THE TREATY POWER: UPHOLDING A CONSTITUTIONAL PARTNERSHIP

JOSEPH R. BIDEN, JR.† AND JOHN B. RITCH III††

In June of 1988, as the leaders of the United States and the Soviet Union met in Moscow to inaugurate the Treaty on Intermediate-Range Nuclear Forces (INF Treaty), their joint act of ratification ended more than a sixteen year hiatus in codified superpower arms control. It also brought to a close an extraordinary episode in American constitutional history: an unprecedented executive-legislative confrontation over the very nature of the treaty power.

The internecine American dispute had arisen nearly three years earlier when the Reagan Administration attempted to adopt a drastically altered interpretation of the most recently ratified arms accord, the Anti-Ballistic Missile Treaty of 1972 (ABM Treaty), and to assert a new constitutional theory purporting that such a change was permissible by presidential fiat.[1] The Senate's response, developed through extensive hearings and analysis, culminated only as President Reagan arrived in Moscow, when it consented to ratification of the INF Treaty with a formal "condition." This measure, known as the Biden Condition, acquired the force of domestic United States law upon the Treaty's ratification. Its effect was to repudiate decisively the Administration's theory, which Senate opponents had labeled the Sofaer Doctrine.

This essay recounts significant events leading to the Senate's refutation of the Sofaer Doctrine and offers a rationale for the necessity of the Senate's action.

---

† United States Senator (D-Del.); Chairman, Senate Judiciary Committee; ranking Democrat, Senate Foreign Relations Committee.

†† Deputy Director of the Senate Foreign Relations Committee. Mr. Ritch worked extensively with Senator Biden and other Committee members throughout the treaty "reinterpretation" debate.

In discussing that constitutional controversy, this article draws upon the authors' account published by the Arms Control Association in the September 1988 issue of *Arms Control Today*. The authors are grateful for the assistance of the Association's associate director for research, James P. Rubin.

[1] *See* Koplow, *Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties*, 137 U. PA. L. REV. 1353, 1374 n.83 (1989).

I. A HISTORY OF THE "REINTERPRETATION" CONTROVERSY

The ABM Treaty "reinterpretation" episode began in March of 1983 when President Reagan, during a nationally-televised address, astonished the world and most of his own advisers by revealing his vision of anti-missile technology that would render nuclear weapons "impotent and obsolete." To observers aware of the contours of nuclear arms control, the inconsistency between the President's declared intent to seek such technology and well-established United States legal obligations under the ABM Treaty was immediately apparent. The ABM Treaty, after all, had been designed to preclude a spiraling race in offensive and defensive technologies and, to that end, embodied a superpower pledge to foreswear precisely the goal of nationwide anti-nuclear defenses that President Reagan had suddenly embraced.

At first, President Reagan's rhetorical flirtation with a "Star Wars" defense seemed no more than a flight of fancy — an ideological expression of the political right's unwillingness to accept a world of nuclear parity and mutual vulnerability with the "evil empire." But the President had unleashed forces of bureaucratic momentum and populist appeal. In an Administration where maximizing defense spending and denigrating arms control were considered parallel virtues,[2] the President's imprimatur quickly gave Star Wars programmatic status as the "Strategic Defense Initiative." Who, against a popular President, could successfully oppose efforts to "defend" the United States?

Still, the SDI threat to the ABM Treaty seemed as remote as the "new technologies" of which the President dreamt. It was not until

---

[2] President Reagan's eleventh hour conversion to arms control did, of course, help to produce the INF Treaty — with a considerable assist from General Secretary Gorbachev, who surprised all concerned by accepting a United States proposal (the so-called "zero option") that Administration officials originally regarded as "non-negotiable." The pure public-relations purpose of the original Reagan zero-option proposal is discussed at length in A. HAIG, CAVEAT: REALISM, REAGAN, AND FOREIGN POLICY (1984), and S. TALBOTT, DEADLY GAMBITS: THE REAGAN ADMINISTRATION AND THE STALEMATE IN NUCLEAR ARMS CONTROL (1984).

But the INF Treaty could not obscure the larger picture. After remaining for five years within the ceilings of the unratified SALT II Treaty, the Reagan Administration had denounced the treaty and intentionally exceeded its limits, thereby ending all constraints on strategic-range nuclear arms. Meanwhile, progress toward a new agreement on strategic arms remained blocked by the President's unwillingness to reaffirm or renegotiate the ABM Treaty. Simultaneously, the Reagan Administration maintained a determined opposition to negotiated limits on nuclear testing.

Thus, the INF Treaty's belated and marginal reductions in nuclear warheads, representing approximately three to four percent of the two sides' arsenals, occurred in a context in which the overall framework of arms control had eroded. Indeed, despite the image of arms control progress, at the end of President Reagan's second term the territory of the United States was targeted by approximately forty percent more Soviet warheads than when Reagan was inaugurated.

more than two years after President Reagan's initial revelation that his loyal lieutenants concocted a second surprise, heavy in implications for both arms control and the Constitution. Appearing on a Sunday morning television talk show in October of 1985, National Security Adviser Robert MacFarlane casually dropped the bombshell.

The Reagan Administration, MacFarlane disclosed, had determined that the ABM Treaty, notwithstanding its express purpose, its explicit provisions and all that the Executive Branch had said about its meaning for thirteen years,[3] actually entailed no prohibitions on the development and full-scale testing of ABM systems comprised of "new technologies" — the very system imagined by President Reagan. This announcement, while perhaps a pleasant surprise even to the President himself, left many in the Senate, the arms control community, and the legal profession agape.[4] Designed and ratified to serve as the bedrock of nuclear arms control, the ABM Treaty was now to be gutted by a unilateral Reagan "reinterpretation."

The Administration's claim derived from a revolutionary reading of the Treaty's "negotiating record" by the State Department's newly-installed Legal Adviser, Abraham Sofaer. His study of this obscure and still-undefined "record," it was asserted, suddenly freed the Reagan Administration to pursue Star Wars unimpeded by a superpower accord that had been negotiated and ratified to proscribe just such activities.

Soon thereafter, Sofaer appeared on Capitol Hill to explain the Administration's archaeological find. In so doing, the Legal Adviser faced two imposing tasks: (1) to argue that the ABM Treaty did not really say what it seemed to say, and (2) to argue that what the Senate was told in 1972 could be disregarded. Encountering congressional skepticism that only intensified after his initial testimony, Sofaer persevered, eventually developing two claims: one factual, the other legal.

A. *Sofaer's Two Claims*

Sofaer's *factual* claim was that the "negotiating record," a nebulous collection of thirteen-year-old internal United States Government

---

[3] See, for example, the annual Arms Control Impact Statements, required by law and transmitted to Congress on behalf of the President after extensive inter-agency review. For the fiscal years 1980-1984, before his advisers had invented the "reinterpretation," the Reagan Administration's own submissions contained clear and unambiguous descriptions of the ABM Treaty as traditionally interpreted.

[4] For their part, in strong language that in this instance proved apposite, the Soviets labelled it a "deliberate deceit." Marshall Akhromeyev, Chief of the Soviet General Staff, *Washington's Assertions and the Real Facts,* Pravda, Oct. 19, 1985.

memoranda, demonstrated that the two superpowers had never achieved agreement concerning a permanent ban on the testing and development of nationwide ABM defenses, notwithstanding that such a ban is critical to the logic of the ABM Treaty.[5] Under this "broad interpretation," which Sofaer argued was consistent with the Treaty text[6] and the 1972 Senate ratification proceedings, future space-based and other mobile ABM systems using "other physical principles" were simply exempt from the ABM Treaty's ban.

Initially, Sofaer's factual claim included a bald assertion concerning the ratification proceedings: that Nixon Administration testimony during the 1972 hearings *supported* the Reagan Administration's new interpretation. Later, however, when this aspect of the factual claim was demonstrated to be egregiously false,[7] Sofaer fell back to an unpersuasive assertion that the ratification record was ambiguous, and substituted a *legal* claim. The essence of this legal claim was that a Presi-

---

[5] Because the transition from successful testing of an ABM system to full-scale production and nationwide deployment has the potential to be accomplished swiftly, and possibly behind a veil of secrecy, the erection of a barrier at a earlier stage — through a prohibition on development and testing — had been considered crucial to the ABM Treaty's function of precluding a spiraling competition in offensive and defensive systems.

[6] For a lucid explication of the ABM Treaty's provisions and of the tortured logic required of Sofaer in trying to impose the "reinterpretation" on the Treaty's text, see Chayes & Chayes, *Testing and Development of "Exotic" Systems Under the ABM Treaty: The Great Reinterpretation Caper,* 99 HARV. L. REV. 1956 (1986).

The Legal Adviser presented his own view in the same journal issue, but later recanted that aspect of his article relating to the 1972 ratification proceedings, citing faulty research by unnamed assistants. *See infra* note 7.

[7] Sofaer attributed the error to "young lawyers" on his staff. *See The ABM Treaty and the Constitution: Joint Hearings Before the Senate Comm. on Foreign Relations and the Senate Comm. on the Judiciary,* 100th Cong., 1st Sess. 2-3, 131-32 (1987) [hereinafter *Joint Hearings*]. Regarding his factual claim as it related to the ratification proceedings, Sofaer responded to questioning as follows:

> Chairman Biden: I refer to your March 9, 1987 letter to Senator Nunn and an account given by Senator Levin that he placed in the Congressional Record of his March 12 meeting with you. You indicate in your letter to Senator Nunn that the October 1985 analysis of the negotiating record "did not provide a complete portrayal of the ratification proceedings with respect to this issue." You wrote further that you "did not review this material personally". . . . According to Senator Levin, you repeatedly disavowed the 1985 memorandum regarding the ratification record which was prepared by 'young lawyers' on your staff.
>
> Now, Judge Sofaer, you have had, in recent months, no hesitation in making categorical statements to the effect that the ratification record of the ABM Treaty supports the broad interpretation. You made those statements in a number of different forums . . . . It would be very helpful if you would give us an analysis of what . . . is still accurate and what part may not be . . . .
>
> Mr. Sofaer: Well, Senator, mistakes like this do happen.

Id.

dent, in interpreting and implementing a treaty, can simply ignore much of what the Executive Branch had told the Senate in obtaining its consent to ratify the treaty. This legal claim became known as the Sofaer Doctrine.

In combination, the two claims were designed to eviscerate the ABM Treaty, clearing the way for the untrammeled pursuit of the President's fantasy of an anti-nuclear astrodome. But the legal claim also had grave and far-reaching implications for all United States treaty-making — not only for the Senate's role, but for the conduct of American diplomacy.

B. *The Congressional Response*

Senators Sam Nunn and Carl Levin of the Armed Services Committee took the lead in assessing the factual claim. They quickly moved Sofaer into a defensive retreat on the ambiguities he claimed to have found in the Senate's 1972 hearings and debate; they insisted further that the Senate obtain the so-called "negotiating record" so that Sofaer's allegations regarding United States-Soviet diplomatic exchanges in the 1971-72 talks could be examined in cold light. Many months later, in the spring of 1987, these efforts culminated in the issuance of Senator Nunn's detailed study,[8] which marshalled overwhelming evidence and argument to refute Sofaer's two factual contentions: (1) that the "negotiating record" showed a failure on the part of United States negotiators to obtain Soviet agreement to the traditional interpretation; and (2) that the ratification proceedings supported the broad interpretation or were ambiguous. Senators Levin and Nunn went on to attach an amendment to the 1987 Defense Authorization bill, which blocked any SDI tests that would have been permitted by the broad interpretation.[9]

The Foreign Relations and Judiciary Committees, meanwhile, focused on the constitutional claim that Sofaer was developing as he found it increasingly difficult to sustain his factual claim concerning the Nixon Administration's 1972 testimony. In joint hearings,[10] the two Committees sought to examine a question never before posed in 200

---

[8] *See id.* at 54-78, 553-811.

[9] *See* National Defense Authorization Act for Fiscal Years 1988-89, Pub. L. No. 100-180, §225, 101 Stat. 1019, 1056 (1987).

[10] *See generally Joint Hearings, supra* note 7. These hearings also covered Sofaer's factual claims through testimony from top Nixon Administration arms negotiators and Senator J. William Fulbright, who had been the Foreign Relations Committee's chairman in 1972 (the Foreign Relations Committee has sole jurisdiction over all treaties).

years of constitutional history: Can the President unilaterally and fundamentally change a treaty by "reinterpreting" it in disregard of executive representations originally tendered to the Senate?

Testimony by eminent constitutional scholars answered this question decisively in the negative[11] and helped lay the groundwork for the drafting of Senate Resolution 167, *The ABM Treaty Interpretation Resolution*.[12] Introduced in March of 1987, it set forth a combination of relevant constitutional principles and contemporary facts which together yielded an inexorable conclusion: that only the traditional interpretation of the ABM Treaty, banning development and testing of present *and* future ABM technologies, is valid constitutionally, as well as under international law. In September of 1987, when the Foreign Relations Committee approved Senate Resolution 167 and sent it to the full Senate, the accompanying Committee report[13] concluded with sharp words concerning the Reagan Administration's legal machinations:[14]

> The Legal Adviser is . . . charged with American compliance with — and American efforts to enforce — the most momentous elements of the rule of law: rules of constitutional power, of international commitment, of war and peace. It is the Legal Adviser who, through his own integrity and the integrity of the legal analysis he oversees, must set the highest standards in honoring the law of the Constitution and the law of nations. It is the Legal Adviser who, when asked to "legalize" short-term policy ends over constitutional means, must be prepared to say no. It is the Legal Adviser who, regardless of political pressures, must revere law as the

---

[11] *See, e.g., id.* at 81-105 (testimony of Professors Louis Henkin and Laurence H. Tribe).

[12] S. Res. 167, 100th Cong., 1st Sess. (1987), *reprinted in Joint Hearings, supra* note 7, at 238-242 (sponsored by Senator Biden).

[13] *See* SENATE COMM. ON FOREIGN RELATIONS, THE ABM TREATY INTERPRETATION RESOLUTION, S. REP. NO. 164, 100th Cong., 2d Sess. (1987) [hereinafter S. REP. NO. 164]. This extensive report provides an exegesis of Abraham Sofaer's factual and constitutional claims, and a detailed rebuttal of both. The authors wish to note the valuable contribution to that report by two Committee consultants: James P. Rubin of the Arms Control Association and the Committee's former Legal Counsel, Professor Michael J. Glennon of the University of California—Davis.

In view of Senate passage of the Levin-Nunn amendment, which prohibited any practical application of the "reinterpretation," and in anticipation that the Senate's forthcoming consideration of the INF Treaty would provide a crucible for debate on the underlying constitutional issue, S. Res. 167 was never brought to the Senate floor.

[14] Testimony particularly pertinent to this criticism was provided by William Sims, former Attorney Adviser in the Office of the Legal Adviser, who had resigned over this issue. *See Joint Hearings, supra* note 7, at 202-225.

alternative to anarchy.

By failing to meet that standard, Mr. Sofaer has done a disservice to the Office of Legal Adviser. . . .

The Committee can find no evidence to contradict the conclusion that the Reagan Administration's "reinterpretation" of the ABM Treaty constitutes the most flagrant abuse of the Constitution's treaty power in 200 years of American history.

. . . .

No standard is more fundamental to civilization than the value of honoring a solemn pledge. While the "reinterpretation" debate has raised many complex and technical questions of international and constitutional law, beneath them all is a simple value with which every American is familiar: the value of honesty.

In seeking to distort the ABM Treaty through the sham of a "reinterpretation," the Administration has denigrated this value in the interest of pursuing a Presidential dream — that the United States can find safety in the nuclear age through the erection of an anti-nuclear astrodome. Some in the Senate support this goal; others regard it as naive, futile, and dangerous. But that debate aside, it should be taken as unarguably true that corrupting our own institutions and constitutional processes is not an effective way to defend the United States of America.[15]

This effort to deal with Sofaer's constitutional claim regarding the ABM Treaty helped to establish a legal and political basis for more formal action by the full Senate to address the treaty interpretation issue in connection with the INF Treaty. In January of 1988, after the INF Treaty had been submitted to the Senate and referred to the Foreign Relations Committee, the Biden Condition[16] was formulated with

---

[15] S. REP. NO. 164, *supra* note 13, at 66-67.

[16] In its final form, as passed by the Senate after minor Byrd and Cohen amendments on the Senate floor, *see infra* note 41, the Biden Condition reads as follows:

> The Senate's advice and consent to ratification of the INF Treaty is subject to the condition, based on the Treaty Clauses of the Constitution, that —
>
> (A) the United States shall interpret the Treaty in accordance with the common understanding of the Treaty shared by the President and the Senate at the time the Senate gave its advice and consent to ratification;
>
> (B) such common understanding is based on:
>
> (i) first, the text of the Treaty and the provisions of this resolution of ratification; and
>
> (ii) second, the authoritative representations which were provided by

the aim of repudiating this claim by exercising the Senate's prerogative to render *conditional* consent to the ratification of a treaty.[17]

In design, the Biden Condition was phrased positively to affirm the principle that in implementing a treaty, the Executive must honor the interpretation shared by the Executive and the Senate at the time of ratification. But the Biden Condition's implicit purpose was negative: to lay permanently to rest the Legal Adviser's newly-spawned legal doctrine — a doctrine that threatened not only the ABM Treaty, but the very foundation of the executive-legislative partnership in treaty-making as mandated by the Constitution.

II. THE SOFAER DOCTRINE

The precise details of the Sofaer Doctrine had emerged gradually in Administration testimony, statements and "studies," and — for political rather than logical reasons — had become increasingly crucial to the case for reinterpretation. On a logical level, opponents of the "reinterpretation" could argue soundly that the Administration's factual claim regarding the content of the "negotiating record" was simply invalid, and that any further debate over the President's constitutional latitude to "reinterpret" was therefore moot. But in a practical political context dominated by a popular President who dreamt of defending the

---

> the President and his representatives to the Senate and its Committees, in seeking Senate consent to ratification, insofar as such representations were directed to the meaning and legal effect of the text of the Treaty; and
>
> (C) the United States shall not agree to or adopt an interpretation different from that common understanding except pursuant to Senate advice and consent to a subsequent treaty or protocol, or the enactment of a statute; and
>
> (D) if, subsequent to ratification of the Treaty, a question arises as to the interpretation of a provision of the Treaty on which no common understanding was reached in accordance with paragraph (B), that provision shall be interpreted in accordance with applicable United States law.

134 CONG. REC. S6937 (daily ed. May 27, 1988).

[17] The "resolution of ratification," the vehicle by which the Senate grants consent to a treaty's ratification, is termed misleadingly; it is the Executive, acting pursuant to the Senate's consent, who actually ratifies a treaty, placing it into force for the United States.

The Senate, through amendments to a treaty's basic resolution of ratification, may condition such consent in two ways. It may require, by means of a "reservation," an alteration in the obligations undertaken through the treaty. Such a condition requires that the Executive obtain formal concurrence from the other party or parties before or at the time of ratification. Alternatively, the Senate may require, as a condition of its consent, certain behavior on the part of the Executive. Such a condition does not require the concurrence of any other contracting party, but does acquire the force of law if and when the President acts upon the consent so conditioned. *See generally* Koplow, *supra* note 1, 1394-95, 1401-02 (discussing the Senate's various options for expressing particular interpretations of a treaty).

United States by neutralizing the nuclear threat, this argument was far from compelling. To the electorate and to some Senators, the very purpose of the ABM Treaty appeared counter-intuitive. The provisions of the Treaty text were intricate in their interaction and not widely understood. And the so-called "negotiating record" — hundreds of pages of still-classified memoranda confusing both in their content[18] and their legal status — compounded the ABM Treaty's vulnerability to distorted description and general obfuscation.

In contrast, the publicly available and comparatively straightforward 1972 ratification proceedings were not shielded behind this smokescreen and therefore presented the "reinterpreters" with a more difficult challenge. Once Senators Levin and Nunn, and then the joint Foreign Relations-Judiciary Committee hearings, had undermined Sofaer's original factual claim that the 1972 proceedings were ambiguous, the case for the "reinterpretation" became heavily dependent upon justifying the proposition that those proceedings, *whatever* their content, imposed no constraint on future presidential interpretations of the ABM Treaty. Thus, Sofaer and his colleagues eventually found themselves fixated on contriving a legal argument that the Executive is simply not *bound* by much of what it has told the Senate in seeking consent to a treaty's ratification.

On March 17, 1988, as the Foreign Relations Committee prepared to act on the INF Treaty and the Biden Condition, the Administration provided its critique of the Condition in a formal letter.[19] Although signed by White House Counsel Arthur Culvahouse,[20] this letter expressed the Sofaer Doctrine in its most crystalline form. The President, said the Reagan White House, is bound by a particular interpretation of a treaty provision only if it meets three criteria: when consent was given, the interpretation must have been (1) "generally understood" by the Senate, (2) "clearly intended" by the Senate, and (3)

---

[18] After its receipt by the Senate, the voluminous "record" was stored in a special room in the Capitol, where interested Senators could view this collection of documents. Only an astute and dedicated reader, however, could master such an amorphous body of information — a fact from which one reasonably may infer that, in the Senate as in the Executive Branch, opinions about the content of the "negotiating record" were more numerous than informed opinions.

[19] *See* SENATE COMM. ON FOREIGN RELATIONS, THE INF TREATY, S. EXEC. REP. NO. 15, 100th Cong., 2d Sess. 435, 443 (1988) [hereinafter INFT REPORT]. This report contains a comprehensive analysis of the treaty interpretation issue and the Biden Condition, *see id.* at 87-108, and is quoted here extensively. The authors wish to note with appreciation the considerable contribution to that report by the Committee's former Legal Counsel, Professor Michael J. Glennon, who served as an informal consultant to the Committee during consideration of the INF Treaty.

[20] Apparently for tactical reasons, the Administration had taken the Legal Adviser off the "front lines" of the treaty interpretation issue.

"relied upon" by the Senate.[21]

The Administration described these criteria, which appeared so beguilingly straightforward and superficially unobjectionable, as comprising a "settled principle."[22] But in fact the Sofaer criteria were asserted with *no* constitutional basis: no reference to the intent of the Framers, to historical precedent, to case law — no reference to any source of constitutional authority. These alleged "principles" were simply invented.

Efforts within the Senate to refute the Sofaer Doctrine faced two obstacles: (1) a phalanx of Star Wars supporters, who in any case might have elevated the President's dream of a strategic defense above what seemed a constitutional technicality, and (2) the difficulty of explaining the implications of the Sofaer criteria. After all, everyone concerned could agree that if these criteria *were* met, the Executive would be bound. It required considerable effort to focus Senators, much less public interest, on the fact that such criteria, if accepted, would in practice be *so* difficult to meet that the Executive would almost *never* be bound by its own presentation to the Senate. Within the criteria lay these virtually unanswerable questions:

> — (1) How many Senators must speak on a given interpretation before it can be proven that the Senate "generally understood" that interpretation, and what standards are to be used in ascertaining *what* was understood?
> — (2) Unless the Senate has affirmed a particular interpretation by means of a formal condition, how can it ever be demonstrated that the Senate "clearly intended" a particular interpretation?
> — (3) If "relied upon" means that a particular interpretation was crucial to the Senate's action in approving a treaty or refraining from the imposition of a formal condition, how can the Senate's collective motivation ever be proven?

Yet, under the Sofaer Doctrine, all three proofs would be required to forestall a "reinterpretation." Thus, in its effect, the Sofaer Doctrine was a claim of wide executive latitude to change a treaty's meaning by means of the assertion, in the context of domestic law, of extreme and unreasonable criteria for what may *not* be reinterpreted.

As a matter of principle, the Doctrine threatened to nullify the Senate's constitutional role in the treaty power. But as a matter of

---

[21] INFT REPORT, *supra* note 19, at 443; *see also* Koplow, *supra* note 1, at 1374 & n.84 (discussing the three strands of the Sofaer Doctrine).

[22] *See* INFT REPORT, *supra* note 19, at 443.

practicality, the Sofaer Doctrine threatened paralysis in American treaty-making — since the Senate's only recourse would be to attach elaborate and numerous conditions to treaties in order to ensure that its understanding became an integral and explicit part of a treaty's ratification documents.

A. *Fundamental Flaw*

The critical flaw in the Sofaer Doctrine was its faulty premise that the Senate is not an integral part of establishing the meaning of a treaty under United States constitutional law except insofar as the Senate does so through affirmative steps which impose restrictions on executive latitude.[23] In relying on this premise, the Doctrine was fundamentally inconsistent with the basic model of United States treaty-making, wherein the Executive negotiates a treaty, explains its meaning to the Senate, and on that basis is accorded consent to ratify the treaty. Instead, the Doctrine called for the Senate to demonstrate a specific understanding, intent and motivation concerning every treaty provision, lest that provision be subject to any interpretation a President might later prefer.

In its INF Treaty Report, the Foreign Relations Committee elaborated on the defining and binding significance of the Senate's understanding of a treaty's meaning:

> Under the Constitution, the President may ratify only a treaty to which the Senate advised and consented. And it must be taken as axiomatic that the Senate cannot consent to that which it did not understand. Accordingly, the operative principle of treaty-making under the Constitution *must* be that, as co-makers of a treaty for the United States, the Executive and the Senate share a common understanding of a treaty which has binding significance domestically as the treaty, upon ratification, becomes an integral part of United States law.[24]

The Committee Report then emphasized where this common un-

---

[23] An attention-getting articulation of this premise by Abraham Sofaer was as follows:

Mr. Sofaer: When [the Senate] gives its advice and consent to a treaty, it is to the treaty that was made, irrespective of the explanations [the Senate] was provided.

Chairmen Biden: Would you say that again?

Joint Hearings, supra note 7, at 130.

[24] INFT REPORT, *supra* note 19, at 92-93.

derstanding is to be found:

> In the establishment and determination of that common understanding, the concept of legislative intent must be as applicable to treaties as it is to statutory law, in which intent may be explicit or implicit . . . .
>
> What is crucial is that legislative intent, with regard to a treaty as well as a statute, is expressed not only in language drafted by legislators but in unchallenged communications of the Executive. Under longstanding principles of textual construction, Executive communications to the Congress concerning the meaning of a text are evidence of the meaning of that text if Congress (or the Senate) acquiesces in that meaning. In other words, the legislative branch is deemed to be placed on notice by the Executive that certain words will be construed in a certain manner. If Congress wishes a different meaning to obtain, it may act so as to effect that different meaning. If Congress does not act, however, it is properly deemed to have accepted — and to intend — the meaning communicated by the Executive.
>
> . . . Professor Louis Henkin, chief reporter of the new *Restatement of U.S. Foreign Relations Law,* summarized this concept as follows: "Where several [Executive] statements are made and there is general acceptance of their tenor, that is the Senate understanding. That is true in the case of Senate consent to a treaty, as it would be in the legislative history of a statute."
>
> Clearly, in determining whether the Senate consented to the ratification of a treaty pursuant to an implicit understanding, a rule of reason must apply. Obviously, where the indicia of Senate intent or understanding (including unchallenged Executive communications or explanations) are few or inconsistent, no implicit Senate intent can reasonably be said to exist. On the other hand, where the indicia of intent (again, including unchallenged Executive communications or explanations) are several and largely consistent, an implicit intent can reasonably be concluded to exist. In such circumstances, the President is bound constitutionally to regard that intent as an implicit Senate understanding, and therefore an implicit condition of the Senate's consent. The Chief Executive cannot bring the treaty into force unless it reflects that condition, and subsequent Presidents must interpret the treaty subject to that intent.

> The essence of the Sofaer Doctrine is to reject this concept of legislative intent as it has been normally understood . . . .[25]

In truth, the Senate's understanding of a treaty is *usually* implicit — that is, registered via acceptance of executive representations. Indeed, the Sofaer Doctrine entailed a profound irony. Since implicit understanding is most likely to occur on those points where there is no controversy requiring explicit resolution, the Doctrine, by discounting implicit understanding, could render vulnerable to "reinterpretation" precisely those points on which there was full consensus at the time of ratification.[26]

B. *The "Negotiating Record" and International Law*

One consequence of Sofaer's stratagems was pervasive confusion about the legal significance of the so-called "negotiating record" of a treaty. His argument, after all, was that the traditional interpretation of the ABM Treaty, even if presented to the Senate and generally accepted by all parties for thirteen years, must be subordinated to the *real* treaty obligations that might be discovered subsequently in such a "record." It therefore bears emphasis that there is, definitively, no such thing as a negotiating record.

Ironically, the vestigial and undefined quality of treaty "records" was underscored by Sofaer himself when he testified in March of 1987 that the search for the United States ABM Treaty "record" — that is, any and all documents and memoranda pertaining to the Treaty negotiation — was still underway and that documents were "continuing to turn up out of the boxes that are arriving in my office from various storage facilities."[27] This statement occurred seventeen months *after* Sofaer had placed the prestige of his office and the honor of the United States behind a radical and unilateral United States revision of the ABM Treaty on the authority of the "negotiating record."

Not only were these documents unknown to the Senate in 1972 and insufficient to meet any agreed definition of a "negotiating record," they also had, under *any* definition, only the most tenuous status under international law.[28] On matters of treaty interpretation, international law looks to the treaty *text* as the primary source. "Subsequent practice" of the parties in implementing the treaty also carries great weight.

---

[25] *Id.* at 93-94 (footnote omitted).
[26] *See* Koplow *supra* note 1, at 1402 & n.205.
[27] *Joint Hearings, supra* note 7, at 147.
[28] *See* Koplow, *supra* note 1, at 1381-83.

True, in areas where the text and subsequent practice leave ambiguity, the original intent of the parties — as reflected in what they said in arriving at the treaty — may have interpretive significance. But in and of themselves, internal United States Government memoranda have virtually no standing under international law. And even documents shared by the parties represent no more than *evidence* as to where the negotiating process stood at a given point.

In the case of the ABM Treaty, both the text (except when read perversely) and thirteen years of subsequent practice (both behavioral and rhetorical) supported the traditional interpretation. Nonetheless, the Administration was relying on a collection of still-classified United States documents (and, as Senator Nunn had discovered, a distorted reading of those documents) as justification for asserting a radical revision of the Treaty in the context of international law.

The Administration recognized, of course, that the President's highest duty — higher than any duty deriving from international law — is to observe his domestic obligations under the Constitution. For example, if a United States statute conflicts with an earlier United States treaty commitment, his constitutional imperative is to obey the statute. The role of the newly-minted Sofaer Doctrine was to *minimize* the requirements imposed by such constitutional obligations, thereby freeing the Executive to act on its "reinterpretation" internationally without constraint under domestic law.

Thus, in the effort to stretch the ABM Treaty to accommodate Star Wars, the roles of the "negotiating record" and the Sofaer Doctrine were analogous to a one-two punch — both illegal.[29]

---

[29] Despite the common impression that the Sofaer Doctrine was a theory in which a treaty's "negotiating record" played a direct role, the Foreign Relations Committee pointed out:

> [There is] no necessary relationship between the Sofaer Doctrine and a treaty's "negotiating record" (aimed at international obligations). By way of example, one may imagine circumstances in which the Sofaer Doctrine (aimed at domestic obligations) would be asserted but the "negotiating record" would play no role. Let us say that President Reagan's successor and Secretary Gorbachev wished to "reinterpret" the INF Treaty in a manner inconsistent with what the Senate had been told in consenting to ratification. The Sofaer Doctrine would play the role of helping the Administration loosen its obligations under domestic law, while as between the parties there would be no resistance to the new meaning being put on existing words and thus no need to justify the change by reference to a "record." Indeed, under this scenario the "record" would be assiduously disregarded, because it reflected a meaning contrary to that which the parties wished to adopt.

INFT REPORT, *supra* note 19, at 91-92.

C. *The "Two Treaties" Issue*

To deflect criticism over their cavalier design to discount the significance of treaty ratification proceedings, Sofaer and his allies relied heavily on what might be called the "two treaties" argument.[30] Referring to the Executive's two sets of obligations — under domestic and international law — with respect to a given treaty, they raised a fearsome specter. If the Executive is constrained by what it told the Senate, might not the United States someday find itself hamstrung vis-à-vis another nation, such as the Soviet Union, which remained free to apply a less restrictive interpretation of a treaty? Implicit was a message of macho realpolitik: a fastidious concern for constitutional niceties could gravely disadvantage the United States on the global battlefield.[31]

This argument, however, appealed more effectively to emotion than to reason. Of course, it is possible to *hypothesize* a "two treaties" scenario in which the Executive, perhaps inadvertently, presents an overly restrictive interpretation to the Senate. Indeed, one can imagine such a case even under the Sofaer Doctrine, since it allows that some, albeit very little, executive testimony may be binding. But in practice "two treaties" has not proven to be a problem, and it was profoundly revealing that Sofaer and others were never able to point to a real-world example.

Certainly, the ABM Treaty was not a case in point. Here it was not the Soviets but the *United States* seeking to apply a less restrictive version. The interpretation still accepted by the Soviet Union comported fully with the meaning originally presented to the Senate.

Nor, as a matter of principle, should it be accepted that differences could commonly exist between what the Executive agreed with the other party and the explanations provided to the Senate. As the Foreign Relations Committee stressed:

> There should be no such difference. It is the Executive's responsibility to ensure sufficient clarity in a treaty, and in its explanations thereof to the Senate, so that no conflict exists between the shared understanding of the parties on the one hand and the shared understanding of the Executive and Senate on the other. If, *in extremis*, such conflict should arise

---

[30] *See* Koplow *supra* note 1, at 1408-12 (discussing the possible divergence of domestic and international interpretations).

[31] For further discussion of the modern "conservative" tendency to view constitutional concerns as a "liberal" impediment to the Commander-in-Chief's efforts to defend America in a dangerous world, see Biden & Ritch, The War Power at a Constitutional Impasse: A "Joint Decision" Solution (forthcoming 77 GEO. L.J. (1989)).

> and prove not resolvable by discussion or negotiation with the other party, the United States of course has the option of withdrawing from the treaty.
>
> In sum, this largely theoretical problem should be addressed if and when it arises — not by a preemptive alteration of consitutional principles. The Senate should not accept a doctrine that assumes and protects carelessness or deviousness on the part of the Executive.[32]

III. THE BIDEN CONDITION

Developed against the backdrop of this controversy,[33] the Biden Condition had four crucial elements:

> (1) the principle that the original "shared understanding" held by the Executive and the Senate must govern United States interpretation and implementation of a treaty;
>
> (2) the principle that the basis for this common understanding is the text of the treaty, as elaborated by the Executive's formal representations to the Senate in seeking consent to ratification;
>
> (3) the principle (really a corollary of the first principle) that the Executive may not, acting alone, adopt a new interpretation of a treaty; and
>
> (4) a reference to the Constitution as the source of these principles.

As both supporters and opponents of the Condition recognized, the last element was critical. While it was understood that, technically, the Condition would apply its interpretation requirement only to the INF Treaty, it was also recognized that couching the requirement as one which the Senate viewed as a constitutional principle would give the Condition a larger significance.

Indeed, reference to the Constitution was essential to prevent the Condition from being stood on its head. Without that reference, the "principle" being applied would be *ad hoc,* and thus no principle at all. The Condition would then carry the implication that unless the

---

[32] INFT REPORT, *supra* note 19, at 103.

[33] The authors wish to express appreciation to Professor Louis Henkin for his generosity in making himself available for frequent consultation with regard to the accurate phrasing of the constitutional principle expressed in the Biden Condition. The question of whether to affirm such a principle as a condition of Senate consent to INF Treaty ratification, however, was a separate, tactical issue on which Professor Henkin's advice was not sought.

Senate, in consenting to a treaty, specifically stipulated such a requirement — as it had not done in consenting to the ABM Treaty — no such requirement would apply. Thus, divested of a reference to the Constitution, the Biden Condition could have become an argument *favoring* the ABM Treaty "reinterpretation," as well as a precedent suggesting the need for such a condition on every future treaty.

Although branded as doing so, the Biden Condition represented no effort to shift the constitutional allocation of powers between President and Congress. Rather, the Condition simply aimed to express and affirm a long-standing, if never-before-articulated, principle: to wit, that the "shared understanding" of the Executive and the Senate, as reflected in the Executive's formal representations, is indeed *fully* binding, as opposed to binding only with regard to those provisions and interpretations that the Senate has gone to extraordinary lengths to brand as crucial to its consent, by a formal condition or some other means.

Unlike the Sofaer Doctrine, the Biden Condition was based on a conception of the Executive and the Senate not as adversaries in the treaty-making process, but as partners — co-makers of the treaty on behalf of the United States. True, both the Biden Condition and the Sofaer Doctrine rested upon the premise that a "shared understanding" is required to bind the Executive to a given interpretation of a treaty, but the key difference concerned the locus of that "shared understanding." As stated in the Biden Condition, that locus is the body of all "authoritative" statements rendered by the Executive in seeking consent to ratification. According to the Sofaer Doctrine, the Executive would be bound only by those "shared understandings" which the Senate somehow labeled as being crucial to its consent by fulfilling the criteria of "generally understood, clearly intended, and relied upon."

Recognizing that such fine distinctions were not the grist of normal political discourse, the Foreign Relations Committee was at pains in its INF Treaty Report to emphasize the role the Biden Condition was and was not intended to play.[34] The Committee also stressed that

---

[34] As stated in the report:

> —The issue addressed by the Biden Condition is *not* a struggle over who interprets treaties. It is solely and indisputably the President's responsibility to interpret and implement treaties for the United States. At issue is the question of what limits are to govern the President's latitude in exercising that power.
>
> —The issue is *not* whether and what testimony by the Executive is "authoritative." To answer that question is still to be without an answer as to whether "authoritative" representations are in any way binding on the Executive. The issue is whether and how such representations have a binding significance under United States law . . . .

the primary source for treaty interpretation is not the *process* of what occurred in the negotiation or what can be found in any party's "record" thereof, but rather the resulting treaty document — the signed and ratified *text*:

> Both domestic and international law give primacy in treaty interpretation to the text of the treaty. International law requires that a treaty be interpreted in accordance with the ordinary meaning to be given the treaty's terms in light of their context and in light of the treaty's object and purpose. Domestic law does not differ, and is also premised on the assumption that the Executive and the Senate, as co-makers of a treaty for the United States, will share a common understanding of a treaty's text. As a matter of record, that common understanding of the text will be reflected in the Executive's formal presentation of the treaty to the Senate: in formal presentation documents, in prepared testimony, and in verbal and written intercourse regarding the treaty's meaning and effect.[35]

The Committee also sought to rebut the Administration's charge that the passage of the Biden Condition would bind the Administration to every statement of any Executive Branch official, even statements accidentally in error:

> The Committee wishes to emphasize that in asserting the binding significance of the Executive's original representations, it has articulated the principle with great care. Whereas some formulations [might] have asserted that the

---

—The issue is *not* whether the Executive is to be bound by every last utterance of its representatives before Congress, but whether and how the principle of original "shared understanding" is to govern a treaty's implementation. Shall it be axiomatic that such "shared understanding" is reflected in authoritative Executive representations of the treaty's meaning? Or must the Senate deal with the Executive as an adversary, who will not act in good faith and around whom a cage of explicit stipulations must be built?

—The issue is *not* a Senate effort to chart new consitutional ground, but an Executive effort to do so. It is not the Senate but the Executive which seeks to assert consitutional principles in a manner which expresses an aggressively broad claim on power. An adequate response requires no counter-assertion of Senate power but a simple manifestation, as reflected in the Biden Condition, of Senate unwillingness to acquiesce in Administration assertions which, if not refuted, could imply acceptance of a radical aggrandizement of Presidential power.

INFT REPORT, *supra* note 19, at 107-08.

[35] *Id.* at 97-98.

Executive is directly and explicitly "bound by" its representations, the Biden Condition makes no such assertion. Rather, beginning with the premise of Executive-Senate partnership in the making of treaties, it asserts only the binding quality of the original "shared understanding" and then asserts a derivative principle: that this "shared understanding" of a treaty's text is "reflected in" — meaning evidenced by — the Executive's authoritative representations "insofar as such representations are directed to the meaning and legal effect of the text of the Treaty."

This construction helps to underscore that a rule of reason must apply in instances where inconsistencies may appear, lest the Executive be "bound by" two inconsistent requirements. Thus, the Biden Condition is precisely and carefully balanced in seeking to articulate the consitutional principles it aims to uphold . . . .[36]

Certainly, substantial weight must be accorded the Executive's formal presentation documents, which include the treaty itself and a detailed explanation of the Executive's understanding of the treaty's terms. Considerable weight must also be accorded the prepared testimony of top executive officials. Additional information elicited during the Executive-Senate interaction regarding the meaning and legal effect of treaty terms will also be important because such discussion and questioning will cover items of particular interest and concern to the Senate, as a co-maker of the treaty for the United States. The overall significance of Executive Branch representations makes it incumbent upon the Executive to take great care to avoid or remove any inconsistency in its overall presentation of a treaty. The possibility, however, that the Executive may prove fallible — that an "authoritative" representation could, on rare occasion, be inconsistent with the text of the treaty, or with another "authoritative" representation — is simply an unavoidable fact of life which does not in any way diminish the crucial role of such representations in providing evidence of the common understanding of the text of a treaty held originally by the Executive

[36] *Id.* at 104-05. As the Biden Condition was being formulated, Senator Christopher Dodd usefully suggested the phrase "insofar as such representations are directed to the meaning and legal effect of the text of the Treaty" as a means of narrowing the scope of those executive representations to be regarded as having binding significance.

and the Senate as co-makers of a treaty.[37]

In addition, the Committee warned that given the Executive's assertion of the Sofaer Doctrine, the only practical alternative to the Biden Condition would be "to lade the INF Treaty and its resolution of ratification with an enormous burden of formal amendments, stipulations, conditions, and the like, which could require months of debate."[38]

A. *Senate Consideration of the Biden Condition*

While it was obvious that Senate opposition to the Condition would be led by dedicated Star Warriors, the key question was whether some Administration loyalists could be won over by emphasizing the constitutional issue, including the direct question of Senate prerogative. To make the case more palatable, Condition advocates[39] were at pains to stress that the principles being affirmed did not lay to rest the entire ABM issue, but only the legal claim. Passage of the Condition, they reiterated, would not *resolve* the ABM Treaty debate, but simply confine it to a dispute over facts concerning the "negotiating record" and the ratification proceedings of 1972.

Nonetheless, battle lines were quickly drawn as the Administra-

---

[37] *Id.* at 98.

[38] *Id.* at 105. The Committee continued as follows:

> For example, in response to questions, the Administration provided "authoritative" representations regarding a number of issues of direct concern to the Committee, including:
>
> —the meaning of "weapon-delivery" vehicle in Article II;
>
> —the effect of Article XIV on U.S.-NATO weapons cooperation;
>
> —the effect of Article VII on testing of sea-launched cruise missiles; and
>
> —the effect of Article II on the testing of strategic missiles at INF ranges.
>
> Given the context created by the Sofaer Doctrine, however, the Committee could not — without the countervailing effect of the Biden Condition — have been assured that such Administration representations were determinative of the Executive's obligations in carrying out the Treaty. Accordingly, in the absence of the Biden Condition, some Members would have felt obliged to propose specific conditions on these and other issues.

Id.

[39] Only days after announcing his intent to offer the Condition at the appropriate time in the Foreign Relations Committee's consideration of the INF Treaty, Senator Biden entered the hospital with a health problem that prevented his return to the debate. He therefore wishes to acknowledge, in addition to the key roles played by Senators Nunn and Levin, the major contribution of several members of the Foreign Relations Committee — particularly Senators Christopher Dodd, Paul Sarbanes, Alan Cranston, John Kerry, and Daniel Patrick Moynihan — in supporting and defending the Biden Condition.

tion — perhaps in recognition of the weakness of the factual case — moved strongly to solidify the ranks of its supporters in the Senate, including moderates, against the Condition. Both in the lead-up to the Committee vote and before the vote on the Senate floor, extensive negotiations occurred on a "compromise." Invariably, however, such proposals put forward by the Administration and its Senate loyalists had three characteristics:

> —(1) language introducing the concept of international law,[40]
>
> —(2) language that would incorporate the Sofaer Doctrine criteria (that is, "generally understood," etc.) into the Condition, and
>
> —(3) deletion of any mention of the Constitution.

Supporters of the Condition, however, stood fast against any such "compromise," recognizing that each element was insidious:

> —(1) proposed references to international law carried an implication that the United States has two sets of obligations under a treaty and might have to subordinate one to another (that is, what the Executive told the Senate might, on occasion, have to be subordinated to the supposedly higher truth of the "negotiating record"),
>
> —(2) introducing the Sofaer criteria into a text designed to refute the Doctrine was clearly perverse, and
>
> —(3) reference to the Constitution was imperative to demonstrate that the Senate was asserting *principles inherently applicable* to all treaties as opposed to imposing an *ad hoc* policy on the INF Treaty.

In April, the Foreign Relations Committee reported the INF Treaty to the full Senate after a contentious debate and adoption of the Condition on a twelve-to-seven vote.

As floor debate began, the treaty interpretation issue occasioned some worry in the arms control community that the controversy could delay or even scuttle the INF Treaty. Nonetheless, Majority Leader Robert Byrd, backed by Senators Nunn, Sarbanes, and Levin, took a firm stand in defense of constitutional principle.

---

[40] The emphasis on United States obligations under international law voiced during the debate by opponents of the Biden Condition bore two ironies: (1) it was expressed by an Administration and by Senators not known for such concern and (2) the ABM Treaty "reinterpretation," which they sought to defend through their legal arguments, represented a blatant disregard for international law.

In preparation for a vote, Senator Byrd made a slight modification in the Biden Condition in order to protect it procedurally from further amendment.[41] With negotiations stalemated, the Leader made clear his determination to let the matter be settled on a close vote if necessary, his position strengthened by a calculus that support for the INF Treaty was sufficiently strong so that the Treaty would prevail with or without the Condition. Finally, with a vote only hours away, Senator William Cohen, a Republican who was a stalwart opponent of the "reinterpretation," made a valuable suggestion, aimed at providing political "cover" for Senators who did not wish to confront the President directly on a high-stakes ideological issue but who recognized the validity of the Condition.

Senator Cohen reasoned that while the factual claim of ambiguity in the 1972 Nixon Administration testimony had been repudiated already, it nonetheless remained an integral part of the mythology underpinning the "reinterpretation." Therefore, why not take into account the possibility of "ambiguous testimony"? Since the Condition was intended only to affirm the principle that the original "shared understanding" must govern treaty implementation, why not add a corollary that would cover the situation alleged in the ill-founded factual claim: to wit, that where *no* "common understanding" has been reached between the Senate and the Executive, a treaty will be interpreted in accordance with applicable United States law?

One may only speculate about the internecine discussions that ensued among Administration representatives and their Senate supporters; perhaps historians will someday learn more. Since it followed logically from the other elements of the Biden Condition, the Cohen Corollary was accepted readily by Condition advocates. Nonetheless, this change precipitated the significant shift toward bipartisanship that Condition supporters sought.

More surprisingly, the Administration seemed to acquiesce. Senator Arlen Specter, an opponent of the Condition, noted that suddenly the Administration's position was "enormously different from what [it] has staunchly contended up to . . . recently."[42] He accused the Administration of "unconditional surrender . . . joined in by a number of my

---

[41] Technically, the Biden Condition was an amendment to the resolution of ratification. Under parliamentary procedure, an amendment to an amendment — a so-called "second degree amendment" — precludes further amendment. Senator Byrd's modification originally was intended to be such a "second degree" amendment. As matters evolved, this technique proved unnecessary when the "Cohen corollary" discussed below produced the support necessary to ensure that the Condition would not be vulnerable to weakening amendments.

[42] 134 CONG. REC. S6740 (daily ed. May 26, 1988).

colleagues on this side of the aisle."[43]

On May 26, with Senators Nunn, Sarbanes, Levin, Cranston, and Dodd leading the debate, and with key Republican leaders, including Senators Dole, Lugar, and Kassebaum, shifting position to join in support, the Senate voted 72-27 in favor of the Biden Condition.

Although this result was quite sufficient to sound the death-knell for the Sofaer Doctrine, the victory was subsequently sharpened, before the final vote on the Treaty, when opponents of the Condition sought to raise the issue anew — with three proposals.

Two, sponsored by Senators Wilson and Specter, respectively, sought to introduce the concept of international law. Condition advocates opposed this, as they had during the "compromise" negotiations, on the grounds that the Condition was directed solely at domestic law and that the proposed language not only confused the issue, but implied the possibility that obligations under international law commonly could conflict with and supercede the imperatives of domestic law. Both amendments were defeated soundly.

In a third proposal of particular significance, Senator Specter offered an amendment "as a means of clarifying the Biden Condition." Notwithstanding that description, the Specter Amendment would have *explicitly affirmed* the Sofaer criteria by adding these words: "Such common understanding means a shared interpretation which is both authoritatively communicated to the Senate by the Executive and clearly intended, generally understood and relied upon by the Senate in its advice and consent to ratification."[44]

Whereas the vote on the Biden Condition had been an indirect vote on the Sofaer Doctrine, the Specter Amendment afforded an opportunity to vote on the Doctrine directly. After advocates of the Condition had reemphasized the perversity of affirming the Sofaer Doctrine in a condition intended to repudiate it, the Specter Amendment was rejected 67-30, a result that served to underscore the significance of the earlier vote on the Condition itself.

B. *The Reagan Letter: A Final Skirmish*

On June 10, having ratified the Treaty, President Reagan con-

---

[43] *Id.* Certainly one explanatory factor was the pressure of time; the President and many aides had already departed for the Moscow summit, where INF Treaty ratification was scheduled to occur. Perhaps equally important, the residual "Administration" in Washington was led at this point by Howard Baker, the White House Chief of Staff — but also a former Senate Majority Leader and a man attuned to the adage that our government consists of laws, not men.

[44] 134 CONG. REC. S6884 (daily ed. May 27, 1988).

veyed a formal message to the Senate, clearly intended by Administration lawyers to dilute the Senate's action and to cast doubt on the legal status of the Biden Condition. The President declared that he could not "accept the proposition that a condition in a resolution of ratification can alter the allocation of rights and duties under the Constitution."[45]

In a formal response,[46] the Chairman of the Foreign Relations Committee, Senator Claiborne Pell, emphasized that the Biden Condition was not aimed at altering the Constitution but at demonstrating the Senate's unwillingness to acquiesce in an Administration effort to undercut the Constitution's allocation of a joint Executive-Senate role in the exercise of the Treaty Power. As to the legal status of the Senate's action, Senator Pell quoted from the Foreign Relations Committee's INF Treaty Report:

> [T]he Condition is binding under domestic law, and obtains its binding effect because the President, in the absence of the resolution of ratification, lacks authority to participate in the Treaty's ratification. He obtains such authority through the resolution of ratification and is governed by any stipulations by which the Senate conditions its consent.
>
> In sum, the President may not act upon the Senate's consent without honoring this Condition. Nothing that he or his Administration does, by statement or action, whether before or after the act of ratification, can alter the binding effect of any condition which the Senate places upon its consent to treaty ratification. If the President brings the INF Treaty into force, the [Biden] Condition takes effect.[47]

Senator Pell concluded: "The Sofaer Doctrine has been formally and overwhelmingly rejected. And nothing in the President's post-ratification letter has changed or could change that fact."[48] As Senator Nunn put it, "The President's letter is entertaining but irrelevant. The Treaty, including this Condition, is now the supreme law of the land. And the President can no more change it with a letter than he can change any other law with a letter."[49]

---

[45] 134 CONG. REC. S8036 (daily ed. June 16, 1988).

[46] *See id.* at S8034-36.

[47] *Id.* at 8034 (quoting INFT REPORT, *supra* note 19, at 100).

[48] *Id.*

[49] Smith, *President Disputes Hill on Treaties,* Wash. Post, June 11, 1988, at A11, col. 1 (quoting Senator Nunn).

IV. IMPLICATIONS

A. *Implications for the ABM Treaty*

As its supporters repeatedly emphasized, the Biden Condition was not designed to resolve the question of alleged ambiguities in the genesis, design and implementation of the ABM Treaty. Accordingly, the Condition by itself could not constitute a final disposition of the issue of ABM Treaty interpretation. Rather, the provision was intended to repudiate the Sofaer Doctrine by affirming certain constitutional principles that were brought into question during the ABM Treaty debate.

The implications for the ABM Treaty, however, are clear and profound. As the floor debate drew to a close, Senators on both sides of the "reinterpretation" issue recognized this significance:

> Senator Nunn: "[The Condition] affirms enduring constitutional principles which apply to the interpretation of all treaties, *including the ABM Treaty.*"[50]
>
> Senator Levin: "[T]he principles set forth in this amendment apply to all treaties. That is why we fought so hard to keep the words in this amendment 'the Treaty Clauses of the Constitution.' "[51]
>
> Senator McClure (a Condition opponent): "This is not some one-time deal . . . . This amendment would affect all treaties, not just the treaty at hand."[52]

The Senate's formal repudiation of the Sofaer Doctrine means that the case for the ABM Treaty "reinterpretation" now rests solely on what is left of Sofaer's factual claims — claims already widely and justifiably denigrated. The residual debris of this "factual" case may be summarized as follows:

> — *Text.* The "reinterpretation" is, on its face, inconsistent with any fair and informed reading of the Treaty document itself.[53]
>
> — *"Negotiating Record."* The so-called "record" of the ABM Treaty negotiation cannot serve, under either constitutional or international law, in the role assigned to it by the "reinterpreters" and, in any case, does not sustain the

---

[50] 134 CONG. REC. S6675 (daily ed. May 26, 1988) (textual emphasis added to reflect emphasis when spoken).

[51] *Id.* at S6728.

[52] *Id.* at S6770.

[53] *See* S. REP. No. 164, *supra* note 13, at 13-14; Chayes & Chayes, *supra* note 6, at pt.1.

> Sofaer-Reagan interpretation — as demonstrated by Senator Nunn's extensive study and as attested by an array of distinguished former officials who negotiated the ABM Treaty.[54]
>
> — *Ratification Proceedings.* Finally, as regards the Senate's consideration of the ABM Treaty in 1972, those proceedings do not *support* the "reinterpretation," as even the Legal Adviser has acknowledged, and the claim of *ambiguity* is plainly belied by any reasonable assessment of this publicly available record.[55]

There is indeed little left of the ABM Treaty "reinterpretation," other than the memory of a failed and disgraced effort to distort the Constitution and a solemn treaty obligation of the United States. That obligation was incurred in pursuit of the American national security interest and should be honored faithfully unless and until compelling reasons of national security require formal United States withdrawal, through procedures stipulated in the Treaty itself, from the ABM Treaty regime.

This is not to say that the future of the ABM Treaty is assured. As a candidate, President Bush pledged fealty to the Reagan dream of deploying a strategic defense, a step that would entail abrogation of the ABM Treaty. But that issue can be addressed, in honorable public debate, on its strategic merits and without further efforts to employ the sham of a treaty "reinterpretation."

B. *Implications for Future Treaties*

As to future treaties, one lesson that should *not* be drawn from this saga is the need of the Senate to see a treaty's "negotiating record."[56] In preparation for dealing with the treaty interpretation issue in

---

[54] *See Joint Hearings, supra* note 7, at 170 (testimony by Ambassador Gerard Smith, chief negotiator of the ABM Treaty, and other negotiators). The one notable exception from the 1971-72 negotiating team is Paul Nitze, a member of the Reagan Administration who supported the traditional interpretation until October, 1985.

[55] Answering questions before the American Society of Newspaper Editors in Washington, D.C., former President Nixon — who signed, submitted to the Senate, and ratified the ABM Treaty — stated:

> Since the Senate has to advise and consent, a treaty . . . means whatever was presented to the Senate. As far as what was presented to the Senate was concerned, it was what we call the "narrow" interpretation. There is no question about that.

Transcript of question and answer session with Richard M. Nixon (Apr. 15, 1988) (available from the American Society of Newspaper Editors).

[56] *Cf.* Koplow, *supra* note 1, 1377 & n.102 (indicating that the Sofaer Doctrine might have obligated the Senate to examine the "negotiating record").

the context of the INF Treaty ratification proceedings, some Senators demanded that "record" in order to underscore that the Administration's assertions about the role of the Senate in treaty-making had destroyed any basis on which the Senate could operate in confidence of executive good faith. They also wished to demonstrate that the practical consequence of the Sofaer Doctrine was an inordinately cumbersome process that could burden this and all future treaties.

As it happened, however, the Reagan Administration complied readily with this request, probably recognizing that to do so played conveniently into its ABM Treaty-related assertion that the "record" was where ultimate truth was to be found. But there are sound reasons why this should not become a precedent, as the Foreign Relations Committee's INF Treaty Report emphasized:

> First, a systemic expectation of Senate perusal of every key treaty's "negotiating record" would inhibit candor during future negotiations and could be expected to induce posturing on the part of U.S. negotiators and their counterparts during sensitive discussions.
>
> Second, by seeking possession of the myriad internal Executive memoranda comprising the "negotiating record," the Senate would impose upon itself a considerable task with no clear purpose. Because this "record" does not constitute an agreed account of the negotiations, such documents have no formal standing. Accordingly, regularized efforts to reconcile these "snapshots" of the negotiation process with the resulting treaty text as explained by the Executive would serve only to divert the Senate's attention from the central aim of the ratification process — which is to build, between the Executive and the Senate, a clear "shared understanding" of the treaty text and the obligations which that text entails.
>
> The overall effect — fully exposed negotiations followed by a far more complicated Senate review — would be to weaken the treaty-making process and thereby to damage American diplomacy.[57]

---

[57] INFT REPORT, *supra* note 19, at 100-01. The Committee continued:

> The traditional approach does not, of course, *preclude* reference to the "record" where such reference can be useful in explaining the effect of treaty provisions which may appear ambiguous or about which questions may arise. The Executive may sometimes wish to initiate such reference to the "record"; on some occasions the Senate may request a detailed account of the interchange which resulted in a particular treaty provision. But this case-by-case approach is far superior to a systematic submission of the "negotiating record," which implies either that treaties tend to be replete

V. CONCLUSION

As to the ultimate constitutional significance of the Senate's action in approving the Biden Condition, the Foreign Relations Committee adopted this balanced perspective:

> The Committee notes that, in one respect, its action in including this Condition in the INF Treaty's resolution of ratification was unnecessary insofar as principles which inherently apply to the INF Treaty would apply even in the absence of any Senate action affirming them. Given the cir-

---

with ambiguity or that the Executive cannot be trusted to present an accurate account of the obligations to be assumed by the United States. Neither assumption should be allowed to govern the basic Executive-Senate interaction in the treaty-making process.

Id. at 101.

As to the status of the INF Treaty "negotiating record" already transmitted to the Senate, the Committee stated:

> Now that the INF Treaty "negotiating record" has been made available to the Senate, the status of these documents requires resolution. In the Committee's view, the resolution would not have been satisfactorily achieved by any stipulation [as some Senators had suggested] declaring the Senate had scrutinized the "record" and satisfied itself that the "record" was in harmony with the formal Executive branch presentation of the Treaty. Such an approach could entail at least three significant problems:
>
> (a) institutionally, it could imply that such scrutiny is important to the Senate's examination of treaties and thus should be institutionalized;
>
> (b) retroactively, it could imply that such scrutiny should have been exercised in the past; and
>
> (c) specifically, with regard to the INF Treaty, it could leave open the question of what is to be done if, in the future, there is an assertion — for example, by a subsequent Administration — that notwithstanding the Senate's perception of harmony there was an inconsistency between the "record" and the Executive presentation.
>
> Accordingly, the Committee believes that no formal finding concerning the contents of the INF Treaty "negotiating record" would be wise. In the Committee's judgment, the status of this "record" is established by the basic principles affirmed in the Biden Condition. If U.S. treaty interpretation is to be based upon the shared understanding of the Senate and the Executive at the time of ratification, and if that common understanding is reflected in authoritative statements made in seeking Senate consent to ratification, the sources of interpretation which appear at variance must be subordinated to those authoritative statements.
>
> In sum, although internal Executive memoranda and the negotiating materials may have been available to members of the Senate, some of whom have sought to assure themselves that this "record" is consistent with the Administration's presentation, the clear corollary of the constitutional principles cited in the Biden Condition is that such documents need not have been examined for consistency and should not be deemed material to U.S. interpretation of the INF Treaty insofar as they are inconsistent with the Executive branch's formal presentation of the INF Treaty.

Id. at 101-02

> cumstances, however, the Committee judged that to fail to affirm such principles could suggest some degree of acquiesence in the Sofaer Doctrine, which the Committee views as an Executive attempt to assert an unconstitutional arrogation of the Treaty Power. In this sense the Committee views the Biden Condition, paradoxically, as both unnecessary and highly significant.[58]

In looking back on the "reinterpretation" saga, one might well find added reason to admire the wisdom of the Founding Fathers. Among the Framers, it was Alexander Hamilton who, though renowned as the leading advocate of a strong presidency, stressed that it would have been "utterly unsafe and improper"[59] to entrust the power of making treaties to the President alone. Indeed, Hamilton's most famous dictum applied directly to the Treaty Power:

> The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.[60]

Hamilton concluded, accordingly, that the Framers' division of the Treaty Power between the Executive and the Senate was "one of the best digested and most unexceptional parts of the plan."[61]

The essence of the Treaty Power is that the President and the Senate are partners in the process by which the United States enters into, and adheres to, international obligations. Through its response to the Reagan Administration's foray into treaty "reinterpretation" — an episode fully reflective of Hamilton's sober view of human nature — the Senate acted effectively to uphold that constitutional partnership.

---

[58] *Id.* at 97.
[59] THE FEDERALIST NO. 75, at 451 (A. Hamilton) (C. Rossiter ed. 1961).
[60] *Id.*
[61] *Id.*