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THE PRESIDENT'S NEW TREATY POWER

While the U.S. Supreme Court makes law in deciding cases, it also makes law in not deciding cases. That's what it did by refusing to decide the case on whether or not the President has the power to abrogate a treaty without the consent of the Senate.

It was a cop-out. The high Court simply refused to decide a case involving an important constitutional issue never decided before, thereby letting stand the lower court decision which gave him the unilateral power to terminate a valid treaty.

The issue was the constitutionality of the President's termination of a treaty which had been ratified by two-thirds of the Senate. The U.S. Constitution is silent on the matter of the abrogation, or the unmaking, of treaties, but it is a reasonable inference that the President's power to unmake a treaty is correlative with his power to make treaties, which is only "by and with the advice and consent of the Senate provided two-thirds of the Senators present concur."

When Carter unilaterally announced that he was terminating the U.S.-Taiwan (Republic of China) Mutual Defense Treaty, this precipitated a lawsuit brought by Barry Goldwater and 24 other Senators. Deciding such a constitutional issue, in such a confrontation between two other co-equal branches of government, is what the Supreme Court is for.

Goldwater's lawyer said the Court's action in refusing the hear the case was "indefensible." "I am ashamed for the Court," he said. The Court must have been ashamed of its own action because its refusal was given in a one-paragraph anonymous order, without any opinion.

That's a customary concealment device when the decision is so bad that no Justice really wants his name associated with it. Most of the worst obscenity decisions, in which the Court overturned convictions of smut peddlers, were "per curiam" anonymous decisions.

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Whether the Supreme Court takes an appeal from a lower court is discretionary, except for a few types of cases. The Court votes on whether to take a case, and at least four Justices must vote yes in order for the Court to hear the appeal. The denial of a petition to hear a case is not a decision on its merits, but it has the effect of letting the lower court decision stand. So, if the Justices like the lower court decision, they can just decline to take the appeal; and if they don't like it, they grab at the case like a drowning man at a life preserver.

The Justices who voted not to hear the Taiwan Treaty case had a hard time coming up with a good reason. Four Justices said the case was "political" and therefore was not appropriate for the Court to decide.

That conclusion won't stand analysis. Just suppose that President Carter were to announce that he is unilaterally declaring the SALT II Treaty in force without Senate ratification. Would the Supreme Court say that is "political" and let him get by with such arrogance?

The refusal of the Supreme Court to hear the Taiwan Treaty case, which involves an issue of tremendous importance to our country because of the growing importance of treaties and because this particular issue has never been decided before, should be contrasted with the eagerness of the Supreme Court to take cases when it wants to make new law.

In the abortion decision, Roe v. Wade, The Supreme Court eagerly took a case it could so easily have dismissed on "mootness"; the issue was actually moot because the woman was no longer pregnant when her case got to the Supreme Court. The Court took the case in order to create a new "right" in the 14th Amendment which, in the words of Justice Rehnquist, was "completely unknown to the drafters of the Amendment."

The list of cases the Supreme Court has taken in order to bring about social change also includes requiring long-distance busing to wipe out neighborhood schools, abolishing prayers in public schools, and requiring reverse discrimination. The record proves that the Supreme Court is more interested in legislating such radical results than in defending the Constitution, and that its goals can be served even by not accepting cases.

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