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Backgrounder

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WHAT DETERMINES U.S. RELATIONS WITH CHINA: THE TAIWAN RELATIONS ACT OR THE AUGUST 17 COMMUNIQUE WITH BEIJING?

In April 1979, Congress enacted a comprehensive law to continue and promote the full-range of friendly contacts with the Republic of China on Taiwan which the United States had enjoyed before Jimmy Carter broke diplomatic relations with that nation. All that was missing from this legislation, known as the Taiwan Relations Act (TRA),[1] was a provision for formal diplomatic relations. In particular, the Act created U.S. defense commitments to the Republic of China (ROC) which congressional leaders considered essential to preserving the military security and the economic, political, and social stability on Taiwan.

On August 17, 1982, the United States and the People's Republic of China (PRC) on the mainland simultaneously issued a joint communique.[2] It set qualitative and quantitative limits on future U.S. arms sales to Taiwan. Because of the subject of the communique, questions immediately arose over its potential conflict with the security provisions of the TRA. The TRA, after all, guarantees that the United States "will make available...such defense articles and defense services in such quantity as may be necessary..." and that the nature and quantity of defense arms and services will be determined by the President and Congress "based solely upon their judgment of the needs of [the ROC]," not upon the judgment of the PRC. Yet the August 17 communique seems to contradict this by limiting the arms which the U.S. will sell to Taipei.

When confronted by this apparent contradiction, the Reagan Administration insists that its guiding principle on arms sales will continue to be that embodied in

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1. Public Law 96-8, April 10, 1979, 22 U.S.C. 3301 *et seq.*

2. The text of the Joint Communique of 1982 is reprinted in *Hearing on China-Taiwan: United States Policy*, U.S. House of Representatives, Committee on Foreign Affairs, 97th Congress, 2nd Session, August 18, 1982, at 31-32.

Note: Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

the TRA. Beijing rejects this, however, and says the communique takes precedence over and thus supersedes the TRA.

A close examination of the matter, drawing upon principles and precedents of international and U.S. laws, leads to a solid conclusion that the TRA has legal precedence over the August 17 communique. If in the future the security of the ROC demands advanced weapons sales from the U.S., then the U.S. would be obligated to provide those weapons.

TRA AND JOINT COMMUNIQUE

The TRA defines U.S. policy toward the ROC in the fields of commercial, trade, cultural, defense, and other relations and preserves the legal status of the ROC under U.S. laws and in U.S. federal and state courts.[3] A key feature of the TRA is the pledge by the U.S. that it will supply the ROC with defensive weapons needed "to maintain a sufficient self-defense capability" (sec. 3[a]).

In spite of this clear language, paragraph six of the August 17 Joint Communique provides that the U.S. "does not seek to carry out a long-term policy of arms sales to Taiwan, that its arms sales to Taiwan will not exceed, either in qualitative or in quantitative terms, the level of those supplied in recent years since the establishment of diplomatic relations between the United States and China, and that it intends to reduce gradually its sales of arms to Taiwan, leading over a period of time to a final resolution."

No Inconsistency. On August 17, 1982, Ronald Reagan announced that "our policy, set forth clearly in the communique, is fully consistent with the Taiwan Relations Act." He added that arms sales to the ROC "will continue in accordance with the Act...."[4] Administration officials appearing before congressional oversight hearings similarly have insisted that there is no inconsistency between the communique and the TRA.

These spokesmen have explained that a "communique" is not a law, but merely a statement by a government. They have testified that the communique 1) "is not a treaty or an agreement but a statement of future U.S. policy,"[5] 2) "cannot bind any future President,"[6] and 3) must be implemented "in accord with the Taiwan

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3. A U.S. District Court has found that the range of ties established by the TRA is so extensive that "quasi-governmental relations" are provided for by the Act. *Chang v. Northwestern Memorial Hospital*, 506 F. Supp. 975, 978 [note 3][N.D.Ill. 1980].

4. The text of the presidential statement on the issuance of the 1982 communique is reprinted in "China-Taiwan" hearing, *supra* note 2, at 33.

5. See statement of John Holdridge, Assistant Secretary of State for East Asian and Pacific Affairs, "China-Taiwan" hearing, *id.* at 6.

6. See statement of Davis Robinson, Legal Adviser, Department of State, in *Hearings on Taiwan Communique and Separation of Powers*, U.S. Senate, Committee on the Judiciary, Subcommittee on Separation of Powers, 97th Congress, 2d Session, September 27, 1982, at 110.

Relations Act."[7] The Department of State submitted written answers to a Senate panel asserting that the term "final resolution" in paragraph (6) of the communique "should not be read as synonymous with 'ultimate termination' of U.S. arms sales to Taiwan" and that the document "does not provide for termination of such arms sales."[8]

Given the good faith of these assurances, serious legal questions remain. Is the communique enforceable under customary international law? Is a solemn declaration of government policies issued jointly and simultaneously with another nation an international agreement? What if U.S. policy declared in the joint instrument with a foreign state rests on a false interpretation or incomplete understanding by the Executive branch of the related U.S. statute? In the event of an actual conflict with a law made by Congress, which will prevail? Can the Executive set aside an inconsistent Act of Congress for the benefit of U.S. foreign affairs interests as seen by the President?

CRITERIA OF INTERNATIONAL AGREEMENTS

The State Department's rules, published in the *Code of Federal Regulations*, define the criteria for deciding whether an international document reaches the level of an international agreement.[9] In applying its rules to the August 17 Joint Communique, the State Department expressly stated in a letter to Congress that "this document is not an international agreement...."[10] Under these criteria, both the U.S. and the other country "must intend their understanding to be legally binding, and not merely of political or personal effect" and "must intend their undertaking to be governed by international law." In addition, to constitute an international agreement, the arrangement 1) must reach a "level of significance" and not be "[m]inor or trivial," 2) requires "precision and specificity in the language setting forth the undertakings of the parties" and shall not be "couched in vague or very general terms," 3) cannot be "truly unilateral in nature" even though an important undertaking, and 4) should use the "customary form" for international agreements or be suspect of a lack of intent to be legally bound.[11]

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7. See statement of Theodore Olson, Assistant Attorney General, Office of Legal Counsel, Department of Justice, in "Taiwan Communique" hearings, *id.*

8. See answers of the Department of State to questions regarding Taiwan arms sales in "Taiwan Communique" hearings, *id.* at 142.

9. 22 C.F.R. Ch. 1 [4-1-87 ed.], at 471-477.

10. Letter of Carolyn Willson, Acting Assistant Legal Adviser for Treaty Affairs, Department of State, addressed to the Honorable George Bush, President of the Senate, dated September 17, 1982.

11. 22 C.F.R. 471-472, Sec. 181.2[a][1]-[5].

Of all these standards, "the intent of the parties is the key factor."[12] Competent U.S. officials, including the State Department Legal Adviser and Assistant Attorney General, Office of Legal Counsel, have declared repeatedly that the 1982 communique "is not a legally binding international agreement creating obligations and rights under international law."[13]

Consent to Be Bound Required

The State Department regulations are based on a core principle of international law: the consent of a state to be bound by an international agreement is essential to the conclusion of such an agreement. There must be a common understanding, therefore, as to the intended effect of the instrument as an international agreement governed by international law.

This is the principle announced by the American Law Institute in its *Restatement of Foreign Relations Law*, where it defines an international agreement as "an agreement between states or international organizations by which there is manifested an intention to create, change or define relationships under international law...."[14] This same principle is evident in the rules of customary international law affirmed in the Vienna Convention of the Law of Treaties.[15]

To create an international legal agreement, moreover, it is not enough that the parties express "a present intention or a personal or political commitment."[16] They must establish an intention to create legal relationships. In the case of the August 17 Joint Communique there has been no ratification, no act of acceptance, accession, or other means of approval of the document by the U.S. which would indicate such an intention to view the document as an agreement. The instrument has not even been signed or initialed by the U.S.

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12. 22 C.F.R. 472, Sec. 181.2[a][3]. The Ministry of Foreign Affairs of mainland China described the communique as an "agreement" in paragraphs [1] and [6] of its official statement accompanying issuance of the communique. "Taiwan Communique" hearings, *supra* note 6, at 194-195. However, the intent of both parties is required to make an agreement.

13. For example, see statements of Legal Adviser, State Department, and Assistant Attorney General in "Taiwan Communique" hearings, *supra* note 6, at 109-110, and answers of the Department of State to Questions 11 and 27, *id.* at 141, 147.

14. American Law Institute, *Restatement of the Law, Second, Foreign Relations Law of the United States* (1965), at 361, Sec. 115[a].

15. See text of Vienna Convention in Message of the President of the United States transmitting the Vienna Convention on the Law of Treaties, U.S. Senate, Executive L, 92nd Congress, 1st Session, November 22, 1971, especially Articles 2, paragraph 1.(g), 9, 11-15. The United States has signed the Convention but has not ratified it. Nevertheless, under customary international law, the U.S. government adheres to parts of the Convention relevant to the present discussion.

16. See the Comment of the American Law Institute on its definition of an "international agreement" reprinted in Marjorie Whiteman, 14 *Digest of International Law*, U.S. Government Printing Office, 1970, at 6.

Oral Executive Agreements

In special circumstances, it is true that even an oral executive agreement can create enforceable obligations under international law. For example, in the case of *Eastern Greenland* between Norway and Denmark, the Permanent Court of International Justice ruled in 1933 that a definitive and unconditional verbal statement by a competent representative of a nation is binding upon the country to which the official belongs.[17] Also, the *Nuclear Tests* cases between Australia and France, decided by the International Court of Justice in 1974, construes a unilateral statement by the French President into an agreement.[18]

The U.S., however, has denied from the very beginning that it was a consenting party to any agreement emanating from the August 17 Joint Communique and has refrained from expressing any promise to bind future Administrations. The pertinent text of the document itself falls considerably short of establishing a clear expression of consent and purpose of being legally bound by international law, as distinguished from a statement of policy or political objective.

Invalidity of Agreement Violating U.S. Internal Law

Even if the Joint Communique were to be construed as an international agreement, the U.S. could invoke the fact that its consent to be bound by the Joint Communique would be "expressed in violation of a provision of its internal law," namely, the U.S. Constitution. Article 46 of the Vienna Convention allows such a defense when the "violation was manifest and concerned a rule of its internal law of fundamental importance." The same Article explains that a violation "is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."[19]

To the extent the communique may contravene the Taiwan Relations Act, it would violate the U.S. Constitution. This fundamental law mandates that the President shall faithfully execute the laws.[20] Moreover, it is Congress who "makes" laws, not the President. Thus, the U.S. constitutional processes would invalidate the Joint Communique as an enforceable international agreement under the defense of the Vienna Convention.

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17. *Legal Status of Eastern Greenland*, 1933 P.C.I.J., ser. A/B, No.43 at 35 [judgment of April 5, 1933].

18. *Nuclear Tests Cases* [*Australia v. France*; *New Zealand v. France*], 1974 ICJ Reports, at 253, 457 [judgments of Dec. 20, 1974]. The Court inferred, from several statements made by French representatives, especially one made by the President of the Republic as a press conference, that France intended to cease atmospheric tests following the conclusion of the 1974 series, thereby achieving the objective pursued by Australia and New Zealand. The Court held that a legal obligation can originate even from a unilateral act, such as a verbal declaration, if the nation making the declaration intends to become bound according to its terms. Here the United States has from the first announced that the communique is not legally binding.

19. Vienna Convention, *supra* note 15, at 24, Art. 46[1]-[2].

20. Article II, section 3 of the Constitution provides: "He [the President] shall take care that the Laws be faithfully executed...."

CONSTITUTIONAL QUESTIONS

In the context of the Joint Communique, Administration officials repeatedly have asserted that the document is not an agreement and that statements of future U.S. arms sale policy embodied in the Joint Communique are intended to be "fully consistent with the TRA."[21] Further, the Administration "made it very plain to the mainland Chinese from the very start that everything we did in reaching this joint communique had to be compatible with the Taiwan Relations Act,"[22] and that "neither this President nor any successor President can change the Taiwan Relations Act."[23]

Could these guarantees be repudiated by a future President? In the event of a direct conflict with the TRA, which would have precedence, the communique or the statute?

Executive Agreements

Presidential authority to make international agreements creating legal rights and obligations was anticipated in the much cited Curtiss-Wright case,[24] which involved the question of the President's power to act in accord with an Act of Congress. Such authority was expressly sustained in *United States v. Belmont*[25] and *United States v. Pink*.[26] The latter two cases involved the authority of the President to make agreements coupled with the simultaneous exercise of the recognition power and invoked the supremacy clause of the Constitution [Article VI, cl. 2] against inconsistent state legislation.

None of these cases, however, suggests that the President might act contrary to an Act of Congress. Moreover, the recognition element of these cases may be considered inapplicable to the present question because, far from accompanying the

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21. See statement of John Holdridge, "China-Taiwan" hearing, *supra* note 2, at 7, and statement of President Reagan, *id.* at 33.

22. See answer of the State Department to Question 1, "Taiwan Communique" hearings, *supra* note 6, at 138.

23. See statement of Davis Robinson, "Taiwan Communique" hearings, *id.* at 110.

24. *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304, 320 [1936]. The Court upheld an executive agreement prohibiting the sale of arms to Bolivia and Paraguay under a joint resolution providing that it shall be unlawful to sell arms "if the President finds that the prohibition...may contribute to the reestablishment of peace between those countries...." *Id.* at 312.

25. *United States v. Belmont*, 301 U.S. 324, 330 [1937]. The case involved the settlement of claims, coincident with recognition of the Soviet Union, to accounts nationalized by the Soviets. *Id.* at 330.

26. *United States v. Pink*, 315 U.S. 203, 229 [1942]. The case involved the propriety of the same Litvinov Assignment considered in *Belmont*. The Court found that "Congress tacitly recognized" the new policy of recognition of the Soviet government and that the Litvinov Assignment was "part and parcel" of that policy. *Id.* at 227.

act of recognizing mainland China, the 1982 communique was issued three and one-half years later.[27]

Separation of Powers

At the heart of U.S. constitutional doctrine is the concept of the separation of powers. It permeates the entire structure of the Constitution.

As applied to the question of whether the President could issue an executive agreement or order contrary to the Taiwan Relations Act, the issue is whether he could justify his act by asserting a superior authority inherent to the Executive office or claiming the subject is beyond the legislative sphere.

While the President has broad foreign affairs powers, the field is not exclusively his. Congress too has functions and powers in foreign affairs. In particular, the subject of U.S. arms sales to the ROC encompasses an aspect of foreign policy making over which Congress has been granted a plenary power, that is, the power to "regulate commerce with foreign nations..." (Article I, sec. 8, cl. 3). Wrote Chief Justice John Marshall in the landmark case of *Gibbons v. Ogden*: "The power over commerce with foreign nations... is vested in Congress as absolutely as it would be in a single government."[28] The movement of arms to a foreign area is a transaction of foreign commerce. The legislative history of the TRA clearly shows that Congress relied on the commerce power in prescribing the policy governing these sales.[29] Thus, the President has no monopoly or primacy over the regulation of foreign arms sales policy and must adhere to the constitutional imperative that he shall faithfully execute the laws.

The Flying Fish

The principle that officers of the Executive branch must follow the rules established by Congress to deal with a problem in a field within legislative responsibility has been embodied in U.S. law since the early years of the Republic. In a case arising out of the undeclared naval war between the U.S. and France in 1799, Chief Justice Marshall decided that the specific orders of President John

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27. Nor do two recent cases support an authority of the President to set aside a previous law. *Dames & Moore v. Reagan*, 453 U.S. 654 [1981], and *Weinberger v. Rossi*, 456 U.S. 25, 31 [1982], each apply prior law to authorize executive agreements with foreign nations consistent with congressional policy, the opposite of the present issue which involves presidential action in violation of an act of Congress.

28. *Gibbons v. Ogden*, 9 Wheaton [22 U.S.] 1 [1824], at 196-197. In addition to regulating foreign commerce, Article I of the Constitution expressly vests both Houses of Congress with several other powers bearing on the conduct of foreign relations, including, in part, those to define and punish offenses against the law of nations, to declare war, to raise and support armies, to provide and maintain a navy, to spend for the general welfare and to control federal expenditures. In addition, Article II vests the Senate with power to advise and consent on treaties and to confirm or reject appointments of U.S. Ambassadors. Taken together, this allotment of wide ranging powers refutes any notion that the Framers left Congress without at least a shared role in making foreign policy, a role it has asserted with respect to arms sales to the ROC.

29. U.S. Senate, Committee on Foreign Relations, 96th Congress, 1st Session, Report No. 96-7, March 1, 1979, at 41.

Adams could not justify the seizure upon the high seas of a vessel sailing from a French port because Congress had enacted a special authority limiting the seizure of vessels sailing *to* a French port, and not *from* those ports.[30]

Marshall reasoned that since "the legislature seems to have prescribed...the manner in which this law shall be carried into execution," it follows that "however strong the circumstances might be," the American warship "would not have been authorized to detain [The Flying Fish]."[31] Although the U.S. warship was acting pursuant to the clear instructions of the President, Marshall wrote that "the instructions cannot change the nature of the transaction, not legalize an act" which Congress had not authorized.[32]

Youngstown Sheet & Tube Co.

Almost 150 years later, the principle formulated by Chief Justice Marshall was applied to the action of another President who claimed an overriding need to meet a national problem arising out of a foreign crisis. In *Youngstown Sheet & Tube Co. v. Sawyer*,[33] the Supreme Court was presented with a test of President Harry Truman's power to issue an executive order providing for seizure of steel plants by the military during the Korean War in order to settle a labor strike endangering the war effort. In deciding against Executive power, the Court reprimanded the President for seeking to usurp the lawmaking role of the Legislative branch. Justice Black, who wrote the opinion of the Court, pointedly stated: "The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control."[34]

Black rejected the notion that the President could act contrary to a relevant statute. He reasoned:

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.[35]

To find authority where Congress had impliedly withheld it, wrote Justice Felix Frankfurter, "is to disrespect the whole legislative process and the constitutional division of authority between President and Congress."[36]

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30. *The Flying Fish* [*Little v. Barreme*], 2 Cranch [6 U.S.] 170 [1804].

31. *Id.* at 176.

32. *Id.* at 177.

33. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 [1952].

34. *Id.* at 588.

35. *Id.* at 587.

36. *Id.* at 609.

Consistent with this rationale, Justice William Douglas wrote in his concurring opinion that "the power to execute the laws starts and ends with the laws Congress has enacted."[37] Justice Robert Jackson elucidated in a concurring opinion his famous grouping of practical situations in which a President's powers may be challenged. "When the President takes measures incompatible with the expressed or implied will of Congress," Jackson wrote, "his power is at its lowest ebb...."[38]

Youngstown Applied to Joint Communique

The facts of Youngstown closely fit a hypothetical presidential action in contravention of the Taiwan Relations Act. Like *Youngstown*, the issue would involve a presidential order (executive agreement) directing that a presidential policy (reduced arms sales to the ROC below the level of its self-defense needs), not a congressional policy, be executed in a manner prescribed by the President (in the communique-executive agreement). Also, like *Youngstown*, Congress already would have made "a conscious choice of policy in a field full of perplexity" and have expressed its will to withhold from the President power to disregard the security needs of the ROC "as though it had said so in so many words."[39] And, like *Youngstown*, the President's need to act (not based on wartime necessity, but only to satisfy Beijing's demands) could not "repeal or amend" an existing statute of Congress (TRA) on the same subject.

TRA–CREATION OF CONGRESS

The legislative history of the TRA shows beyond any doubt that Congress rejected the Carter Administration's original position and that the final version of the law was designed and shaped in Congress to correct serious deficiencies in the Carter proposal. Senator John Glenn, the Ohio Democrat who was Acting Floor Manager of the bill, said: "I want to emphasize that this is a committee-drafted measure, not the administration bill."[40] In like manner, the report on the TRA from the House Committee on Foreign Affairs criticized "various shortcomings in the Administration legislation" and revealed that "Chairman [Clement] Zablocki subsequently circulated among Committee Members a new draft bill which was designed to remedy the deficiencies...."[41]

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37. *Id.* at 633.

38. *Id.* at 637. In a case arising shortly after *Youngstown*, the Fourth Circuit held, as to an executive agreement in contravention of the policy declared by Congress, that "whatever the power of the executive with respect to making executive trade agreements in the absence of action by Congress, it is clear that the executive may not through entering into such an agreement avoid complying with a regulation prescribed by Congress." *United States v. Guy W. Capps, Inc.*, 204 F. 2d 655 [4th Cir. 1953], at 659- 660. The Supreme Court affirmed on a different ground. 348 U.S. 296 [1955].

39. 343 U.S. 602 (Justice Frankfurter).

40. 125 Cong. Rec. 4089.

41. U.S. House of Representatives, Committee on Foreign Affairs, 96th Congress, 1st Session, Report No. 96-26, March 3, 1979, at 2. Similarly, Senator Church, Chairman of the Foreign Relations Committee, remarked on the final bill that "this conference report is a vast improvement over the legislation initially proposed by the administration." 125 Cong. Rec. 6707.

Senator Jacob Javits, the New Yorker who was ranking Republican on the Foreign Relations Committee, later commended the TRA as an important example of the "unique" and "independent congressional role" in U.S. foreign policy.[42] In short, the TRA is a creation of Congress.

Taiwan's Security

A major concern of Congress in drafting the TRA was the need to provide explicitly for the security of the ROC and the freedom of its people. Zablocki, manager of the TRA in the House of Representatives, frankly declared that the major failing in the Carter Administration version was that "it made no provision for American policy with regard to the future security of Taiwan."[43] The report of the Senate Foreign Relations Committee on the measure also pointed out that "the bill as submitted by the Administration contained no references to the interest of the United States in Taiwan's security, and lacked any reference to the sale of defensive arms to Taiwan."[44] Senator Javits remarked on the final bill: "A strong statement of the United States' national interest in Taiwan's security is in the bill as it emerged from conference.[45]

Modern and Sufficient Arms

To correct the security deficiencies of the Carter Administration bill, Congress inserted provisions addressing the protection of the people, economic and social system, and integrity of the ROC. As Glenn explained in presenting the Committee bill to the Senate: "Some form of a tangible security clause of an indefinite future was deemed mandatory."[46] In discussing this security feature during markup of the TRA by the Senate Foreign Relations Committee, Chairman Frank Church, an Idaho Democrat, portrayed these provisions as "very broad indeed, broader than the objective of the mutual defense treaty, which had to do with an attack and only an attack." In contrast, he said:

> "[W]e have considered not only the security, but also the social and economic system of the people on Taiwan. We have considered not only the resort to force, but other forms of coercion."[47]

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42. Jacob Javits, "Congress and Foreign Relations: The Taiwan Relations Act," 60 *Foreign Affairs* 54 [Fall 1981].

43. 125 Cong. Rec. 4475.

44. U.S. Senate, Committee on Foreign Relations, 96th Congress, 1st Session, Report No. 96-7, March 1, 1979, at 8.

45. 125 Cong. Rec. 6709.

46. 125 Cong. Rec. 4090. In response to Senator Glenn, Senator Javits said the security provision of the TRA creates "a very long-term commitment [of] our determination to protect the security and the integrity of Taiwan." 125 Cong. Rec. 4091.

47. Hearings on S. 245, Taiwan Relations Act, U.S. Senate, Committee on Foreign Relations, 96th Congress, 1st Session, February 1979, at 779. In the House, Congressman Lester Wolff agreed: "we have gone far beyond the mutual defense treaty...." 124 Cong. Rec. 4514.

To execute this legislative policy, the House Foreign Affairs Committee report declared: "It is the committee's intent that the United States will continue to make available modern weapons for Taiwan and not shift to a policy of supplying only obsolete weapons."[48] This purpose was reinforced by use of the word "sufficient" in the statute. Explained Javits:

> "[W]e put the word, a very important word, in the self-defense capability, which we would equip....The word is 'sufficient.' That is that they have enough to defend themselves, whatever it took."[49]

CONCLUSION

From this legislative history, as well as from the text of the TRA itself, it is obvious that Congress has withheld the power from the President to end unilaterally the U.S. role in supplying the Republic of China on Taiwan with such defensive weapons as are sufficient to meet its self-defense needs.

The same would be true of an attempt by any President to nullify the TRA under the guise of interpreting it in a manner calculated to thwart the clear legislative policies of the Act. For example, section 3 (b) of the Act provides that the President and Congress together "shall determine the nature and quantity" of defensive arms and services needed by the ROC "in accordance with procedures established by law." However, the Act itself does not specify any such procedures, a fact that was noted by the State Department Legal Adviser during testimony defending the President's authority to issue the joint communique before the Senate subcommittee on Separation of Powers.[50] The implication is that in the absence of set rules, participation by the Legislative branch is satisfied by *ad hoc* procedures, especially if those procedures include "full consultations with the Senate and House committees having primary oversight responsibility under the act," as suggested by the Legal Adviser.[51]

President May Not Modify TRA. In the absence of detailed rules spelling out the process for joint action, it might satisfy the TRA so long as there is some form of participation by the legislature, such as prior consultations, and the action decided on does not conflict with the general requirements of other provisions of the law. But there is no implication that the President can modify the requirements of the Act or act contrary to it simply because formal procedures have not been created for joint action by the President and Congress. It is nonsense to argue that Congress contemplated or intended that all its labors in legislating a substantial relationship

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48. H. Report 92-96, *supra* note 41, at 6. Adding to this assurance, Congressman Wolff, one of the Floor leaders on the TRA, declared: "To establish the legislative history here, we do not mean that we will deliver to [Taiwan] outmoded, outdated, horse-drawn vehicles. We mean that we will deliver to them appropriate equipment which is necessary to the defense of Taiwan." 125 Cong. Rec. 4509.

49. 125 Cong. Rec. 4336.

50. "Taiwan Communique" hearings, *supra* note 6, at 95-96.

51. *Id.* at 96.

between the U.S. and the ROC and adding more detailed security assurances for the ROC, including specific provisions for arms sales, were to be ineffective and without meaning until express procedures for joint action were enacted. In the words of Senator Glenn during debate on the bill: "Taiwan's future is not some vague abstraction...."[52]

To find authority for the President to waive the security provisions enacted by Congress for the protection of the ROC is to disregard the clear will of Congress and the basic scheme of the separation of powers. Such a proposition would fly in the face of a basic creed of American constitutional doctrine, defined by James Wilson as early as 1791: "[T]he law is higher than the magistrate who administers it...."[53]

There may be, of course, serious political consequences attached to any decision to cancel the August 17 Joint Communique. As a legal matter, it is clear that the August 17 Joint Communique is not an enforceable international agreement. Even if the Joint Communique were to be considered an executive agreement, in a case such as this, without any claim of ongoing wartime necessity and occurring far past the act of recognition, the Taiwan Relations Act would have precedence in any contest under the laws of the United States between the August 17 Joint Communique and the Act of Congress.[54]

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52. 125 Cong. Rec. 4089. Nor does any other statute authorize the President to override the TRA. The State Department Legal Adviser has stated that the "only procedure established by other statutes that is pertinent to arms sales to Taiwan is that contained in the Arms Export Control Act...." "Taiwan Communique" hearings, *supra* note 6, at 96. That law does not grant Executive discretion to waive the requirements of other laws, but rather facilitates the role of Congress in deciding on sales of "large ticket" items to foreign countries. 22 U.S.C. 2751 *et seq.*, especially 2753-2754. The Arms Export Control Act specifically provides that the ROC is eligible for the sale of sophisticated weapons systems. 22 U.S.C. 2754.

53. *II The Works of James Wilson* [Robert McCloskey ed.]. Belknap Press of Harvard University Press [1967], at 444.

54. The general rule was stated over 40 years ago in the seminal study of executive agreements: "A direct Presidential agreement will not ordinarily be valid if contrary to previously enacted legislation." McDougal and Lans, "Treaties and Congressional- Executive or Presidential agreements: Interchangeable Instruments of National Policy," 54 Yale L. J. 181 [1945], at 317.

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