

THE REINTERPRETATION DEBATE AND CONSTITUTIONAL LAW

EUGENE V. ROSTOW†

I wish to raise two issues with respect to Professor Koplow's article. The first is whether it is proper for the American Society of International Law to undertake the report which served as the basis for the Koplow piece. I believe that it is improper for the Society to issue a collective public statement endorsing one side of a partisan political controversy. Secondly, with respect to the substance of Koplow's argument, I disagree with parts of his analysis and find his proposed solution for the dilemma of treaty interpretation unsatisfactory in principle and unworkable in practice.

I. THE SOCIETY'S INVOLVEMENT IN THE CONTROVERSY

The pride of the American Society of International Law has been to hold high the banner of scholarship in the conviction that the scrupulous and disciplined study of international law by individual scholars is an indispensable resource in the quest for a system of world public order governed by law. Until recently, the Society has confined its collective activities to the publication of its *Journal*, the organization of meetings, and other matters of institutional concern, and has avoided even the appearance of participating in public debates on political issues involving international law.

The reason for the rule is obvious and compelling: learned societies are not and should not seek to become parliaments of politicians, accustomed to reaching compromises in order to achieve consensus. On the contrary, learned societies are in the nature of things fora for the scholarly examination of problems by individuals who are often eccentric and unworldly individualists: their highest professional duty is to publish their research findings without shading of any kind. Both the mission of the Society and the diversity of its membership preclude any other rule. There is no conceivable possibility of obtaining unanimity

† Sterling Professor of Law Emeritus, Yale University; Distinguished Visiting Professor of Law and Diplomacy, National Defense University. This comment is based on a dissenting opinion to the Interim Report of the Special Working Committee on the Legal Aspects of Arms Control and Disarmament Policy of the American Society of International Law. That report served as the basis for Professor David Koplow's article.

among scholars in a given field on any but the most abstract and banal propositions of policy, and no earthly reason for trying to do so. The goal of the Society has been and should once more become to encourage the advancement of learning by supporting a rich variety of views based on serious study, not the preparation of communiqués designed to put the Society's prestige behind one or another side of a current political controversy. Let there be no mistake about it. In the media and in Congress, a statement by a Committee of the A.S.I.L. would inevitably invoke the reputation and specific gravity of the Society itself.

Professor Koplow's article is based on the Interim Report of the Society's Special Working Committee on Legal Aspects of Arms Control and Disarmament, and is one of the number of similar initiatives taken by Keith Highet as President of the Society during his period in office. I believe that President Highet attempted to change the non-political tradition of the A.S.I.L. by setting up several committees and working parties which would have brought the Society into the front lines of hotly contested political battlefields. Professor Koplow was Reporter for the Committee and did a faithful and sophisticated job.

Many members of the Society opposed President Highet's policy and many more had misgivings about it. As a practical matter, the experiment has thus far proved to be unworkable. Consider, for example, the experience of the Panel on International Adjudication and the Jurisdiction of the International Court of Justice, on which I served. That committee met under the outstanding Chairmanship of John R. Stevenson. Its real mandate was to fight the possibility that the United States might modify or abandon its partial acceptance of compulsory jurisdiction in the International Court of Justice, an issue precipitated by the controversy between the United States and Nicaragua concerning Nicaraguan assistance to the rebellion in El Salvador, and the scope of El Salvador's rights of individual and collective self-defense in resisting that armed attack. Some members of the Committee wanted it to issue a public statement urging the United States to continue its adherence to Article 36(2) of the Court's statute, a 1946 commitment to accept compulsory jurisdiction in certain cases on a reciprocal basis.

When it became clear that the group was deeply divided on the matter and the Administration withdrew the 1946 decision without waiting for the Committee's Report, Mr. Stevenson steered the Committee to another course. It abandoned the idea of a Committee recommendation, but instead prepared a book on the subject, each member taking responsibility for a chapter. The draft chapters were discussed by the Committee, but each writer had the last word on the text for the chapter assigned to him. The book was edited by Professor Lori

Damrosch, and has now been published as *The International Court of Justice at a Crossroads*. It is a useful compendium on an important topic, but it clearly did not reach a collective conclusion on the political issue, nor did it purport to speak for the Society or any committee or working group of the Society.

It is regrettable that our Working Committee, which produced the basis for Professor Koplow's article, did not follow Mr. Stevenson's example.

II. THE SUBSTANCE OF THE KOPLOW ANALYSIS

On a famous occasion, Justice Holmes recalled the common law maxim that "hard cases make bad law." "Great cases like hard cases make bad law," he said:

For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgement. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even settled principles of law will bend.¹

The tone, substance, and orientation of the discussion reflected in Professor Koplow's article demonstrates once more the hazards against which Holmes warned in his *Northern Securities* dissent.

The article focuses on a controversy about the interpretation of the A.B.M. Treaty of 1972. That debate has aroused a good deal of political passion during the last few years. It became part of the campaign by Congress and particularly by the Senate to take over large areas of presidential power in the field of foreign affairs. The "hydraulic pressure" of that controversy has distorted the Koplow presentation of the record and his analysis.

The article has a number of revealing errors. For example, Koplow asserts that "[a] new constitutional crisis has been thrust upon the American body politic." He defines that crisis in the following terms:

In particular, the 1972 Treaty on Anti-Ballistic Missile Systems ("ABM Treaty") and the 1987 Treaty on Intermediate-range Nuclear Forces ("INF Treaty") have been em-

¹ *Northern Securities v. United States*, 193 U.S. 197, 400-401 (1903) (Holmes, J., dissenting).

broiled in an attempt by the Executive to reserve the right unilaterally to reinterpret treaties. What is immediately at stake in executive reinterpretation has been a threat to gut the central purposes of the ABM Treaty and to abort the nascent INF Treaty. Unless corrected, attempts by the Executive to usurp treaty reinterpretation power will, in the longer term, undermine United States arms control policies, jeopardize future Strategic Arms Reduction Talks ("START") agreements, and weaken the security of the international community.²

This statement by Koplow supports and echoes two paragraphs of his Draft Interim Report which read as follows:

The Reagan Administration has recently asserted that the executive branch possesses a previously-unknown constitutional authority to reinterpret unilaterally the United States' international treaty obligations, departing from authoritative prior representations provided to the Senate at the time of advice and consent to ratification. This proposition — initiated, but not implemented, in the case of the 1972 US-USSR treaty on Anti-Ballistic Missile Systems — would jeopardize virtually all U.S. treaty obligations, and it carries profound implications both for the orderly evolution of the system of international law and adherence to the constitutional scheme of separation of powers.

The Special Working Committee on Legal Aspects of Current Issues of Arms Control and Disarmament Policy of the American Society of International Law, having studied the historical precedents of arms control treaties, and having surveyed the applicable principles of international and domestic U.S. law, finds that this novel assertion of a reinterpretation power is unsubstantiated and improper. The executive branch cannot disregard the Senate's constitutional role in the treaty process, and must recognize and give domestic effect to the treaty as it was approved by the Senate - including the Senate's *implicit* understandings that *may* have been based upon executive branch testimony and representations.³

² Koplow, *Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Agreements*, 137 U. PA. L. REV. 1353, 1356 (1989).

³ SPECIAL WORKING COMMITTEE ON LEGAL ASPECTS OF CURRENT ISSUES OF ARMS CONTROL AND DISARMAMENT POLICY OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW, INTERIM REPORT 4-5 (1988) (emphasis added) (excerpt on file with the *University of Pennsylvania Law Review*).

One of the principal objectives of the Constitution of 1787 was to establish a strong, independent President for a country which had been floundering badly under congressional government. Since the President necessarily interprets and reinterprets every statute and treaty each time he applies them to new fact situations, the constitutional authority about which Koplou and the Report wax so indignant is an essential part of the executive power entrusted to the President under Article II of the Constitution. Section 326 (1) of the Restatement (3d) of the Foreign Relations Law of the United States fully recognizes that the authority to determine the interpretation of an international agreement is an executive function reserved to the President; Comment a ventures the observation that if there are in fact "understandings expressed by the Senate in giving its advice and consent," they must be respected by the President.⁴ The Senate expressed no such "understandings" in its Resolution of Consent to the Ratification of the A.B.M. Treaty.

It is therefore difficult to define the grave threat that Koplou perceives to the orderly evolution of international and constitutional law. If Congress disagrees with the President's interpretation of a treaty (or a statute), its constitutional remedy is to pass a statute subject to the President's veto. This was done, for example, during the dispute over economic sanctions against the then government of Rhodesia some fifteen years ago.⁵ Such statutory changes occur often in the field of tax law and many other branches of municipal law, including those which involve the interpretation of treaties. Subsequent statutes inconsistent with a President's interpretation of a treaty or statute are commonplace in our legal history. And of course they prevail as law, as they do when Congress disagrees with the judicial interpretation of a statute and passes a new law to change it.

This is the real point at issue in the present controversy. It is not mentioned in the article. What the Senate has been seeking is not to reaffirm the power of Congress to overrule a President's construction of a treaty, which needs no reaffirmation, but to acquire an entirely new and clearly unconstitutional senatorial veto over the exercise of an important aspect of the President's executive powers. Accepting the position would support its bold and unconstitutional effort to evade the President's veto power, and seize executive power itself.

There is another element in the controversy: the claim that the Reagan Administration's construction of the A.B.M. Treaty with regard to "novel" anti-missile technologies differs from some views on the

⁴ RESTATEMENT (THIRD) OF THE FOREIGN RELATION LAWS OF THE UNITED STATES § 326 comment a (1987) [hereinafter RESTATEMENT (THIRD)].

⁵ See *Diggs v. Shultz*, 470 F.2d 461 (D.C. Cir. 1972).

point expressed in 1972 by officials of the Nixon Administration during the Senate committee hearings on ratification. Koplow takes the view that such a change of position, if shown, would somehow be improper. The facts do not support Koplow. Neither does the law.

The brief colloquy before the Senate Armed Services Committee on which the Koplow article relies raises more questions than it settles. As a matter of legal craftsmanship, it is perfectly reasonable to argue, as Koplow and others do, that article 5 of the A.B.M. Treaty, confining A.B.M. systems to fixed ground-based devices, applies also to systems based on new and unknown technologies. But that argument does not do justice to the position that the Soviet representatives took at the time, embodied ultimately in Agreed Statement D. According to senior participants in the negotiations — Kissinger, Haig, and Nitze, among others — the Soviets said: “we do not know what future technologies will make possible and neither do you. Therefore we should not attempt to legislate on the subject, but leave it open.” Koplow, moreover, fails to explain why the Soviet representatives rejected American draft formulations that would have accepted the so-called “restrictive” interpretation and insisted instead on Agreed Statement D. If the Treaty is interpreted to mean what Senator Nunn and the other critics of the Reagan Administration claim it means, Agreed Statement D was unnecessary.

In addition, it is myth to claim that there was a “traditional, restrictive” interpretation of the application of the A.B.M. Treaty to novel technologies between 1972 and the Reagan Administration, and a departure from the true faith thereafter. Like Judge Sofaer, Colonel A. Richard Richstein, the General Counsel of ACDA during most of my tenure in the post of Director, has fully demonstrated how hollow that claim is. The so-called “restrictive” or “traditional interpretation” made its first official appearance in 1979. John Rhinelander dealt with the problem at an A.S.I.L. meeting in 1973 in the following terms, which are almost exactly the conclusions subsequently reached by Judge Sofaer and Colonel Richstein: “[T]he treaty prohibits the deployment (but not the development and testing) of ‘future’ ABM systems based on components capable of substituting for ABM missiles, launchers, and radars.”⁶ And the law remains clear in any event, as Koplow agrees, that a treaty is a contract between states and must be construed as such. Learned quarrels among American experts do not bind the Soviet Union.

⁶ Rhinelander, *An Overview of Salt I*, 67 AM. J. INT’L L. 29, 32 (1973) (Proceedings of the American Society of International Law).

The outcry about President Reagan's interpretation of the provisions of the A.B.M. Treaty of 1972 with respect to novel technologies is a symptom and manifestation of the most serious constitutional crisis the nation has faced since President Franklin D. Roosevelt proposed to pack the Supreme Court in 1937. The contemporary crisis has nothing to do with the President's power to interpret and reinterpret treaties, which has been self-evident at least since 1793. In that fateful year, when France declared war against Great Britain, President Washington had to decide under our Treaty of Perpetual Alliance with France whether he could declare the nation's neutrality, or whether he was obliged by the Treaty either to give military assistance to France, or to ask Congress for a Declaration of Neutrality or even a Declaration of War against Great Britain. President Washington issued a proclamation of neutrality, and the next year induced a reluctant Congress to support his interpretation of the Treaty by passing a Neutrality Act. On a first reading, the Treaty seemed to preclude the President's construction. But the United States would have risked extinction if the President had followed that view. And if he had gone to Congress for a Declaration of Neutrality in 1793, he might have failed, with catastrophic consequences.

The phenomenon of presidential interpretation and reinterpretation of treaties is not "previously unknown," as Koplow states. It occurs daily in every nook and cranny of the law. When the President sends instructions to representatives of the United States at the United Nations Security Council and at international conferences on dozens if not hundreds of subjects ranging from telecommunication and aviation to fisheries and the law of war, he is interpreting and reinterpreting treaties as he "faithfully executes" the law. Similar interpretations and reinterpretations are made by the Executive Branch in carrying out domestic statutes of all kinds: the Internal Revenue Code, for example. This process of change and development is inherent in the growth of the law. Sometimes the changes are incremental and interstitial. Sometimes they are considerable. They are in fact inevitable as law confronts life every day of the week. Laws evolve around the broad policy purposes sought by their progenitors. But the progenitors can never freeze the law into a static pattern, nor anticipate exactly how it should be applied in all future circumstances. Nor can it be assumed that every lawmaker voted for the reasons advanced by one or a number of his or her colleagues in debate, or by representatives of the Executive Branch in testimony before committees.

The real constitutional crisis of our times is not the tempest in a teapot which exercises Senator Nunn and Professor Koplow. More om-

inous even than the Court Packing Plan of 1937, it has been gaining in momentum for some forty or fifty years. Madison analyzed the crisis in several of his Federalist Papers, particularly Numbers 47 and 48. The greatest danger to the constitutional order and to the liberty of the citizen, Madison warned, was not the risk of a presidential tyrant, which he regarded as slight, but the possibility that Congress would take over the powers of the other two branches of government. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands," Madison wrote, "may justly be pronounced the very definition of tyranny."⁷ Power, in Madison's view, "is of an encroaching nature" and ought to be "effectually restrained from passing the limit assigned to it."⁸ The risk of encroachment by Congress is great, far greater than the risk from the President or the courts. Congress "alone" has access to the pockets of the people. Its supposed influence over the people is an inducement to act, and it can expand its powers in many ways, "mask[ing], under complicated and indirect measures, the encroachments which it makes on the coordinate departments."⁹ Madison states that "it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions," and concludes by noting that "[t]he legislative department is everywhere extending the sphere of its activity, and drawing all power into its imperious vortex."¹⁰

The assertion in the Draft Interim Report, supported by Koplow's article, that a President is bound to give "domestic" effect to a treaty as it was approved by the Senate—"including the Senate's *implicit understandings* that *may* have been based upon Executive Branch testimony and representations"—is worthy of a jurisprudential King Canute. It demands an outcome that can never be delivered, as the history of law attests. The growth of law cannot be confined by so simple a rule. Of course witnesses for the Executive Branch should tell the truth to congressional committees, and they normally do, insofar as they can perceive it. And of course Congress is entitled to rely on their testimony, if it really does. But even if Senators are misled or do not understand what they have heard or read, the Senate's Resolution of advice and consent is nonetheless an official act, and cannot be collaterally impeached. In some state legislatures, the fourteenth amendment may well have been approved by dubious procedures. When Congress certified that it had been adopted, however, it became and remains the law.

⁷ THE FEDERALIST No. 47 (J. Madison) (B. Wright ed. 1961).

⁸ *Id.* at No. 48 (J. Madison).

⁹ *Id.*

¹⁰ *Id.*

In any case, "the truth" is not always easy to know, as Koplow's analysis demonstrates convincingly. The application of the A.B.M. Treaty to novel technologies was not a major issue in the ratification process in 1972; what was said on the subject by various witnesses then is quite as diverse as what is being said and written today. A few exchanges before a committee, a few sentences in prepared statements or speeches on the floor, may of course have been among the factors persuading a Senator to vote "yea" or "nay" on the Resolution giving the Senate's advice and consent to ratification. But the larger meaning of A.B.M. and the Interim SALT agreement together was quite different. Those agreements were considered to have been a matter of great importance to the future of Soviet-American relations and to the Republican Party in the 1972 elections. As many judges have said, however, they cannot and should not assume that legislators vote in reliance on any particular statement made in the course of debate. After all, many remain silent. Justice Jackson once acidly remarked that it is not yet the rule that a judge can examine the text of a statute or a treaty only if the legislative history is ambiguous.

In this instance the text of the A.B.M. Treaty, read in the perspective of its policy goals and the setting of its negotiation and presentation, is hardly a mystery. The American negotiators tried to persuade their Soviet opposite numbers that the Treaty should apply to all anti-missile defenses, whether based on current or on future technologies. The Soviet Union refused, saying over and over again that it was impossible to legislate about weapons whose potentialities were unknown to both sides. Ambassador U. Alexis Johnson, an experienced and responsible witness, carefully informed the Senate that Soviet views on these subjects did not necessarily agree with our own. Agreed Statement D was the consequence. Later, some American officials persuaded themselves that the Soviet Union had really agreed with our position in 1972. Now, of course, the Soviet government has obligingly cooperated. Confronting these facts, on which all sides were once agreed, the Senate and the Working Committee Report cannot credibly claim that the few comments seeming to support the so-called "restrictive interpretation" were the "basis" for the Senate's consent to the Treaty's ratification. The Senate made no reservation or statement of understanding on the subject. Under such circumstances, according to Comment d of Section 314 of the Restatement, at least, the matter could become at most material for a debate about "legislative history."

I do not agree with the language on this subject put forward in the A.L.I.'s new Restatement on Foreign Relations Law. But the formulation in the Koplow article goes far beyond the Restatement. Sec-

tion 314(2) says that “[w]hen the Senate gives its advice and consent to a treaty on the basis of a particular understanding of its meaning, the President, if he makes the treaty, must do so on the basis of the Senate’s understanding.”¹¹ Both Comment b on this section and Comment a on section 326 refer to written statements of understanding by the Senate, transmitted verbatim to the other party or parties, and included in the President’s proclamation of ratification. These are not empty formalities, but essential procedural steps in treating the agreement at all times as a contract between states.

No citation of authority support these Comments. But whatever the status of these Sections of the Restatement may turn out to be as predictions of the law, they do not approach the extreme statements in Koplow’s article or the Draft Report of the A.S.I.L. Working Group. Either formula would severely constrain the dialogue between the Executive Branch and the Senate and multiply suspicions within a relationship which should be one of confidence, cooperation, and candor.

¹¹ RESTATEMENT (THIRD), *supra* note 4, at § 314 (2).