

# EXCURSUS I

Gerald F. Hyman on  
The Imperial Presidency Again?

Apart from the obvious questions about its political advisability, profound constitutional questions attend the president's precipitous announcement to an attentive nation and an adjourned Congress that the United States would "recognize the Government of the People's Republic of China as the sole legal Government of China." Putting aside the foreign policy issues—the question of what we got for what we gave; the consequences of leaving all but defenseless a small ally and its seventeen million people; the implications of that virtual abandonment for South Korea, the Philippines, Japan—even our allies in South Asia and the Middle East; the effect on our alliances of advising our allies, as we did in 1972, to watch their TVs so that Walter Cronkite could explain to them as he was explaining to us the latest turn in American policy—putting all that aside, surely the president's policy raises some serious domestic issues.

To be sure, the seeds of the constitutional issue were planted at Shanghai, but the harvest belongs peculiarly to the Carter administration. The People's Republic made three demands, and the administration, in our name, acceded almost without qualification to all of them. We have agreed to remove all formal diplomatic personnel from and terminate all diplomatic relationships with Taiwan, to withdraw all remaining troops, and to abrogate the Mutual Defense Treaty of 1954. The slight qualification consists in our unilateral declaration that "We will continue to have an interest in the peaceful resolution of the Taiwan issue."

The legal force of that declaration rests on the fact that, as the president assures us, "it has not been contradicted by the People's Republic of China." There is one additional understanding, according to the secretary of state, namely, that "we will continue to supply arms to Taiwan." We will now fill the orders "already in the pipeline," he said, and after 1979 we will supply at a level sufficient to defend the Republic, a level that, with the removal of the American military presence from the island, has in the last year or so become an issue of sharp dispute between the Republic and the U.S. Vice-Premier Teng, on the other hand, has already reiterated the longstanding Chinese position that the Taiwan issue is a domestic and not an international affair; and, at least legally, we have now agreed.

But, again, aside from the international implications of this precipitous act, what about the domestic ones? How is it that the president can, alone and in twelve short minutes, abrogate a treaty whose initial ratification required the advice and consent of two-thirds of the Senate? How is it that, with a smile and a twinkle, the man who was going to restore confidence, constitutionality, openness, and a part-

nership between the executive and legislative branches simply abrogated a treaty?

For all the talk about the imperial presidencies of Lyndon Johnson and Richard Nixon, when did they simply tear up a treaty on national TV? For all the discussion of the license taken with the Tonkin resolution, still the undeclared war and the ever-increasing military commitment were subsidized annually by congressional allocations. And for all the secrecy, all the Swiss uniforms, all the paranoia, and even all the executive privilege evident in earlier presidencies, when has there been so clear a violation of the spirit, if not also the letter, of the Constitution? What possible meaning can be given to the requirement of senatorial concurrence if the president can, on his own announcement, declare abrogated a solemnly ratified treaty? Does the president also have the power then to abrogate the NATO treaty? the Rio treaty? the treaty with Japan? Could the next president simply abrogate the Panama treaty? the SALT agreements? the Middle East settlement? Is this the power of the presidency that the Senate shall concur, shall be partner to sovereign commitments that the president can simply terminate?

Assuming the Senate were inclined to act, what could it do? It could demand a reading of the legality of the act. It could refuse to fund the new mission. It could refuse to confirm the first five (ten? fifteen?) ambassadorial nominations. It could require sales of military weapons for Taiwan as part of any future military appropriations bills. It could link SALT, the Middle East, and China. It could make the future of our relations with the PRC a nightmare of contingencies and obstacles. It could tie the president's hands with little knots for the rest of his term. It could do all these things.

But why must our foreign policy be a constant game of chicken? Why must presidents continue to move unilaterally and then invoke the prestige and credibility of the United States to assure compliance? ("How can we undermine the president, who speaks for the nation?") Why must our honor be a constant hostage of the executive? Why is it that a president feels perfectly justified in calling the congressional leadership to the White House (then locking it up there) in order, three full hours before the event, to announce the abrogation of a treaty? This was no national emergency. It required no immediate presidential decision. It wasn't even a pressing issue. But it has become one. Not only as a matter of foreign policy, but as a matter once again of presidential power.

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