice Powell, speaking for himself, commented that no "final" vote had been taken on the Resolution, and that it was unclear whether the Resolution was intended to have a retroactive effect. Therefore, he concluded, the issue of the case was not ripe for judicial review. *Goldwater v. Carter*, 100 S.Ct. 533, 534 (1979) (mem.).

(or other laws) with a stroke of his pen? The President's constitutional duty--the essence of the Executive power--is to see to it that the laws and treaties of the United States are "faithfully executed." Does that mandate include the authority to repeal either statutes or treaties? If the duty to carry out laws subsumes the privilege of annulling them, how could such a claim be reconciled with the President's limited veto power, in the case of statutes, and the requirement of an extraordinary majority of the Senate to advise and consent to the ratification of treaties? Granting President Carter's position would, I believe, make nonsense of the separation of powers and go far toward establishing an Imperial Presidency.

It would do more. In the "great external realm" of foreign affairs, the thought that the President of the United States could alone terminate a security treaty of the United States has shocked and frightened those responsible for the fate of nations from Tokyo and the NATO capitals to Jerusalem, Cairo, and Canberra, creating doubt about American security commitments, the only cement of the world political system.

Drawing the boundaries between the executive, the legislative, and the judicial powers is not always easy, but sometimes the task is inescapable.³ To paraphrase Mr. Justice Stewart's celebrated comment about pornography, we may not be able to define such limits very well, but we know them when we see them. As I view the problem, the power to abrogate treaties simply cannot be part of the President's executive authority. Even so staunch an advocate of Presidential power as Hamilton thought that the President could only "suspend" (not terminate) the 1778 Mutual Defense Treaty with France during a period of non-recognition.⁴

3. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872); *Buckley v. Valeo*, 424 U.S. 1 (1976).

4. *The Works of Alexander Hamilton* 442 (Henry Cabot Lodge, ed., 1904). Justice Brennan's opinion in *Goldwater v. Carter* is surely in error in contending that the President's broad constitutional discretion with respect to recognition goes so far. While *United States v. Pink*, 315 U.S. 203 (1942), and related cases held that the President could take over outstanding claims on behalf of the United States in order to facilitate recognition, the presidential power with respect to recognition, like his power as Commander-in-Chief, is subject to all the normal constitutional limitations.

Early in 1979, Senator Barry Goldwater and other members of Congress brought suit in the District Court of the District of Columbia to enjoin the termination of the 1954 Treaty with Taiwan on the ground that the termination had not been approved either by a two-thirds majority of the Senate or by a simple majority of both Houses of Congress. The President's action, the plaintiffs said, deprived them of their right as Senators or members of Congress to vote on a proposal to abrogate the Treaty. The District Court upheld Senator Goldwater's position, and the Court of Appeals, in an opaque opinion, agreed with the Administration.⁵ The Supreme Court granted the writ of certiorari but then summarily vacated the judgment of the Court of Appeals and ordered the complaint to be dismissed, without full brief or argument. Four opinions left the state of the law thoroughly confused, which was perhaps what the Court intended. Four justices, led by Justice Rehnquist, thought the controversy was not justiciable. Four justices thought it was justiciable, but, of these, one concluded that it was not ripe and another that the Court of Appeals decision should have been affirmed. Only two justices would have set the case for plenary consideration. Justice Marshall concurred in the result without opinion.⁶ The vote recalls Dean Shulman's witty note, "Sawing a Justice in Half."⁷

Luckily, the Supreme Court has not flatly sustained the Court of Appeals decision. If it should ever do so, I believe a constitutional amendment would be necessary to restore the balance of the Constitution and the possibility of world public order.

4. (Continued)

He cannot, for example, abolish trial by jury for servicemen's dependents at overseas military bases, *Reid v. Covert*, 354 U.S. 1 (1957); nor could he extradite a political refugee in order to placate the government being recognized, or even to obtain the release of citizens held as hostages. *See Valentine v. Neidecker* 299 U.S. 1 (1936).

5. *Goldwater v. Carter*, No. 79-2246, 48 U.S.L.W. 2380 (D.C. Cir. Nov. 30, 1979).

6. *Goldwater v. Carter*, 100 S.Ct. at 539 (1979).

7. 48 Yale L. J. 1455 (1939).

II

How did such an unlikely situation come about?

At the end of President Nixon's visit to China in 1972, a communique was issued by the Chinese and American governments in Shanghai. The document consists of three parts--one stating Chinese views on problems of world politics; a second setting forth American positions; and a brief third section announcing the joint opposition of both governments to "efforts by any ... country or group of countries to establish ... hegemony" in the Asia-Pacific region,⁸ a phrase readily understood to announce Chinese and American agreements that Soviet hegemony in Asia would be intolerable to them. Later, Japan adhered to this policy despite vehement Soviet protest. The third part of the Shanghai Communique constitutes a significant and constructive change in the balance of power which continues to radiate influence in every theater of the world crisis brought about by the Soviet Union's accelerating drive for dominion.

In the American part of the communique, the United States

... acknowledges that all Chinese on either side of the Taiwan Strait maintain there is but one China and that Taiwan is part of China. The United States government does not challenge that position. It reaffirms its interest in a peaceful settlement of the Taiwan question by the Chinese themselves. With this prospect in mind, it affirms its ultimate objective of the withdrawal of all U.S. forces and military installations on Taiwan as tension in the area diminishes.⁹

This statement is often and quite wrongly referred to as an "agreement" between the United States and China, or an American "commitment" to abandon the

8. Text of the Joint Statement Issued at the Conclusion of the President's Visit, 8 Weekly Comp. of Pres. Doc. 473, 475 (February 27, 1972).

9. *Id.* See note 1 *supra*, at 2266.

Security Treaty with Taiwan. And it has been invoked to justify President Carter's announcement of December 15, 1978, that the Treaty with Taiwan would be abrogated in connection with the establishment of full diplomatic relations between the United States and China. In *Goldwater v. Carter*, an affidavit by the Deputy Secretary of State, Warren Christopher, asserts that:

Commencing with President Nixon's trip to China in 1972, which produced the Shanghai Communique, three American Presidents have worked toward diplomatic relations with China. In order to achieve this goal, the United States and the P.R.C. had to remove the longstanding barrier to reconciliation raised by the Mutual Defense Treaty. The P.R.C. made it clear that the confirmation of the Treaty was incompatible with normalization of relations and that without its termination, normalization was impossible. The P.R.C. sought an immediate abrogation of the Treaty, but the United States insisted that the Treaty instead be terminated according to its provisions. Having reached agreement on this issue, the leaders of the two countries issued a Joint Communique on December 15, 1978, announcing their agreement to establish diplomatic relations as of January 1, 1979. On December 23, 1978, the United States, acting pursuant to Article X of the Mutual Defense Treaty, gave notice of termination of the Treaty to the Taiwan authorities.¹⁰

By chance, I happen to be in a position to comment on Secretary Christopher's statement. During June and July, 1978, I visited China, and had a series of extended conversations with Chinese foreign and defense policy officials. In each of these conversations, the Taiwan question was vigorously discussed. The Chinese reiterated the view that they could not promise to use only peaceful means in solving the Taiwan question.

10. Secretary Christopher's affidavit is reprinted at p. 65 of the Court of Appeals record in *Goldwater v. Carter*. This particular quotation may be found at pp. 66-67 of the record; it is on pp. 2-3 of the affidavit itself.

The culminating talk in this sequence was with the Deputy Prime Minister, Teng Hsiao-ping, on June 22, 1978. Responding to my contention that abrogating the American Security Treaty with Taiwan was not in the interest of China, the United States, or world political stability, and that this issue was comparable in sensitivity to the problem of the reunification of Germany and Korea, Mr. Teng Hsiao-ping said that "the organization of strategic and economic cooperation" between China and the United States "does not have to wait on normalization."¹¹ The substance of this conversation was made available to the United States government at the request of the Secretary of State.

Strictly speaking, the President's political judgment about the wisdom of terminating the American Security Treaty with Taiwan has nothing to do with his authority to accomplish that termination without the advice and consent of the Senate or of Congress. There are many steps a President may regard as wise foreign policy, but which he cannot undertake unless Congress agrees-- a declaration of war, for example; an increase in the military establishment; an increase or a reduction of tariffs, or establishing a new international bank. Yet in the Taiwan affair, Secretary Christopher's statement is psychologically central both to the President's action in the first instance, and to the reluctance of the Court of Appeals and the Supreme Court to take responsibility for a decision which, the judges naturally fear, might disturb the course of the nation's foreign policy.

III

Nagging doubts about the practical international effect of a judicial decision in Senator Goldwater's favor are close to the surface of one of the articles in this outstanding symposium and other comments on the problem. Professor Covey T. Oliver, who wrote one of the most important papers in this symposium, is a first-rate scholar whose work also shines with wit--a rare combination. His distinguished career includes periods of service as Ambassador, Assistant Secretary

11. N. Rostow, Notes of a Conversation between Vice-Premier Teng Hsiao-ping and Eugene V. Rostow, in Peking, June 22, 1978, p.5 in Notes on Conversations in China (on file with *Yale Studies in World Public Order*).

of State, and Law School Dean. Professor Oliver's paper reflects both his scholarship and his practical experience. He views the arguments of Judge Gasch and Senator Goldwater as exemplars of the sin of formalism: mechanical application of dogmatic rules which would sacrifice the spirit to the letter of the law, and ignore the wisdom of history. He contends that past practice, functional necessity, and the nature of our evolving, unwritten Constitution justify President Carter's attempt to terminate the Treaty with Taiwan. And he would view the denial of such presidential power as a further impairment of our capacity to conduct a coherent foreign policy.

Professor Oliver is among the severe critics of our constitutional arrangements for conducting foreign policy. He believes that the United States already gives Congress too much power in the field of foreign affairs, especially when compared with other representative democracies. Moreover, he argues that the judiciary is a particularly inappropriate forum for the settlement of interbranch foreign policy disputes. Therefore, he urges Congress and the Presidency to work together outside the courts to fashion realistic solutions to the problem of international commitment. Professor Oliver's prescription would of course concede the correctness of Senator Goldwater's basic position--that the President cannot and should not act alone.

Mr. Jonathan Y. Thomas, whose article has already been extensively cited by Judge MacKinnon in his dissent in the Circuit Court decision in *Goldwater v. Carter*, challenges the analysis of an important State Department memorandum¹² by Mr. Herbert J. Hansell, the former Legal Adviser of the State Department. Mr. Hansell's memorandum reviews the record of American practice in terminating treaties, and concludes that the President acted without benefit of Senate or congressional approval in twelve (or perhaps thirteen) out of fifty-two to fifty-five cases of treaty termination. These twelve episodes, Mr. Hansell argues, justify President Carter's

12. "President's Power to Give Notice of Termination of U.S.-ROC Mutual Defense Treaty," memorandum from Herbert J. Hansell, State Department Legal Adviser to the Secretary of State, December 15, 1978, *reprinted in* Senate Committee on Foreign Relations, 95th Cong., 2d Sess., *Termination of Treaties: The Constitutional Allocation of Power* (Comm. Print 1978).

decision to terminate the Mutual Defense Treaty with Taiwan. Mr. Thomas, however, finds that the twelve or thirteen precedents on which Mr. Hansell relies do not in fact support his thesis. In Mr. Thomas' view, each of those episodes involved either congressional approval, a violation of the treaty by another party, or fundamental changes which would effectively nullify the treaty in accordance with the legal doctrine of *rebus sic stantibus*. In the latter two classes of cases, the President's function in announcing the termination of the treaty is within his competence as the agent of the nation in the conduct of our foreign relations. In such instances, he is not "terminating" the treaty but recognizing that the treaty has been terminated either by the other party or by circumstance.

The article by Professor Edward McGlynn Gaffney, Jr., examines in detail the congressional and judicial processes that culminated in the Supreme Court's December 1979 opinion. Professor Gaffney suggests that the questions raised in *Goldwater* implicate important issues relating to rules of standing, to the political question and separation of powers doctrines, and to the appropriate use of historical evidence in evaluating constitutional arguments. He finds that these issues have been inadequately dealt with and need to be resolved with a view that goes beyond effective collaboration between Congress and the President in the conduct of foreign affairs to the more basic policy question of popular participation in public policy formulation. He concludes that the President's unilateral power to terminate treaties is unsound and unconvincing and that democratic government requires congressional participation in decisions to terminate treaties.

Professor Alan C. Swan starts with the proposition, which few would deny, that as part of the President's power to conduct international relations, he may terminate treaties where the other party has committed a fundamental breach, or where underlying circumstances have changed. But Professor Swan argues that President Carter's action with regard to Taiwan could be justified only by the broadest and most extreme versions of an "inherent" presidential power in the field of foreign affairs, far beyond Justice Sutherland's famous dicta in *Curtiss-Wright*.¹³ What President Carter did,

13. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

Professor Swan contends, cannot be reconciled with the view of the Presidency which historically has been reflected in practice and in the decisions of the Supreme Court. The Presidency is a powerful and independent office, indeed, but one cabined nonetheless by the separation of powers doctrine and other constitutional limitations. In the end, Professor Swan argues, the Carter position leads to the dangerous heresy that democratic processes ought to be sacrificed to the claims of efficiency in government.

IV

The editors of *Yale Studies in World Public Order* have assembled a diverse array of articles on a fascinating and novel set of problems. I commend the issue to a wide readership, confident that it will make a genuine contribution to an important constitutional problem which has not yet been considered by the Supreme Court of the United States.

New Haven, Connecticut
April, 1980

