THE FORUM FORUM

Constitutional Confusion: Treaty Denunciation

ALFRED P. RUBIN

In conceiving a Constitution full of intricate checks and balances, the founding fathers of the United States were aware of the positive effects that negotiation and cooperation among the branches of government would have on government policymaking. Unfortunately, all too many occasions arise where confrontation among policymakers causes the Constitutional checks and balances to be exercised in their most extreme and formal fashions. It is all the more unfortunate that an instance of this sort has recently presented itself in the delicate area of treaty denunciation, creating unnecessary confusion with regard to the delegation of powers in directing United States foreign policy.

On 17 October 1979, Judge Gasch of the United States District Court for the District of Columbia, in the case of *Senator Barry Goldwater, et al. v. James Earl Carter, et al.*, declared that President Carter's notice of termination of the 1954 *Mutual Defense Treaty Between the United States and the Republic of China* must receive the approval of two-thirds of the United States Senate or a majority of both houses of Congress for that notice to be effective, and ordered Secretary of State Vance and his subordinate officers to refrain from taking any action to implement that notice until it was so approved. On 30 November 1979, Judge Gasch's ruling was reversed by a vote of 6 to 1 of the Circuit Court of Appeals in the District of Columbia. The Supreme Court has confirmed the conclusion of the Circuit Court by denying "standing" to the Senators in a narrow ruling which commanded only a plurality, not a majority, of the Court. It is instructive to examine some of Judge Gasch's reasoning and to speculate for a moment on its implications, which are likely to surface again.

Alfred P. Rubin is Professor of International Law at The Fletcher School.

The first legal hurdle the plaintiffs, individual Senators, had to overcome involved the question of "standing." They had to show that they had suffered an injury in fact, that their injured interests were within a "zone of interests" protected by a provision of the Constitution, that the injury was caused by the challenged action, and that a favorable decision would in fact redress the injury. Judge Gasch held that the individual Senators had suffered and were still suffering injury in fact to their legislative right to be consulted and to vote on the termination of the Treaty. He concluded that all four criteria for standing were met.

This result, involving the Judiciary in a conflict of authority between the Executive and Legislative branches of our government, is not unprecedented, as is readily apparent to those who followed the ballet of all three branches during the period immediately preceding the resignation of President Nixon. There are those who strongly object to having the Court play this sort of umpire's role; but to defenders of the Court's role, these objections seem to involve technical readings of some Supreme Court decisions which erect far-reaching Constitutional conclusions on a flimsy substructure. In addition, advocates of the Court's role note that the Supreme Court's past overstatements of Executive authority in the foreign affairs field, such as Justice Sutherland's mention of "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations,"[1] have long been criticized by scholars. Even allowing that the judiciary has a proper role in settling disputes regarding the distribution of legal powers under our Constitution, it is not clear that the judicial forum is the best one in which to resolve those disputes.

There are many gray areas in the Constitution, areas in which general grants of authority to the Executive and to the Congress overlap, and areas in which neither political organ has clear authority. To assert an exclusive authority in one branch or the other, and to structure the confrontation in such a way that the other branch must yield its portion of the gray areas or marshal its own confrontational forces, is to force the defending branch into a choice that is rarely conducive to wise policy. Moreover, it undercuts the sort of cooperation based on persuasiveness that our system of checks and balances requires. The aggrieved Senators cannot be faulted for resorting to the Judiciary when the Executive Branch left them no other effective way to assert their interest. To expect ambitious and jealous politicians operating within our Constitutional order to yield to other ambitious and jealous politicians without a struggle is to misconceive our political order and exhibit considerably less foresight than did

1. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 at 320 (1936). This has been narrowed by later Supreme Court analysis; *see generally,* Henkin, *Foreign Affairs and the Constitution,* Chapter II (1972).

the framers of our Constitution. In a sense, the Senators were fighting for the integrity of Congressional and Senatorial powers no less important to our system than the integrity of Presidential powers, whatever the substantive merits of the particular case.

It is fortunate for our Constitutional order that Judge Gasch was not persuaded that the 1 January 1980 deadline for action on the Mutual Defense Treaty of 1954, fixed by our Executive branch negotiators and the Chinese government in Peking, was Constitutionally significant. An artificial time limit fixed by the unchecked exercise of authority by a single branch of our government certainly cannot be permitted to affect the integrity of our system, where checks do exist.

Similarly, arguments based on the supposed need to bolster the credibility of the President in an area in which the President himself has placed that credibility in question seem to misconceive the Constitutional order. After a thirty year delay in accepting the diplomatic position of the People's Republic as at least a government *in* China — long after any rational doubts about the stability of that government had disappeared — the Executive, which has the sole authority under the Constitution to send and receive Ambassadors, cannot claim that there is now an objective need for urgency or for credibility. Nor, indeed, can it claim that the credibility of the President will be enhanced by an action that relies on the supposed need for that credibility for its own effectiveness.

Indeed, the entire confrontation raises additional questions of credibility, or, to put it more bluntly, competence in the Executive branch. Judge Gasch correctly pointed out that under international law a treaty loses its legal force (absent denunciation) when it is superseded; when it becomes impossible to perform or is otherwise rendered inoperative; when it is violated or denounced by the other party; or when there has been a fundamental change in circumstances affecting the treaty. These and some other bases for rendering a treaty void without formal denunciation are codified in the Vienna Convention on the Law of Treaties.[2]

The United States could well have noted the use of these methods by Japan in revising its Chinese policy. A strong argument, used by Japan when it adjusted its own relations with Peking and Taipei following President Nixon's trip to China in 1972, is simply to accept the view of both Peking and Taipei that there is only one China, exercise national discretion within the limits allowed by international law to "recognize" the Peking government as what it and its rival both claim to be (which certainly comes closer to reality than "recognizing" the Taipei government as the government of all China), and agree with

2. U.N. Doc. A/CONF. 39/27, 23 May 1969, also in 63(4) *American Journal of International Law* 875 (1969). *See* articles 48, 53, 61-2, 64.

the government in Peking that the treaties between Japan and Taipei have no legal force. This is not the place to analyze all possible arguments for regarding the Mutual Defense Treaty of 1954 between the United States and the "Republic of China" as terminated, but it must be clear that such arguments exist and would suffice to bring about the legal result sought without a formal act of denunciation. It surely cannot be pretended that the government in Taiwan and its American supporters would be less offended by explicit denunciation than by appeal to well-established rules of international law. Indeed, the two paths are not mutually exclusive and the legal termination of the Treaty could have been put forth as a reason for taking the formal step of denouncing it in order to eliminate any doubts that might remain in American municipal law when that municipal law ceased to reflect the international law applicable to relations between Taiwan and the United States. Clearly a perceptive Executive Branch could have accomplished its objective of rendering the Treaty void without the costly confrontation with the Legislative Branch which placed the issue in the courts.

As to the technical questions of Constitutional law used by Judge Gasch to reach the conclusion that the Treaty remained valid until formally acted on by the Senate or the Congress as a whole, there are two major points that deserve special comment. In order to find municipal law effects of the Treaty, as distinguished from its international legal effects, and to bolster the conclusion that the Congress has a Constitutional role in treaty termination, Judge Gasch asserts that a number of the Treaty's provisions are "self-executing,"[3] i.e., change American municipal law without any implementing legislation. Among them he specifically cites Article V, which declares that in case of an armed attack each party will act to meet the common danger in accordance with its constitutional processes. But the President's and the Congress's powers to act in accordance with American Constitutional processes are in no way affected by the Treaty. Thus it seems that the Treaty in this provision is not "self-executing;" it fixes an international law obligation (and a very vague and probably undecipherable one at that) without touching the municipal law of the United States.

The peculiar analysis by Judge Gasch, holding a provision that seems to have no effect in American municipal law to be "self-executing" under that law, contrasts with his holding that Article X, the denunciation provision which provides for termination of the Treaty on a year's notice by either side, is *not* self-executing. If that latter provision were self-executing, the President, as Chief Executive, would have the legal power to denounce the Treaty in exercise of the power given the United States in Article X, regardless of inconsistent provisions of American municipal law or gaps in the Constitutional pattern of

3. *See* text above Note 60 of the Order.

authority distribution.[4] Judge Gasch thus had to hold it non-self-executing in order to find that the Senate's advice and consent to the Treaty did not delegate to the President the legal power to terminate it. Aside from his bald assertion that Article X is non-self-executing he gives no logic to support his position.

The reason why Judge Gasch apparently felt it unnecessary to state his legal position in detail seems to have been his underlying assumption that terminating a treaty is legally the same as entering into a treaty. He thus reads the Constitutional provision regarding advice and consent of the Senate for treaty formation to imply a symmetrical provision requiring the same process for treaty termination. But the Constitution is full of asymmetries, and in this area there is a reason for asymmetry that must have seemed overwhelming to the framers: entering into a treaty saddles the United States with a superstructure of rights and obligations built on an underlying body of international law. It is the underlying law that makes treaties binding and governs relations generally in areas not covered by treaty. Denouncing a treaty builds nothing; it restores the legal situation to the *status quo ante*. There is no significant change in legal relations other than to abolish special rights and avoid special obligations built on the lasting substructure of international law. It should, of course, be easier to denounce treaties than to enter into them, since denouncing them cannot go farther than to restore our legal relations to what they would have been had there never been a treaty. But entering into new treaty relations is entirely different; it opens the possibility of new commitments of lives and fortune that should be subjected to the most severe scrutiny by the Senate, as the repository of the equal sovereignty of the states of the Union.

It may well be that treaty denunciation should, as a matter of wise policy, be subjected to Congressional or Senatorial scrutiny. But the Constitution does not assure wise policy; only the distribution of powers that makes jealous and ambitious statesmen pause before they act. And it can certainly be argued that the many special grants of authority to the President to act independently of the Congress, such as his power to receive ambassadors or command the armed forces, are part of the checks and balances built into our Constitution to guard against legislative excesses.

There are many more dubious points to Judge Gasch's analysis. But the abili-

4. Missouri v. Holland, 252 U.S. 416 (1920), held that a Treaty properly entered into empowered the Federal Government to legislate in an area which had been believed reserved to the States under the Tenth Amendment to the Constitution. Wilson v. Girard, 354 U.S. 524 (1957) held that an Executive Agreement pursuant to a Treaty authorized the Executive Branch without implementing legislation to hand a soldier over to a foreign country for trial under a disputed interpretation of the Executive Agreement. There are limits on the power of the Executive Branch, and on the Federal Government as a whole to enter into treaties (*see* Reid v. Covert, 354 U.S. 1 [1957]), but none that seem relevant in this case.