THE ABUSE OF HISTORY: A REFUTATION OF THE STATE DEPARTMENT ANALYSIS OF ALLEGED INSTANCES OF INDEPENDENT PRESIDENTIAL TREATY TERMINATION

Jonathan York Thomas*

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.

---Acting Attorney General Biddle, July 5, 1930, 5 G. Hackworth Digest of International Law, 338-39 (1943)

Introduction

The Carter-Hua Communique of December 15, 1978,\(^1\) announced the intent of the United States to establish full diplomatic relations with the People's Republic of China (PRC), effective January 1, 1979. Though in no way mandated to do so by the terms of this act of recognition, President Carter, at the insistence of the PRC, followed on the Communique by giving notice to the Republic of China\(^2\) (ROC or Taiwan) that the United States was terminating the Mutual Defense Treaty of

---

*B.A. 1976, Yale University; D. Phil. Candidate, Oxford University; J.D. Candidate, Yale Law School.
2. Id. at 2274.
1954 between the United States and the ROC. No senatorial or congressional authorization was sought prior to the termination announcement.

On December 22, 1978, Senator Barry Goldwater challenged the President on aspects of the termination issue in a suit filed in the District Court for the District of Columbia. Goldwater agreed that the so-called "foreign affairs clause" of the Constitution gave the President competence to communicate the United States stance on the fate of the Mutual Defense Treaty to the Taiwan Government. But, he argued, no constitutional reading vindicated the independent presidential formulation of that stance: Carter should have solicited the advice and consent of either two-thirds of the Senate or a majority of both houses of Congress before deciding to abrogate the Treaty.

The State Department has offered a number of arguments in defense of Carter's actions. One such argument revolves around the examination of past precedents as a means of defining the proper procedure in a situation similar to that at issue in the present case. Herbert J. Hansell, the State Department's Legal Adviser, has performed that examination and uncovered twelve past

---


4. Goldwater v. Carter, 481 F. Supp. 949 (D.D.C. 1979); rev'd. per curiam, 617 F.2d 697 (D.C. Cir. 1979)); vacated as nonjusticiabie 100 S.Ct. 533 (1979) (mem.). Five Senators, one senator-elect, and nine Congressmen are named as co-plaintiffs along with Senator Goldwater. Secretary of State Cyrus Vance is named as co-defendant.


6. The President's so-called "foreign affairs" powers are enumerated in art. II § 2 of the Constitution.

instances allegedly involving a President terminating a treaty solely on his own initiative. These instances, he argues, identify the Carter procedure as the proper one. They are as follows:

In 1815, President Madison exchanged correspondence with the Netherlands, which has been construed recently by the State Department as establishing that the 1782 Treaty of Amity and Commerce between the two countries had been annulled.

In 1899, President McKinley gave notice to the Swiss Government of the United States' intent "to arrest the operations" of certain articles of the 1850 Convention of Friendship, Commerce, and Extradition with Switzerland.

In 1920, President Wilson, by agreement, terminated the 1891 Treaty of Amity, Commerce, and Navigation with Belgium concerning the Congo.

In 1927, President Coolidge gave notice of termination of the 1925 Treaty with Mexico on the Prevention of Smuggling.

In 1933, President Roosevelt delivered to the League of Nations a declaration of the United States' withdrawal from the 1927 multilateral Convention for the Abolition of Import and Export Prohibitions and Restrictions.

In 1933, President Roosevelt gave notice of termination (which was withdrawn subsequently) of the 1931 Treaty of Extradition with Greece.

In 1936, President Roosevelt approved a protocol (deemed to be notice of termination) terminating the 1871 Treaty of Commerce and Navigation with Italy.

In 1939, President Roosevelt gave notice of termination of the 1911 Treaty of Commerce and Navigation with Japan.
In 1944, President Roosevelt gave notice of denunciation of the 1929 Protocol to the Inter American Convention for Trademark and Commercial Protection.

In 1954, President Eisenhower gave notice of withdrawal from the 1923 Convention on Uniformity of Nomenclature for the Classification of Merchandise.

In 1962, President Kennedy gave notice of termination of the 1902 Convention on Commercial Relations with Cuba.

In 1965, President Johnson gave notice of denunciation, subsequently withdrawn, of the 1929 Warsaw Convention concerning international air travel.\(^8\)

This article undertakes a reanalysis of the instances discussed by Hansell. As will be shown, none of these instances serves to substantiate the State Department claim that the President may withdraw from or terminate treaties on his own initiative, i.e., without Senate or congressional approval.\(^9\) In each instance, there had either been: (1) expressed or implied authority given to the President by one or both houses of Congress—no instance involved the President acting against the majority will of Congress; (2) a material breach or requested termination of the given treaty or convention by one or more parties other than the United States; or (3) a fundamental change in circumstances such that the treaty was effectively void before the presidential notice was given.

---

8. *Id.* at 3-4.

9. "Senate or congressional approval" is herein defined as: (1) a law passed subsequent to a given treaty enactment effectively authorizing the President to act contrary to the dictates of that treaty; (2) proposed law(s) or resolution(s) awaiting certain passage which articulate Senate or congressional support for the President on a given matter; or (3) a consensual expression of sentiment so pronounced as to clearly define the affirmative Senate or congressional stance on a proposed course of action.
Supporters of the President's right to terminate treaties without benefit of Senate or congressional approval frequently begin the defense of their argument with James Madison and his termination in 1815 of the 1782 Treaty of Amity and Commerce between the United States and the Netherlands. A close look at the historical circumstances surrounding that termination, however, shows that Madison's actions were academic, as the treaty in question had already been annulled before Madison chose to act.

Moore explained that:

[I]n 1793...a war broke out between the United Provinces of the Netherlands and France. In 1795 the Stadtholder [the principal Dutch magistrate] was driven from the country and the Batavian Republic was established. This was succeeded by the Kingdom of Holland, after which the country was incorporated into the French Empire, and remained a part of that empire until the abdication of Napoleon. On the reconstruction of Europe at the Congress of Vienna a new kingdom was formed, called the Kingdom of the Netherlands, in which was included the territories which had formed the United Provinces of the Netherlands.

During the period 1795-1813, a time in which "the political existence of Holland was ... terminated," the rulers of the area once constituting the Netherlands failed to honor the 1782 treaty.

11. 5 V. Moore, International Law Digest, 344-45 (1906).
For a long series of years Holland was not in a condition to execute her part of the engagements of that treaty. During this long period there was none of that reciprocity of advantages which is the essence of treaties of amity and commerce, but all that the treaty engaged on the part of Holland toward the United States was withheld and denied by the government which controlled her.\footnote{Id. at 724.}

By these facts, it is clear that the treaty was effectively both breached and abrogated with the overthrow of the Netherlands Government in 1795.

That the Government of the new Kingdom of the Netherlands felt the 1792 treaty annulled is evidenced in their overtures for renewed peace and amity with the United States in 1815. On February 24 of that year, Dutch Minister Changnion proposed "as a base for the new treaty to be concluded the text of the old treaty concluded in 1782."\footnote{Id. at 721-22 (emphasis supplied).} Secretary of State Monroe, writing on behalf of President Madison, reflected in his response of April 15 a recognition on the American side that the 1782 treaty had long since been void.

The treaties between the United States and some of the powers of Europe having been annulled by causes proceeding from the State of Europe for some time past, and other treaties having expired, the United States have now to form their system of commercial intercourse with every power, as it were, at the same time ... To this the President has readily agreed. I have assured you of the willingness of the President to make the ancient treaty between our countries the basis of the proposed one.\footnote{Id.}

The President had no choice but to agree that the 1782 treaty was no longer in force. The one country originally party to that treaty with the United States had ceased to exist as a political entity. The "Kingdom
of the Netherlands" established at the Congress of Vienna was technically a new country, not a vestige of the "United Provinces of the Netherlands." As such, it sought a new treaty of peace and amity, with the United States only using the 1782 treaty as a guide for the 1815 edition.

In 1815 President Madison, without authorization from the Senate or from Congress, declared the 1782 treaty annulled. As shown, however, that act was declaratory.

McKinley's Denunciation of the 1850 Commercial Convention with Switzerland

The only other instance in the nineteenth century of supposed independent [presidential] abrogatory action was McKinley's denunciation of articles VIII-XII of the 1850 United States Convention of Friendship, Reciprocal Establishments, Commerce, and Extradition with Switzerland.16

According to these articles, Switzerland was to enjoy most-favored-nation status vis-à-vis the United States. Article X for example, stated that "... each of the contracting parties hereby engages not to grant any favor in commerce to any Nation, Union of Nations, State, or Society, which shall not immediately be enjoyed by the other party."

The 1850 Convention remained operative through 1899, at which time, the State Department maintains, President McKinley denounced the articles without benefit of Senate or congressional approval. But, as the following narrative shows, this was not the case.

On July 24, 1897, Congress passed a Tariff Act which read, inter alia: "The President...is hereby, authorized...to enter into negotiations with the governments of those countries exporting to the United States the above-mentioned articles, or any of them, with a view to the arrangement of commercial agreements in which reciprocal and equivalent concessions may be

secured in favor of the products and manufactures of the United States."\textsuperscript{18} Shortly following the enactment of the 1897 Tariff Act, the United States entered with France into a reciprocity agreement of the type specified by the Act.\textsuperscript{19} About a month thereafter the Swiss government claimed under articles 8, 9, 10, & 12 of the 1850 Convention that "Swiss products may enjoy, on entering the territory of the Union, the concessions granted to France" in the United States-France reciprocity agreement.\textsuperscript{20}

The United States response indicated that "the most-favored-nation clause does not entitle a third government to demand the benefits of a special agreement of reciprocity,"\textsuperscript{21} and that such clauses "were never intended as a surrender of the right of either nation to independently adjust the interests of its special commerce with any other country by special and mutually compensatory contract."\textsuperscript{22}

As the Swiss Government had offered no reciprocal concessions of the type offered by France, they, the Swiss, were in no position, barring compensatory negotiations with the United States, to press their claim for equal commercial treatment. As Secretary Hay explained, the United States policy was:

...to treat the commerce of all friendly nations with equal fairness, giving exceptional 'favors' to none. Should this Government continue to give to Swiss products gratuitously all advantages which other countries only acquire for an equivalent compensation, it would expose itself to the just reproaches of other Governments for its exceptional favoritism. We desire that our friendly international policy should be maintained in its uniform application to all our commercial relations.\textsuperscript{23}

\textsuperscript{17} \textit{Id.} at 989.
\textsuperscript{18} Tariff Act of 1897, 30 Stat. 151.
\textsuperscript{19} [1899] Foreign Relations of the United States, at 740.
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textit{Id.} at 741.
\textsuperscript{22} \textit{Id.} at 746.
\textsuperscript{23} \textit{Id.} at 748.
As the President was authorized by the 1897 Act to conclude only commercial agreements with countries making reciprocal concessions, he had no choice but to either denounce articles VIII-XII of the 1850 Swiss Convention or to terminate that convention in its entirety. That he had no choice was clear by (1) the decision that "it was incumbent upon the President, charged with the conduct [of] negotiations with foreign governments and also the duty to take care that the laws of the United States are faithfully executed, to reach a conclusion as to the inconsistency between the provisions of the treaty and the provisions of the new law"; (2) the fact that the 1897 Act was clearly in conflict with articles VIII-XII; and (3) the fact that "[s]ince the President cannot enforce two equally valid laws which are in conflict, he is compelled to select that which most reflects the current will of the Congress."

Accordingly, President McKinley, upon receiving final word from the Swiss Government that no negotiations for a reciprocal agreement were desired by that Government, gave notice (as provided for in article XVIII of the 1850 Convention) "of the intention of the United States to arrest the operations of Articles VIII to XII, inclusive, of the convention signed on the 25th day of November, 1850." Termination of those articles became effective one year after McKinley's denunciation on March 23, 1900.

Wilson's 1920 Abrogation of 1891 Treaty with Belgium

On March 5, 1915, Congress passed the Seamen's Act. Article 16 of that Act specifically directed the President to terminate any articles in existing treaties or conventions that were in conflict with the provisions

26. Foreign Relations of the United States, supra note 19, at 754.
27. 11 C. Bevans, Treaties and Other International Agreements of the United States of America 1776-1949, 894.
of the Act. 29 Pursuant to article 16, notice was given to States party to twenty-five different treaties. 30

One treaty so affected was the 1891 Treaty of Amity, Commerce, and Navigation between the United States and the Congo. 31 On July 6, 1915, the United States gave notice to Belgium, the power then sovereign over the Congo, of its intention to terminate article 5 of the 1891 treaty as of July 1, 1916. On June 29, 1916 the Belgian Government responded:

As regards the Treaty of January 24, 1891 with the former Independent State of the Kongo, the Government of the King desiring, on its side, to make modifications in several of its provisions, considers that the best solution consists in terminating the convention itself. I should be obliged to you, Mr. Consul, if you would be good enough to inform the American Government and request it to make formal acknowledgement of this denunciation to the Belgian Government. 32

On November 11, 1916, the State Department, apparently not realizing that the June 29 letter was an effective denunciation of the 1891 Treaty by the Belgian Government, responded:

In view of the fact that the Government of the United States has given notice of the abrogation of Article 5 of this Treaty, in pursuance of the Act of March 4, 1915, which notice has been accepted by the Belgian Government, that Government may not consider, as does the Government of the United States, that notice of the denunciation of the Treaty as a whole should more appropriately be given on behalf of the other contracting party by the Government of Belgium. 33

29. The authority of Congress to issue this directive was upheld in the Van der Heyde case, supra note 24.
30. 5 G. Hackworth, Digest of International Law, 309-10 (1943).
32. [1916] Foreign Relations of the United States, at 34.
33. Id. at 35.
If we overlook the redundancy of this State Department response for a moment, one thing is clear: that the State Department felt it was their place to terminate only the article in conflict and not to terminate the treaty in its entirety. The latter act they felt to be the right of the Belgian Government.

On December 31, 1916, Belgium replied that the letter of June 29, 1916, "was for the very purpose of giving the Government of the United States notice by the King's Government of the termination of that Convention as a whole ... the Treaty of January 24, 1891 will be deemed to have been denounced on July 1, 1916."34

The American Government was slow to acknowledge the denunciation. It was not until over four years later, December 13, 1920, that the American Ambassador wrote to the Belgian Minister of Foreign Affairs:

My Government is pleased to acknowledge that notice as given and released July 1, 1916. As the Treaty of Amity, Commerce and Navigation, concluded on January 24, 1891, between the United States and the Independent State of the Kongo contains no stipulation respecting termination thereof or the period required for the giving of notice of termination, my Government feels that it may assume that the wishes of the Belgian Government may best be met by considering that the treaty terminated at the expiration of such a period of notice as customarily is provided for in treaties of amity and navigation.

My Government is therefore pleased to regard the treaty as having ceased to be operative on July 1, 1917, at the expiration of one year from the date of the notification of the Belgian Government.35

As this brief review of the correspondence between the American and Belgian Governments shows, the termina-

34. Id. at 36.
tion of the treaty of 1891 was a three part process: (1) Denunciation by the President of article 5 of the treaty (pursuant to article 16 of the 1915 Seamen's Act); (2) Belgium's termination of the entire 1891 treaty on June 29, 1916; and (3) State Department acknowledgement of Belgium's termination on December 13, 1920.

In reality, President Wilson's "act of termination" was no more than a pro forma acknowledgement of the termination already effected by Belgium. Consequently, it serves no precedential purpose for the State Department argument.

Coolidge and the Smuggling Treaty with Mexico

The termination on March 21, 1927, of the 1925 Smuggling Treaty with Mexico, came in direct response to several years of turbulent relations between the United States and the Mexican Republic. The sources of the turbulence were numerous. First, there was a fear, fueled by Secretary of State Kellogg, that the Mexican Government of President Calles was a Bolshevist stronghold that aimed to work against American interests in Nicaragua and ultimately to take over the United States. Second, there was the religious concern, espoused most notably by the "Knights of Columbus," that the Calles regime was waging war on Catholicism. Third, and clearly the most drastic from the congressional point of view, were the property- and commercial-oriented problems that grew out of confiscations by the Mexican Government in the mid 1920's. It is this last source that we shall examine in detail.

According to the Mexican Constitution (adopted in 1857), people, including American citizens, could acquire property holdings both through individual and

37. 68 Cong. Rec. 1649 (1927).
38. Id. at 1692.
corporate ownership. Throughout the last half of the nineteenth century, Americans were encouraged to make investments in Mexico to promote the development of natural resources, transportation, and industry.39

In 1917 a new Constitution was adopted with provisions affecting agricultural, mining, and oil lands, which the American government thought threatened the holdings of its nationals with retroactive confiscation. Assurances to the contrary were received from President Obregon in 1923.40 But when Calles succeeded Obregon, the new President made it clear that he did not feel bound by the assurances of his predecessor. By late 1925, his new government had passed the Alien Land Bill and the Petroleum Bill,41 both of which sanctioned the confiscation of American property interests pursuant to article 27 of the Mexican Constitution.

Reaction to the two bills was swift and pronounced. Secretary Kellogg wrote to the Mexican Government on December 31, 1925:

...my Government directs me to inform your Excellency that it hereby reserves on behalf of citizens of the United States whose property interests are or may hereafter be affected by the application of the two ... laws, all rights lawfully acquired by them under the Constitution of laws of Mexico in force at the time of the acquisition of such property interests and under the rules of international law and equity, and points out that it is unable to assent to an application of the recent laws to American owned properties so acquired which is, or may hereafter, be retroactive and confiscatory.42

42. Id. at 554.
Congressional commentary on the confiscation problem was voluminous. For example, during a discussion in the Senate over whether to submit property disputes to international arbitration, a number of Senators took the opportunity to condemn the Mexican practice:

Senator Lenroot:

With the purpose of Mexico to provide lands for her people, we must all sympathize. It is a most laudable undertaking, and her right to make such expropriation of lands of American nationals upon proper indemnification has never been denied. But article 27 of the Constitution lays down rules for compensation and method of payment that are shocking to the American sense of justice.... The Constitution provides that the payment for certain of the lands will be made in 20 annual installments, not cash as international law requires, and the owner is further compelled to accept state bonds, not bonds of the Federal Government, but State bonds as his compensation. In other words, instead of compensation there is substituted a promise to pay of little or no value. But quite apart from this, the Mexican Government has not even followed these provisions of the Constitution. I understand that up to this time there have been 121 agrarian expropriations and 602 property seizures, and not one dollar has been paid in compensation and not a single bond has been issued therefor, as the Constitution provides ... I am frank to say that I do not see how we can continue any relations with Mexico unless she shall have some regard for her solemn promises and international obligations.43

43. 68 Cong. Rec. 2204-05 (1927).
Senator King:

The claims presented by our Government to Mexico for indemnity had been ignored, and after the Mexican War and from then down until the present day our Government has been compelled to make representations because of her violation of these rights of American citizens. These appeals and representations have been in vain.... Hundreds of millions of dollars of property has been destroyed, or confiscated. But no reparations have been paid and thousands of American citizens have been deprived of all their property because of the transgressions of the Mexican Government or its nationals .... We ought not to have diplomatic relations with countries which refuse to carry out their treaty obligations and to govern their conduct with the United States, as well as other countries, according to the highest principles of international community and justice.44

Senator Gallivan:

The adventurers and bandits ... who have transformed themselves into what they impudently call a republic and a government, are engaged in the congenial task of harassing, robbing, and outraging the easiest marks in the North American continent - the American citizens doing business on the other side of the Rio Grande. They are doing it in perfect safety, knowing that ... the clerical yellows of this Republic will applaud and defend them, and that every minus 100 per cent American, every red communist, every anti-American, every piffling pacifist ... and every political eunuch in the community will cheer them and fly to the defense of Calles and his cutthroats.45

44. Id. at 2229, 2231.
45. Id. at 2258.
Many congressional remarks such as the three included above were made in early 1927 in the context of debates over whether relations had grown so poor with Mexico that withdrawal of recognition of the Calles Government or war were the only two viable alternatives left to the United States. While the Congressmen were deeply split over what course to take--most leaning in the direction of trying to work out a peaceable solution--they were in almost unanimous accord that something had to be done to prohibit the confiscation of American commercial and property interests.

This, then, was the political climate of the mid 1920's. The relation between this climate and the termination of the 1925 Smuggling Treaty with Mexico is evident in the phrasing of the termination notice sent by Kellogg to the Mexican Government on March 21, 1927:

The Convention between the United States and Mexico to prevent smuggling and for certain other objects was signed December 23, 1925, ratified March 11, 1926, and proclaimed March 18, 1926. It went into effect so far as the United States was concerned upon March 28, 1926. By its terms the Convention was to remain in force for one year, upon the expiration of which period, if no notice of a desire to terminate it had been given by either party, it was to continue in force until thirty days after either party should give notice of termination.

It may be pointed out in this connection that the United States has no commercial treaty with Mexico, and that in the circumstances it is not deemed advisable to continue to effect an arrangement which might in certain contingencies bind the United States to cooperation for the enforcement of laws or decrees relating to the importation of commodities of all sorts into another country with which this Government has no arrangement, by treaty or otherwise, safe-guarding American commerce against possible discrimination.46

By this notice it is clear that the State Department had reassessed the Treaty since its enactment in late 1925. Confiscations during the ensuing year demonstrated that decisive steps had to be taken to protect American property and commerce. The most appropriate move was to terminate the 1925 Treaty under which, as pointed out in the termination notice, the American Government was powerless to prevent discriminatory action against American commerce. This the President did in 1927.

It is true that the President did not seek official approval of Congress before or subsequent to terminating the Treaty. Congressional sentiment at the time of the termination, however, was strongly on the side of any move that would help protect American commercial or property interests in Mexico. There can be no question but that Congress gave its tacit approval of the termination.

President Coolidge, then, was certainly not acting without at least the implied consent of Congress when he terminated the 1925 treaty.

Roosevelt's Termination of the 1927 Multilateral Tariff Convention

The goals of the November 8, 1927, Convention on the Abolition of Import and Export Prohibitions and Resolutions are expressed in its preamble, which reads:

Being guided by the conclusions of the International Economic Conference held at Geneva in May 1927, and agreeing with the latter that import and export prohibitions, and the arbitrary practices and disguised discriminations to which they give rise, have had deplorable results, without the grave drawbacks of these measures being counter-balanced by the financial advantages

or social benefits which were anticipated by the countries which had recourse to them;

Being persuaded that it is important for the recovery and future development of world trade that Governments should abandon a policy which is equally injurious to their own and to the general interest;

Being convinced that a return to the effective liberty of international commerce is one of the primary conditions of world prosperity; and

Considering that this object may best be achieved by resort to simultaneous and concerned action in the form of an international convention;

Have appointed their plenipotentiaries...[who]...have agreed to the following provisions...48

On June 16, 1933, Congress passed the National Industrial Recovery Act (NIRA).49 Section 3(e) of the Act reads:

On his own motion, or if any labor organization, or any trade or industrial organization, association, or group, which has complied with the provisions of this title, shall make complaint to the President that any article or articles are being imported into the United States in substantial quantities or increasing ratio to domestic production of any competitive article or articles and on such terms or under such conditions as to render ineffective or seriously to endanger the maintenance of any code or agreement under this title, the President may cause an immediate investigation

48. *Id.* at 2462.
to be made by the United States Tariff Commission, which shall give precedence to investigations under this subsection, and if, after such investigation and such public notice and hearing as he shall specify, the President shall find the existence of such facts, he shall, in order to effectuate the policy of this title, direct that the article or articles concerned shall be permitted entry into the United States only upon such terms and conditions and subject to the payment of such fees and to such limitations in the total quantity which may be imported (in the course of any specified period or periods) as he shall find it necessary to prescribe in order that the entry thereof shall not render or tend to render ineffective any code or agreement made under this title. In order to enforce any limitations imposed on the total quantity of imports, in any specified period or periods, of any article or articles under this subsection, the President may forbid the importation of such article or articles unless the importer shall have first obtained from the Secretary of the Treasury a license pursuant to such regulations as the President may prescribe. Upon information of any action by the President under this subsection, the Secretary of the Treasury shall, through the proper officers, permit entry of the article or articles specified only upon such terms and conditions and subject to such fees, to such limitations in the quantity which may be imported, and to such requirements of license, as the President shall have directed. The decision of the President as to facts shall be conclusive. Any condition or limitation of entry under this subsection shall continue in effect until the President shall have and inform the Secretary of the Treasury that the conditions which led to the imposition of such condition or limitation
upon entry no longer exists.50

Clearly, if the President wanted to act pursuant to section 3(e) by licensing imports or imposing embargoes, he would be acting in violation of the 1927 Tariff Convention. It was incumbent upon the State Department, then, to relieve the United States of its obligations under that convention.

To say that the United States was bowing out of the convention because of self-serving legislation, though, would have been very embarrassing for the United States Government. Thus, the State Department had to come up with some other reason for withdrawal that they could cite instead of that involving the conflict of laws. A series of letters commencing three days after the passage of the NIRA between the Acting Secretary of State (Phillips) and the American Delegation to the Monetary and Economic Conference (Hull) in London reflects State Department concern. On June 19, 1933, Phillips wrote to Hull:

In a note dated June 14 British Ambassador states that His Majesty's Government has deemed it advisable to avail themselves as from June 30 of their right to be relieved of the obligations accepted by them in accordance with the Import and Export Prohibitions and Restrictions Convention "in order that they may be free to enter into any agreements bearing upon the question of prohibitions, quotas and similar restrictions which may result from the Monetary and Economic Conference," adding that a formal declaration of withdrawal has been forwarded to the Secretary General of the League of Nations.

This action by the British Government and certain provisions of the new Recovery Act which authorize the President to license imports and impose embargoes make it imperative that we give immediate consideration to the question of what the United States should do in respect of this Convention.

50. Id. at 196-97.
Please telegraph immediately your views and recommendations, bearing in mind that only countries besides ourselves which remain bound by the Convention are Japan, Norway, Denmark and Netherlands. 51

Hull responded on June 23, 1933, by suggesting that the State Department say that the reason for withdrawing from the Convention was that so many other nations had already so withdrawn. In his letter, though, it is obvious that he was offering this rationale in an attempt to cover up the real reason for withdrawal, i.e., the conflict arising out of the enactment of the NIRA. Hull wrote:

My judgment is that various considerations, among which are the possible developments of our domestic policy and the decision of the British Government, make withdrawal by the American Government from the Import and Export Prohibitions and Restrictions advisable.

I desire therefore that the Department notify the Secretary General of the League of Nations of the American withdrawal in conformity with the requirements of the convention and usual practice.

I am reluctant to take this action at the present time. It is important that it not be construed as evidence of any new decision by the American Government to shape its policy on domestic rather than on international lines. The note to the Secretary General besides, therefore, covering the formal notification, should contain an explanation in substance as follows:

The Government of the United States takes this action with regret. It has been disappointed that so few governments have seen their way clear to become parties to this agreement. Furthermore, it would appear that in the judgment of many governments the convention has become somewhat unadapted to present conditions. The recent withdrawal of other governments has emphasized this conclusion.

The Government of the United States still favors a policy of abolition either outright or gradual by international action of the type of restriction in international commerce which is dealt with in the convention. It is prepared to participate in more effective action directed towards that end.

Lay this telegram before the President for final decision and direction.\(^5^2\)

Sometime between June 23 and June 27, Phillips presented Hull's suggestions to President Roosevelt. The President immediately embraced those suggestions as the proper course and directed Phillips, as Acting Secretary of State, to give notice of the American Government's withdrawal from the 1927 Convention to the Secretary General of the League of Nations, effective June 29, 1933. Phillips acted accordingly and the withdrawal was effected on June 30.\(^5^3\)

The State Department currently contends that President Roosevelt acted on his own initiative in terminating United States involvement in the 1927 Convention. It contends that the sole reason was that other countries had withdrawn, leading to the conclusion that the convention was not fully adapted to current economic and commercial conditions.\(^5^4\) If, however, we take careful note of the timing as well as of the remarks in the State Department correspondence printed above, observing

---

52. Id. at 784-85.
53. Id.
54. Id.
in the process that twenty-two of the twenty-nine countries party to the convention had already withdrawn from the convention fully three years before the United States chose to do so, the "official" contentions of the State Department are seen to be illusory. This termination is certainly not one that adds any substantial fuel to the State Department argument.

Roosevelt's Termination of the 1931 Treaty of Extradition with Greece

In *Charlton v. Kelly*, the Court recognized the President's right to terminate a treaty violated by another party. In 1933, President Roosevelt threatened to exercise that right in a dispute involving the May 6, 1931 Treaty of Extradition with Greece.

Samuel Insull, former Chairman of the Board of Directors of the Middle West Utilities Co. and the Mississippi Valley Utility Investment Co., sought refuge in Greece in 1932 to escape a charge of embezzlement and larceny. Upon request of the State Department, Insull was arrested and detained by the Greek police on November 4, 1932. On December 27, 1932, however, a Greek court rejected the United States request for extradition in a trial that was conducted under questionable proceedings. American Chargé in Greece Morris noted:

...unofficial evidence indicates court violated both spirit and letter of treaty in passing upon actual substance of the indictments and in pronouncing that the proofs submitted do not constitute a crime under American law.

Affidavits made by Floyd Thompson, Oliver McCormick and E. Davis, expressing their personal opinion that Insull did not intend to commit a crime but carried out...
the money transfers as a normal business transaction in the interest of his companies, were introduced by the defense attorneys without opportunity of examination or challenge by prosecutor or states attorneys and accepted as weighty evidence. Illinois state's attorneys Bellows and Vlachos were present but were not allowed to speak or even to present rebuttal to defense through Greek prosecutor.59

On April 29, 1933, the Secretary of State wrote to Chargé Morris that the case against Insull was actually of much greater magnitude than at first thought. The charge went beyond embezzlement and larceny to transfer of property in contemplation of bankruptcy, in violation of the bankruptcy laws of the United States. Secretary Hull wrote:

Washington, April 29, 1933--1 p.m.
Your dispatch No. 2386, March 18. The Department desires you to request personal interview with Greek Foreign Minister and to inform him orally and in strictest confidence that Federal authorities, as result of involuntary petition in bankruptcy filed on April 18, 1932, against the Corporation Securities Company of Chicago, have been investigating affairs of that Company and operations of its officers among whom is Samuel Insull. United States Attorney at Chicago is preparing to obtain indictments charging accused officers and agents on five counts with unlawfully, willfully, knowingly, feloniously and fraudulently transferring to Northern Trust Company, National City Bank of New York, Continental Illinois Bank and Trust Company, and Central Hanover Bank and Trust Company, in contemplation of bankruptcy of Corporation Securities Company and while the Company was insolvent, assets of the Company amounting approximately to $2,330,820 with intent to defeat the Federal Bankruptcy Acts.60

59. Id., at 556.
60. Id. at 560.
Chargé Morris relayed the message as requested.

On October 31, 1933, "the extradition of Insull was refused again." 61 The decision of the court admitted that the acts committed were violations of the law in both countries but contended that the proof of criminal intent was insufficient.

Hull responded angrily on November 2, 1933, that "unless prompt action is taken by the Greek authorities to reopen the case, the Department is considering instructing you to lodge an emphatic protest at the decision of the court and to give formal notice of this Government's denunciation of our Extradition Treaty with Greece." 62

Once it was made clear that the Greek Government was not going to reopen the case, 63 the American Minister to Greece (MacVeagh) wrote to the Greek Minister of Foreign Affairs (Maximos) on November 5, 1933:

My Government finds it difficult to reconcile this unusual decision with the admission of the competent authorities that the fugitive committed the acts with which he was charged and that these acts are illegal and fraudulent both in the United States and in Greece. I am directed to add that my Government considers the decision utterly untenable and a clear violation of the American-Hellenic treaty of extradition signed at Athens May 6, 1931.

Inasmuch as the Greek authorities have now seen fit on two occasions to deny the just requests of the United States made under the provisions of the above mentioned treaty, it is apparent that this treaty, although similar in terms to treaties which the United States has found effective in extraditing fugitives from other countries, cannot be relied upon to effect the extradition of fugitives who have fled to Greece.

61. Id. at 562.
62. Id. at 563.
63. Id. at 564.
My Government therefore considers that from the American point of view the treaty is entirely useless. Accordingly I am instructed to give formal notice herewith of my Government's denunciation of the treaty with a view to its termination at the earliest date possible under its pertinent provisions.64

The United States denunciation was issued with a view to termination at the earliest date possible under the provisions of the treaty, i.e., November 1, 1937. Before that date, however, the United States and Greece concluded and signed on September 2, 1937, a protocol of interpretation of the article of the treaty which had given rise to the divergence of the two governments in the Insull case. Thereafter the United States, on September 29, 1937, withdrew its denunciation. It was not regarded as necessary to submit the protocol to the Senate since it did not change the treaty as interpreted by the United States.65

In summary, the Insull case involved an American citizen given asylum in Greece, in whose protection Greece had no legitimate interest. The Greek Government's refusal to grant extradition rights to the United States was a clear violation of the 1931 treaty. President Roosevelt, in threatening to terminate the treaty (note the termination was never effected — the treaty remains operative to this day), was doing nothing more than acting upon a material breach by the other party to the treaty. As Roosevelt's actions were not taken without provocation, they do not serve as an example of a President acting "solely on his own initiative."

Roosevelt's Termination of the 1871 Treaty of Commerce and Navigation with Italy

The 1871 Treaty of Commerce and Navigation between Italy and the United States66 stipulated, inter alia,

64. Id. at 566.
65. 5 G. Hackworth, supra note 30, at 315.
that neither country could discriminate against the commerce of the other. In 1936, Italy broke with provisions of that treaty by not giving appropriate preferential treatment to American goods. Acting Secretary of State Moore wrote in November, 1936, for example, that "[n]umerous Italian products notably have been accorded ... reduced rates [as per the treaty] without any corresponding quid pro quo from the Italians."67

In 1934, Congress passed the Trade Agreements Act.68 Section 350 of the Act read:

Sec. 350. (a) For the purpose of expanding foreign markets for the products of the United States (as a means of assisting in the present emergency in restoring the American standard of living, in overcoming domestic unemployment and the present economic depression, in increasing the purchasing power of the American public, and in establishing and maintaining a better relationship among various branches of American agriculture, industry, mining, and commerce) by regulating the admissions of foreign goods into the United States in accordance with the characteristics and needs of various branches of American production so that foreign markets will be made available to those branches of American production which require and are capable of developing such outlets by affording corresponding market opportunities for foreign products in the United States, the President, whenever he finds as a fact that any existing duties or other import restrictions of the United States or any foreign country are unduly burdening and restricting the foreign trade of the United States and that the purpose above declared will be promoted by the means hereinafter specified, is authorized from time to time—

(1) To enter into foreign trade agreements with foreign governments or instrumentalities thereof; and

(2) To proclaim such modifications of existing duties and other import restrictions, or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign trade agreements, as are required or appropriate to carry out any foreign trade agreement that the President has entered into hereunder. No proclamation shall be made increasing or decreasing by more than 50 per centum any existing rate of duty or transferring any article between the dutiable and free lists. The proclaimed duties and other import restrictions shall apply to articles the growth, produce, or manufacture of all foreign countries, whether imported directly, or indirectly: Provided, That the President may suspend the application to articles the growth, produce, or manufacture of any country because of its discriminatory treatment of American commerce or because of other acts or policies which in his opinion tend to defeat the purposes set forth in this section; and the proclaimed duties and other import restrictions shall be in effect from and after such time as is specified in the proclamation. The President may at any time terminate any such proclamation in whole or in part.69

The 1934 Act, then, authorized the President to suspend beneficial duties to imports from any country discriminating against American exports. If President Roosevelt had taken such action against Italy, though, he would have been acting in violation of the 1871 Treaty; that is, the 1871 Treaty and the 1934 Act were in direct conflict. Thus, President Roosevelt had a choice: either sanction the Italian treatment by doing nothing (an option which would assuredly have received no backing from any government official) or act pursuant to the most

69. Id. at 943-44.
recent expression of congressional will (the 1934 Act) by terminating the 1871 Treaty. On December 15, 1936, he chose the latter course.\textsuperscript{70}

It should be noted parenthetically that Italy had, by its prejudiced trade regulations, effectively breached the 1871 Treaty before Roosevelt ever notified the Italian Government of his intent to terminate. As was the case with the Greek extradition breach, the President had the authority to terminate this treaty if and when Italy violated its terms.

President Roosevelt, then, had two reasons to terminate the 1871 Treaty: an indirect congressional mandate and a material breach by the other party to the treaty. Here again, his act of termination does not stand as an "independent act."

\textit{Roosevelt's Termination of the 1911 Treaty of Commerce with Japan}

If there were ever a case of a President acting on implied congressional authority when terminating a treaty, that case would be Roosevelt's termination in 1939 of the 1911 Commercial Treaty with Japan.\textsuperscript{71} The Treaty, proclaimed on February 21, 1911, gave Japan most-favored-nation status with respect to the United States. Pursuant to maintaining that status, Japan agreed not to discriminate against the United States in any commercial matter.\textsuperscript{72}

In the early 1930's, Japan attacked and took control of Northern China.\textsuperscript{73} In 1938, the Japanese militarists administering the captured area began imposing a series of restrictions on American and other foreign commercial interests. By early 1939, the situation had grown particularly prohibitive from the United States perspective. Secretary of State Hull wrote on March 9, 1939:

\begin{itemize}
\item \textsuperscript{70} Foreign Relations of the United States, \textit{supra} note 67, at 356.
\item \textsuperscript{71} Treaty of Commerce and Navigation, Feb. 21, 1911, United States-Japan, 37 Stat. 1504, T.S. 558.
\item \textsuperscript{72} \textit{Id.} art. V.
\item \textsuperscript{73} 84 Cong. Rec. 10761-10762 (1939).
\end{itemize}
The Government of the United States regards the export restrictions which have been announced in North China as the most comprehensive discrimination against the United States and other foreign countries and in favor of Japan which has yet been established in North China by Japanese authorities, and as a virtual nullification in that area of the Open Door so far as import and export trade is concerned. The proposed measures would automatically increase the price of exports by a large margin in terms of foreign currencies, and probably have the effect of reducing markedly exports to foreign countries other than Japan, and pari passu of reducing imports from those countries while leaving trade between that area and Japan virtually unrestricted. During the past year the exchange value of the currencies in circulation in North China has been considerably depreciated and prices in that area have become more or less adjusted to this depreciated value; if exports are quoted suddenly in terms of a new currency whose value is maintained by exchange control at an artificially high level in terms of foreign currencies North China's foreign trade will tend to suffer and imports to decline along with exports. Meanwhile it is clear that Japanese trade will not only be damaged by the proposed restriction but be benefited by the new measures. These considerations give added force to the objection which the American Government has repeatedly advanced to institution of trade or exchange control by Japanese authorities in North China, the basis of such objection being that all trade with North China would thereby become subject to Japanese discretion and that equality of opportunity would no longer be possible.\textsuperscript{74}

A number of American companies in North China reported great commercial difficulties. Universal Leaf Tobacco Company and Standard-Vacuum Oil Company, for example, indicated that their business was being seriously restricted by the Japanese regulations.75

Just to what extent Japan was stifling all commercial interests but its own in China was indicated in an article cited by Consul General Gauss at Shanghai to Secretary Hull on March 23, 1939:

In summary, it is suggested that this Introductory Survey of China's trade for 1938 provides information from which generalizations may be made regarding the effects of the first full year of hostilities upon the foreign trade of China. It indicates Japan's steadily increasing power, by the occupation of China's ports, fixing of its tariffs, detention of its Customs revenues, and control, by means of blockade and other restrictions, of its exports to exert pressure upon the Chinese Government and to displace the trade of other nations in China. It shows that these measures have already brought about a large increase in Japanese trade, both proportionately and in actual value, and have caused decreases in the trade of each of its important rivals. The report brings out the significant fact that in North China where Japanese control is most complete the benefit to Japanese trade and the damage to the trade of other nations is the greatest. The most disturbing fact brought out, however, is that Japan has caused the United States to suffer the greatest loss of China trade suffered by any country and has succeeded in displacing the United States as the leading nation in China's trade.76

75. Id. at 391.
76. Id. at 389.
Two conclusions may be drawn from this discussion of the Northern Chinese situation. First, it is clear that the Japanese, by harassing American commercial interests, were at the very least perilously close to violating the 1911 Commercial Treaty with the United States. Second, by promoting Japanese business in Northern China at the expense of foreign competitors, and by compromising China's territorial integrity through military occupation, Japan was clearly in violation of the so-called Nine Power Treaty of 1922.

By the terms of the 1922 Treaty, the contracting powers (which included Japan and the United States) agreed:

(1) to respect the sovereignty, the independence, and the territorial and administrative integrity of China;
(2) to provide the fullest and most unembarrassed opportunity to China to develop and maintain for herself an effective and stable government; (3) to use their influence for the purpose of effectually establishing and maintaining the principle of equal opportunity for the commerce and industry of all nations throughout the territory of China; (4) to refrain from taking advantage of conditions in China in order to seek special rights or privileges which would abridge the rights of subjects of citizens of friendly states and from countenancing action inimical to the security of such states.77

Not only was it felt in the United States that Japan was in violation of the Nine Power Treaty, but there was also strong sentiment that the United States was indirectly violating the same treaty by supplying Japan with large quantities of raw materials that ultimately became munitions for the Japanese war effort in China. Senator Schwellenbach remarked on August 2, 1939:

In our actions in reference to Japan and by our violation of the Nine Power Pact, we became just as flagrant a violator of international agreements as any other nation in the world. And it does not speak very well for us to be casting reflection upon other nations when we, just because we can make some money out of it, just because we can make some profits out of it, proceed to furnish, I think, probably 70 percent—I have not attempted to segregate these figures, but, as I pointed out, it is 56 percent of the total amount, and I think 70 percent of the really essential material that Japan is using in the transaction of this war. 78

The various Japanese transgressions provoked substantial outrage in congressional circles. As a result, a number of resolutions arose that aimed either to relieve the United States of its obligations under the 1911 Commercial Treaty or to terminate those commercial dealings with Japan that compromised United States assurances given in the Nine Power Treaty. On April 27, 1939, Senator Pittman, the chairman of the Foreign Relations Committee, ordered printed in the Congressional Record "Senate Joint Resolution 123":

Resolved, etc., That the President is authorized to place restrictions upon trade and commerce between the United States and any state, a party to the treaty (nine-power pact) between the United States, Belgium, the British Empire, China, France, Italy, Japan, The Netherlands, and Portugal, regarding principles and policies to be followed in matters concerning China, signed at Washington, February 6, 1922, when he shall adjudge and decree that such state is endangering the lives of our citizens or depriving them of their legal rights and privileges through the commission of acts or through failure to perform acts in violation of the express provisions and guarantees in said treaty: Provided, That this

78. Id. at 10766.
act shall not authorize any restrictions upon exports of agricultural products of the United States or possessions over which it has sovereignty, and: Provided further, That in the enforcement of the provisions of this act there shall be no discrimination between states, parties to said treaty, who are equally violators thereof.

Sec. 2. Such restrictions may be imposed by the President from time to time through embargoes upon the export and import of certain commodities, articles, and materials, and by restrictions upon monetary exchange and credits specifically limited and defined in proclamations made by the President.

It is the intent of Congress that the authority herein granted shall be exercised to the extent only as may be considered necessary in the protection of the lives of our citizens and their rights and privileges guaranteed under said treaty, and not until after the President has made every reasonable effort to induce said State to comply with the terms of said treaty as affecting the lives of our citizens and their rights and privileges.

Sec. 3. That the President shall not have authority to impose any of the restrictions provided for in this act or to issue any proclamations relative thereto, except as provided in section 5, until 10 days after he shall have submitted to both branches of Congress while in session the proclamation he intends to make relative to such restrictions, accompanied by a full report of the facts, evidence, and diplomatic correspondence bearing upon the necessity for his intended action.

Sec. 4. The President shall carry out the provisions of this act through
proclamations which shall have the force of law and through appropriate and consistent rules and regulations that he may from time to time promulgate.

Sec. 5. When a proclamation has been made under the provisions of this act and thereafter the President finds that said violations of said treaty have ceased, or when the President determines further enforcement of the provisions of the act are unnecessary to secure the safety of the lives of our citizens and the protection of their said rights and privileges, then he shall so proclaim, and thereupon and thereafter all former proclamations shall be deemed repealed, and all acts and things done under such proclamations shall also be deemed to be repealed and shall be of no further force and effect. The President may from time to time, by proclamation annul or modify any restrictions theretofore imposed.

Sec. 6. This act shall terminate on the 1st day of May 1940, and all proclamations issued thereunder and all acts and things done by virtue of said proclamations shall upon said date be deemed repealed and cease to have force and effect.79

Senator Pittman's resolution implicitly suggested a curtailing of normal commercial relations between the United States and the violating party, i.e., Japan. Such curtailment necessarily would mandate a termination of the 1911 Treaty.

On June 1, Senator Schwellenbach introduced "Senate Joint Resolution 143," in which was resolved:

...[t]hat in compliance with our treaty engagements, and to conserve our resources for national-defense purposes, there shall be retained within the United States, and denied export therefrom, all goods, wares, merchandise, munitions, materials, and supplies of every kind and character, except agricultural products, which there is reason to believe will, if exported, be used, directly or indirectly, in violation of the sovereignty, or the independence, or the territorial or administrative integrity of any nation, whose sovereignty, independence, and territorial and administrative integrity the United States is obligated by treaty to respect.80

While Schwellenbach himself felt his resolution could be adopted without terminating the 1911 Treaty, it was clear from the discussion on the floor at the time the resolution was introduced that a large number of those Senators backing the resolution felt otherwise.81

On July 18, 1939 Senator Vandenburg introduced "Senate Resolution 166," which read:

Resolved, that it is the sense of the Senate that the Government of the United States should give Japan the 6 months' notice required by the treaty of 1911 for its abrogation, so that the Government of the United States may be free to deal with Japan in the formulation of a new treaty and in the protection of American interests as new necessities may require.

Resolved further, That it is the sense of the Senate that the Government of the United States should ask that the Conference of Brussels of 1937, now

81. Id. at 10785.
in recess, should be reassembled to determine, pursuant to the express provisions of the Nine Power Treaty of Washington of 1922, whether Japan has been and is violating said treaty, and to recommend the appropriate course to be pursued by the signatories.

It should be noted here that the need to protect American (economic) interests was the reason behind the suggested termination of the 1911 Treaty.

Finally, on July 19, 1939, Representative Sterns entered into the Congressional Record "House Resolution 264," another resolution favoring the notification of Japan of the intention of the United States to abrogate the Treaty of 1911.

It is most significant that each of the listed resolutions received wholehearted backing in their respective chambers. Of the June 1 resolution, for example, Senator Schwellenbach wrote, "Since I have been in Congress I have never seen such a favorable response."84

The prevailing mood in both Houses of Congress in mid-1939, then, was one of breaking off commercial relations with Japan. As suggested above, this mood grew out of the conviction that Japan had violated both the 1911 Commercial Treaty and the 1921 Nine Power Pact. The obvious appropriate measure was to give notice of the termination of the 1911 Treaty.

On July 26, 1939, before any of the four resolutions had been officially adopted, the State Department gave notice to the Japanese Government of the 1911 Treaty:

Washington, July 26, 1939.
Excellency: During recent years the Government of the United States has been examining the treaties of commerce and navigation in force between

---

83. Id. at 9544.
84. 84 Cong. Rec. 10766 (1939).
the United States and foreign countries with a view to determining what changes may need to be made toward better serving the purposes for which such treaties are concluded. In the course of this survey, the Government of the United States has come to the conclusion that the Treaty of Commerce and Navigation between the United States and Japan which was signed at Washington on February 21, 1911, contains provisions which need new consideration. Toward preparing the way for such consideration and with a view to better safeguarding and promoting American interests as new developments may require, the Government of the United States, acting in accordance with the procedure prescribed in Article XVII of the treaty under reference, gives notice hereby of its desire that this treaty be terminated, and having thus given notice, will expect the treaty, together with its accompanying protocol, to expire six months from this date.

If we compare the phrase emphasized above with Senator Vandenburg's resolution, we see the Senator's rationale for termination directly reflected in the State Department's notification. The State Department, as did Vandenburg, held harassment of American interests the prime reason to terminate the Treaty. And, again, "harassment of American interests" was tantamount to a breach of the 1911 Treaty. Thus, the State Department was merely acting in response to a material breach by the Japanese.

Despite the fact that Congress had not actually voted on the four listed resolutions, it was steadfastly behind the State Department's actions. Thus, notwithstanding the fact that the State Department claimed this to be an independent act of termination by an American President, Roosevelt was effectively acting with overwhelming congressional approval, and not independently at all.

86. 5 G. Hackworth, supra note 30, at 331-32.
Roosevelt's Denunciation of the 1929 Convention for Trade Mark and Commercial Protection

The 1929 Inter-American Convention for Trademark and Commercial Protection,87 assured the contracting states that their respective manufacturers, industrialists, merchants, and agriculturalists would enjoy reciprocal trademark and commercial protection. This Convention was in large part an effort to reconcile the different judicial systems which prevailed in the several American republics.

On September 29, 1944, Secretary of State Hull gave notice of denunciation by the United States of the Protocol to the 1929 Convention:

September 29, 1944
The Director General, of the Pan American Union.

Sir:

As the result of the experiences of the last several years, the Government of the United States of America has come to the conclusion that the Inter-American Trademark Bureau at Havana and the Protocol on the Inter-American Registration of Trade Marks signed at Washington on February 20, 1929 have failed to serve any purpose which would adequately justify the annual quota of funds contributed by it for the support of the Bureau.

Accordingly, the Government of the United States of America, acting in conformity with the provisions of the third paragraph of Article 19 of the Protocol under reference, gives notice hereby of its denunciation of the Protocol, and, having thus given notice, understands that the Protocol will cease to be in force as regards

the United States of America upon
the expiration of one year from
the date of this notice.88

In a letter that same day to certain United States diplomatic officers in the American republics, Hull elaborated on the reasons for the denunciation. Most notably, he cited the "past ineffectiveness" of the convention,89 suggesting that some of the states party to the convention had not fulfilled their obligations; that is, there had been, prior to American denunciation, an effective breach by parties other than the United States. President Roosevelt (through Secretary Hull), then, was merely exercising his authority to denounce a violated treaty when he denounced the 1929 Convention.

Eisenhower's Termination of the 1923 Multilateral Nomenclature Convention

On May 3, 1923, the United States became a party to the Convention on Uniformity of Nomenclature for Classification of Merchandise.90 Hansell remarks:

Under the 1923 Convention the parties had agreed to employ the Brussels nomenclature of 1913 in their statistical reporting of international commerce, either exclusively or as a supplement to other systems. However, the Brussels system of 1913 had become outdated. In 1950 the United Nations developed what is known as the Standard International Trade Classification. Following this development was the adoption of the Uniform Central American Customs Nomenclature by the Committee on Economic Cooperation of the Ministers of Economy of Central America sponsored

88. Dep't of State Bull. No. 11, 1944 at 442 (emphasis in original).
ABUSE OF HISTORY

by the U.N. Economic Commission for Latin America. This nomenclature employed the Standard International Trade Classification as its basis. In 1950 the United Nations Economic and Social Council urged governments to use the Standard International Trade Classification.

Under these circumstances, the Tenth Inter-American Conference of American States, meeting at Caracas, Venezuela in 1954, adopted Resolution LXXXVIII on Customs Nomenclature. The Resolution after reciting the above history of the matter, made the following recommendation:

1. That, in as much as the Brussels nomenclature of 1913 has become outdated and has thereby rendered inapplicable the Santiago Convention on Uniformity of Nomenclature for the Classification of Merchandise, the ratifying Governments consider the desirability of withdrawing from the said Convention, as provided in Article V, in order that the Convention may be legally abandoned by all the parties.

2. That the Member States take cognizance of the method used in the development of the new Uniform Central American Customs Nomenclature, accomplished with the assistance of the United Nations and the Inter-American Statistical Institute, and seek to adopt and put in effect as soon as possible the Standard International Trade Classification of the United Nations, either exclusively or as a supplement to the national systems. (U.S. Archives, 74D431.)

The U.S. notice of withdrawal from the 1923 Convention simply quoted recommendation 1 of Resolution LXXXVIII, and said that "in accordance with the foregoing recommendation," the U.S. Government was
This case marks a clear application of the *rebus sic stantibus* doctrine. The Harvard Research in International Law remarks concerning *rebus*:

The idea common to most concepts of the doctrine is that a treaty becomes legally void in case there occurs a change in the state of facts which existed at the time the parties entered into the treaty. It is generally admitted, however, that not every change in those facts terminates the binding force of a treaty. ... Many writers affirm that a change in the state of facts terminates the binding force of a treaty only when the parties entered into the treaty with reference to this state of facts and envisaged its continuance unchanged as a determining factor which moved them to undertake the obligations stipulated.

In the instant case, it was assumed at the time the 1923 Convention was signed that the 1913 Brussels nomenclature would be the nomenclature used in the future classification of merchandise. When the new nomenclature superseded the old in the early 1950's, the main determining factor in the 1923 Convention became anachronistic. The 1923 Convention, as a result, became, according to *rebus* doctrine, effectively null and void.

It should be noted that this was not a case of impossibility. *Theoretically*, at least, the United States could have continued to use the 1913 nomenclature after 1954. Obviously, however, since all of the states party to the Tenth Inter-American Conference were abandoning that nomenclature, it would have been absurd for the United States to continue its use. The United States Government, then, had no *practical* choice but to act in accordance with Resolution LXXXVIII by announcing American withdrawal from the 1923 Convention. This it did

---

92. 5 G. Hackworth, *supra* note 30, at 349.
through notice given by President Eisenhower on May 24, 1954.

The President, then, was doing nothing more than exercising the only practical option open to him in light of the fundamental change in circumstances that had transpired since the signing of the 1923 Convention. He was not acting on his own initiative or without justifiable provocation.

Kennedy's Termination of the 1902 Commercial Convention with Cuba

On August 21, 1962, President Kennedy gave notice of the termination of the 1902 Commercial Relations Convention with Cuba. This step was an integral part of the United States economic embargo of the Castro regime in Cuba, declared on February 2, 1962, in which the United States was joined by the Organization of American States.

President Kennedy had absolute congressional sanction for his action, as is shown by the following:

(1) By the Foreign Assistance Act of 1961, "[n]o assistance shall be furnished under this Act to the present Government of Cuba. As an additional means of implementing the carrying into effect the policy of the preceding sentence, the President is authorized to establish and maintain a total embargo upon all trade between the United States and Cuba."

(2) The Export Control Act of 1948 authorized the President to control exports for the purpose of preventing national shortages, protecting national security and promoting foreign policy. Significantly, the Congressional Quarterly Almanac reported in late 1962:

President Kennedy Feb. 3 proclaimed an almost total embargo on U.S. trade with Cuba, effective

---

Feb. 7. He acted under the provisions of the Foreign Assistance Act of 1961 and the Export Control Act of 1948 as amended. The move which exempted from the ban some shipments to Cuba of U.S. food and medicines, was expected to deprive the Castro government of about $35 million in foreign exchange (mostly from sales of tobacco to the U.S.) and thus "reduce the capacity of the Castro regime...to engage in acts of aggression (and) subversion."97

(3) According to the Trading With the Enemy Act of 1917, the President had virtually unlimited power to regulate "through any agency that he might designate, or otherwise," all foreign exchange transactions with any foreign country or foreign national when the United States is at war or when the President has declared a state of national emergency.98

(4) By the Mutual Assistance Act (otherwise known as the Battle Act), the President could impose an embargo on United States arms and strategic goods to the Communist bloc.99

(5) Finally, the President had the authority to terminate commercial relations with Cuba as a result of 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 1947:100

1. To suspend immediately trade with Cuba in arms and implements of war of every kind.

2. To charge the Council of the Organization of American States, in accordance with the circumstances and with due consideration for the

---

98. Id. at 296.
99. Id.
constitutional or legal limitations of each and every one of the member states, with studying the feasibility and desirability of extending the suspension of trade to other items, with special attention to items of strategic importance.

3. To authorize the Council of the Organization of American States to discontinue, by an affirmative vote of two-thirds of its members, the measure or measures adopted pursuant to the preceding paragraphs, at such time as the Government of Cuba demonstrates its compatibility with the purposes and principles of the system.

President Kennedy, then, was acting under the authority of four congressional acts and one agreement to which the United States was party when he terminated the 1902 Commercial Convention with Cuba. His was an action based on definitive legislative approval.

Johnson's Denunciation of the 1965 Warsaw Convention

On November 15, 1965, President Johnson denounced the so-called "Warsaw Convention." A press release issued by the State Department on May 5, 1966 summarized the events leading up to that denunciation.

The Convention for the Unification of Certain Rules Relating to International Transportation by Air, generally known as the Warsaw Convention, was negotiated in 1929 and is today one of the principal multilateral agreements applicable to international air transportation. It establishes uniformity of documentation and creates a uniform body of law with regard to the rights and responsibilities of passengers,

---

shippers, and air carriers in international air transportation. In addition, its application has had the effect of making it unnecessary for the courts of the United States to decide many difficult and unsettled international conflicts of law issues. On the other hand, in cases of injury or death to passengers, the Convention limits the liability of airlines to only $8,300.

The Convention came into force on 13 February 1933. The United States joined the Convention in 1934. Eventually, over ninety countries became parties to the Convention.

In September 1955, following several preparatory international meetings under the auspices of the International Civil Aviation Organization (ICAO), and as a result primarily of United States dissatisfaction with the low limits of liability, a diplomatic conference was called to amend the Warsaw Convention. The conference, held at The Hague, resulted in a Protocol that amended the Warsaw Convention in several respects. But despite urging by the United States to reach agreement on a higher limit, the conference agreed to increase the limit only to $16,600. The Protocol was transmitted to the Senate on 24 July, 1959, but was not acted upon.

In the summer of 1961, the Administration undertook a broad study of the relationship of the United States to the Warsaw Convention and the Hague Protocol. The Interagency Group on International Aviation (IGIA), which is composed of representatives of agencies and departments of the Government having an interest in international aviation affairs, was given the task of studying the problem and making appropriate recommendations. Between
the summer of 1961 and 1964, the 
IGIA conducted an intensive review 
in consultation with interested 
industry and public representatives. 
In addition, public hearings were 
held and the views of all interested 
parties were invited at several 
different stages of the study. After 
full consideration, the IGIA made two 
basic and related recommendations to 
the Secretary of State; first, that 
efforts be continued to ratify The 
Hague Protocol, and, second, that 
this be coupled with complementary 
legislation providing for automatic 
compulsory insurance in the amount 
of $50,000. Together with The Hague 
Protocol limit of $16,600, this would 
have permitted a maximum recovery of 
$66,600.

On 7 August 1964, the legislation 
and the recommendation to ratify The 
Hague Protocol were transmitted to 
the Congress. The 88th Congress did 
not act on the legislation or the 
Protocol and the package proposal 
was resubmitted, without change, on 
30 April 1965.

On 26–27 May 1965, the Senate 
Foreign Relations Committee held hear-
ings on the Protocol.

The Foreign Relations Committee 
issued its report on 29 June 1965. The 
report indicated that "the Warsaw Con-
vention establishes uniform rules as 
to the rights and obligations between 
air carriers and users of international 
transportation, and creates uniformity 
with respect to transportation documents 
required." The report noted, however 
with the complementary insurance legis-
lation, maximum recoveries could be 
had of $66,600. On this basis, the 
Committee recommended ratification of 
the Protocol but added that if the 
legislation "is not enacted within a 
reasonable time (in fact prior to the
adjournment of the 89th Congress),
the Department of State should take
immediate steps to denounce the War-
saw Convention and The Hague Protocol."

When Congress failed to take action
on the compulsory insurance legislation,
the Administration, like the Foreign
Relations Committee, concluded that The
Hague Protocol alone would not afford
adequate protection to the American
traveling public. If no supplementary
protection could be made available, then
withdrawal from the Convention and
reliance on the common law would afford
the best measure of protection. In
search of a supplementary measure that
would provide a satisfactory alterna-
tive to withdrawal from the Convention,
the Administration suggested that the
United States carriers voluntarily in-
crease their limits of liability to
$100,000. Such voluntary action is
permitted under Article 22 of the
Convention. After several meetings
and conversations, it became apparent
that some carriers were prepared to
agree on a limit of $50,000 but no
carrier was prepared to go as high
as the $100,000 limit suggested by
the Government. Moreover, some carriers
would not agree on any amount unless
the amount was also agreed upon by the
principal foreign international carriers.

Following further consideration
by the IGIA, it was decided that the
United States should deposit a notice
of termination of the Warsaw Convention
on 15 November 1965. Article 39 of the
Convention specifically permits such
action by any state party to the Con-
vention and provides that termination
takes effect six months after deposit
of the notice.102

102. 32 J. Air L. & Comm., 243-45 (1966),
The State Department felt that before it could move toward denunciation of the Warsaw Convention it had to retrace some of its steps with the Senate, particularly with the Senate Foreign Relations Committee. The State Department had asked the Foreign Relations Committee to recommend ratification of The Hague Protocol, and it would be improper for the State Department now to take steps to denounce the Warsaw Convention without first asking the Committee if it had any objection.

Under Secretary of State for Economic Affairs Thomas C. Mann and members of the Staff of the State Department's Legal Adviser met with the Senate Foreign Relations Committee and Under Secretary Mann asked whether the Committee would have any objection to the State Department's moving toward denunciation of the Warsaw Convention. After some discussion Senator Fulbright, Chairman of the Committee, indicated that the Committee would have no objection and that the State Department was free to move toward denunciation.\textsuperscript{103}

The United States, as suggested above, gave notice on November 15, to be effective May 15, 1966. Not only did the President have the backing of the Senate Foreign Relations Committee for his action, but he had significant support from the House as well. On August 12, 1965, for example, resolutions were introduced by Representatives Wolff and Tenger that strongly supported denunciation.\textsuperscript{104} Each introduction was accompanied by impassioned explanation. Representative Tenger remarked:

Mr. Speaker, I am pleased to sponsor a resolution which expresses the sense of the House of Representatives that the Hague Protocol to the Warsaw Convention should not be ratified and

\textsuperscript{103} 31 J. Air L. & Comm., 301 (1965).
\textsuperscript{104} H. Res. 518 and H. Res. 519, 89th Cong., 1st Sess., 111 Cong. Rec. 20374-20378.
further that the United States should not adhere to any provision of the Warsaw Convention which limits the liability of international air carriers to passengers on flights covered by the Convention. The withdrawal by the United States from this treaty will assist American passengers who may be injured in future airline accidents and will afford necessary protection to the estate and beneficiaries of those Americans who may be fatal victims of these tragic accidents.

Our Nation stands as leader of the free world because we have committed ourselves to the protection of the individual, his constitutionally guaranteed freedoms, his rights, and his pursuit of happiness. By withdrawing from participation in the Warsaw Convention, we will be in effect restating our determination to protect individual rights and we will be acting in accord with basic principles of our Nation. The principles of justice, when balanced against our international relations, tip the scales in favor of withdrawal by the United States from the Warsaw Convention and rejection of the Hague Protocol.105

The text of the denunciation notice reflected the concern of both Congress and the State Department over unjust liability regulations and the clear desire of those two bodies to have a more equitable set of regulations enacted. At the time the notice of denunciation was given, the State Department made it clear that it would withdraw that notice if prior to its effective date there were:

... reasonable prospect of an international agreement on limits of liability in international air transportation in the area of $100,000 per passenger or on

uniform rules ... without any limit of liability, and if, pending the effectiveness of such international agreement, there ... [were] a provisional arrangement among the principal international airlines waiving the limits of liability up to $75,000 per passenger. 106

As it developed, the results of eleventh hour negotiations met the State Department demands. The denunciation was accordingly withdrawn on May 14, 1966. 107

It should be remarked that the withdrawal elicited dismay in one circle. A group of Senators were hoping for an even more drastic change in liability regulations than was afforded by the last minute compromise. They favored not withdrawing the denunciation until full public hearings were held and the views of qualified and interested persons determined. 108 The withdrawal came notwithstanding their complaints. The convention remains in effect to this day.

It is clear that President Johnson had considerable congressional support for his denunciation notice. While it is true that no specific piece of legislation was passed as of November 15, 1965, that gave him the authority to denounce the Convention, it is just as true that the mood of Congress as expressed by Resolution or Committee recommendation was decidedly one backing the denunciation action. President Johnson, therefore, was not acting independent of congressional authorization.

Conclusion and Postscript

The "past precedent" analysis introduced by the State Department ultimately does nothing to aid the presidential cause in the Goldwater v. Carter controversy. As this discussion has shown, that analysis crumbles in the face of detailed historical scrutiny. Not one instance cited in the Hanssell Memorandum involves a President withdrawing from or terminating a treaty on his own

That the argument set forth in this article is a persuasive one emerges from a brief review of actual judicial treatment of the "past precedent" issue in the Goldwater case itself. Judge Gasch, in holding for the plaintiffs, noted in the District Court opinion that, "[t]aken as a whole, historical precedents support rather than detract from the position that the power to terminate treaties is a power shared by the political branches of this government."\textsuperscript{109} Gasch's conclusion was reached without benefit of this article.

Subsequent to the handing down of the District Court opinion, Senator Goldwater's attorneys requisitioned this article to bolster the precedent argument further still and submitted it as a brief to the District of Columbia Circuit Court of Appeals. That court was within constitutional bounds in independently terminating the Mutual Defense Treaty. Significantly, though, the Court failed to draw upon the State Department "past precedent" argument in explaining its holding. Commenting on the precedent issue, the court merely remarked:

\begin{quote}
Plaintiffs and defendants here have offered competing interpretations of how the long sequence of treaty terminations in our history was accomplished. Whether or not the historical record supports either party's substantive constitutional argument -- and we express no views on this -- it does show that when Congress wants to participate directly in the termination process, it can find the means to do so.\textsuperscript{110}
\end{quote}

In direct contrast to the majority, Judge MacKinnon in dissent spoke most pointedly to the teachings of history. Seizing upon the historical analysis presented in

\begin{itemize}
\item \textsuperscript{109} 481 F. Supp. 949, 960 (D.D.C. 1979).
\item \textsuperscript{110} Goldwater v. Carter, 617 F.2d 697, 715 (D.C. Cir. 1979) (Wright, J. concurring) (emphasis supplied).
\end{itemize}
this article, he concluded after some fourteen pages of
discussion that the State Department's arguments on this
subject were vacuous and that in each of the instances
discussed in the Hansell Memorandum, the President had
*not* acted alone in terminating the treaties in question.

On appeal, then, the "past precedent" issue once
again worked only in favor of the Goldwater challenge:
State Department arguments on the subject went almost
completely unheeded.

On December 13, 1979, the Supreme Court vacated the
Court of Appeals opinion and remanded the case to the
District Court with directions to dismiss the complaint.
In so ordering, the Court gave no majority opinion on
any of the numerous substantive questions (including
past precedent) posed by the litigants. Thus, the basic
constitutional issue at stake -- whether the President
may independently terminate treaties on his own initia-
tive -- remains a matter for conjecture.

Should a future President try to follow Mr. Carter's
example by abrogating a treaty without first consulting
the Senate or Congress as a whole, he will most certainly
face charges identical to those leveled in *Goldwater v. Carter*. In that instance, it seems clear from this dis-
cussion that that President will be able to call upon
only one historical example in his defense -- President
Carter's unilateral termination of the 1954 Mutual
Defense Treaty with Taiwan.