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## The Treaty Power

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# The Treaty Power

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## I. ABRAHAM D. SOFAER

I would like to put the present debate over the 1972 Anti-Ballistic Missile (ABM) Treaty into some historical perspective.<sup>1</sup> From time to time, the debate associated with the ratification of a particular treaty moves beyond the merits of the policy, or particular issue under consideration, to an argument about the treaty process itself, especially the correct interpretation of the treaty power as set out in article II, section 2, of the Constitution.<sup>2</sup> Debate over the treaty process

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1. Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, United States-Union of Soviet Socialist Republics, 23 U.S.T. 3437, T.I.A.S. No. 7503.

2. U.S. CONST. art II, § 2.

often distorts that process, disrupts accepted treaty practice, and even threatens the utility of the treaty making mechanism.

This hypothesis is supported by recent experience. The President's Strategic Defense Initiative (SDI) has been the subject of extensive public and congressional analysis scrutiny. Another controversial subject has been the proper interpretation of the 1972 ABM Treaty. The ABM Treaty became a major issue after this administration concluded, in late 1985, that a broader interpretation was fully justified by the treaty, and its negotiating record.<sup>3</sup> If implemented, this broader interpretation would allow increased flexibility in developing and testing mobile systems or components based on what the treaty calls "other physical principles,"<sup>4</sup> which I understand to be principles other than those used in 1972 ABM systems.

The administration's legal judgment—based on painstaking study—is that the Soviets did not agree in the ABM Treaty to be bound by U.S. proposals that would have entirely banned the development and testing of mobile devices based on "other physical principles," including space-based devices.<sup>5</sup> Despite this fact, however, the President has not implemented the so-called broader interpretation, nor has he decided when, and under what conditions, he would implement it. He has promised that he would consult Congress before making any decision to implement the broad interpretation of the ABM treaty. The nation, nonetheless, has been subjected to a massive dispute over both the merits of the broader interpretation, and the President's power to implement it without the Senate's consent.

While it might be tempting to claim that this ABM debate reflects some unprecedented, unjustifiable, and incomprehensible aberration in American constitutional history, in actuality it illustrates a recurring phenomenon in the historic tug-of-war between the President and the Senate over the treaty power. The Senate has guarded and aggressively expanded its prerogatives in the treaty process, whenever it has been politically convenient to do so. Technical issues of treaty law and questions of competence become the surrogates for policy disputes, subverting the constitutionally mandated process of Senate advice and consent to treaty ratification. Professor Holt, a scholar of the history of American treaty law, described this phenomenon years ago. He stated:

[W]hen a treaty is the subject of a contest in the Senate the consti-

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3. THE ABM INTERPRETATION RESOLUTION: REPORT OF THE SENATE COMMITTEE ON FOREIGN RELATIONS, S. REP. NO. 100-164, 100th Cong., 1st Sess. 26, 28 (1987).

4. See ABM Treaty, *supra* note 1, at 3456.

5. See ABM INTERPRETATION RESOLUTION, *supra* note 3, at 26.

tutional distribution of the treaty-making power between President and Senate becomes involved and the treaty is certain to be attacked on the grounds that the prerogatives of the Senate are being invaded by the President.<sup>6</sup>

In 1888, for example, when anti-British sentiment was high in America, the Senate considered a proposed treaty with the United Kingdom concerning the Northeast fisheries.<sup>7</sup> The treaty offered a peaceful solution to the conflict between the two countries, but its opponents killed it in the Senate on a strictly partisan basis.<sup>8</sup> The treaty was attacked on the grounds that the President had failed to get the Senate's consent in selecting the persons he chose to negotiate the treaty. Senator Chandler said a treaty so negotiated was "a gross violation of the Constitution, wilfully, recklessly, and defiantly perpetrated; and the Senate might well have refused on this ground even to consider the terms of a treaty thus first introduced into its presence."<sup>9</sup> It was clear in 1888, as it is today, that Senator Chandler's attack on the treaty was unjustified. Presidents long before and after 1888 have employed treaty negotiators without seeking the Senate's advice and consent. This attack illustrates how the Senate will occasionally advance some meritless restriction, supposedly found within the treaty power, to defeat a treaty disliked for its substantive policy.<sup>10</sup>

The Treaty of Versailles<sup>11</sup> provides another illustration. Various senators proposed a number of killer reservations to ratification of the treaty that, in effect, constituted rejection of the treaty.<sup>12</sup> Senator Sherman argued that the President was proposing to allocate powers to a foreign institution that were inconsistent with the constitutional authority of the United States government.<sup>13</sup> Similarly, Senator Reed argued that calls for freedom of transit, and for equitable treatment of international commerce, were unconstitutional. He stated: "What can it mean, except that the League [of Nations] proposes to regulate international commerce as the Congress now regulates interstate commerce? How can Congress regulate commerce with foreign nations and at the same time the League be the instrumentality to secure equitable treatment?"

One proposed reservation would have required that anyone sent

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6. W. HOLT, *TREATIES DEFEATED BY THE SENATE* 145 (1933).

7. S. EXEC. DOC. NO. 176, 50th Cong., 1st Sess. 10 (1888).

8. *Id.*

9. 50 CONG. REC. 19, 6355 (1888).

10. See generally H. WRISTON, *EXECUTIVE AGENTS IN AMERICAN FOREIGN POLICY* (1967).

11. Treaty of Versailles, June 28, 1919, 225 Parry's T.S. 188.

12. 66 CONG. REC. 58, 8767-69 (1919).

13. *Id.* at 8770.

to the League of Nations as a participant representing the United States be appointed by the Senate itself, and sent by Congress, not by the President.<sup>14</sup> Another reservation, actually adopted, empowered the United States to withdraw unilaterally from the League and provided: "the United States shall be the sole judge as to whether all its international obligations and all its obligations under the said covenant have been fulfilled, and notice of withdrawal by the United States may be given by a concurrent resolution of the Congress of the United States."<sup>15</sup> This passage reflected the Senate's intent to keep the President out of the process of terminating a treaty, a process that has historically been squarely within his authority.

A similar fight took place in 1946, in connection with the approval of an executive agreement between the United States and Canada, relating to the Great Lakes St. Lawrence Deep Waterway.<sup>16</sup> The President's legal adviser at that time, former Judge Hackworth, was cited at the Senate hearings as stating that the St. Lawrence Deep Waterway plan could be adopted by legislation, even though it could not get the two-thirds vote necessary for a treaty.<sup>17</sup> The chairman of the Senate Committee on Foreign Relations asked Hackworth how the Senate could do by law what really should be done through a treaty. Would the consent of the Congress "make the leopard change its spots?" With his usual intellectual candor, Hackworth replied, "The leopard would change its spots if Congress chose to approve this agreement as legislation. After all, if both the political branches of the Government agreed this was the way to handle the matter, who was to say it wasn't?" Senator Bailey said he found that explanation "as convincing as the difference between a four-legged horse and a quadruped in the nature of a horse."

In reaction to this testimony by the President's legal adviser, the subcommittee called Professor Borchard from Yale, who offered his legal opinion that the St. Lawrence project could be concluded only by treaty. Borchard urged the Senate to stand on its constitutional prerogatives and warned against giving the House of Representatives any role in treaty-making.<sup>18</sup> He stated:

In fact, to me, it is very important that the Senate retain its power

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14. *Id.* at 8777.

15. *Id.*

16. *A Joint Resolution Approving the Agreement between the United States and Canada Relating to the Great Lakes-Saint Lawrence Seaway Basin: Hearings on S. J. Res. 104 Before a Subcom. of the Senate Comm. on Foreign Relations, 79th Cong., 2d Sess. 372 (1946) [hereinafter *Joint Resolution*].*

17. *Id.* at 1312.

18. *Id.* at 1313.

over treaties. It is the only check over a somewhat uncontrollable Executive that we have; and if the Senate abandons its power I am doubtful of the future of the country. . . . To approve . . . [this legislation] you have got to approve abandoning the Constitution. Once you approve this legislation you have cut the Nation's last defense, and you will drain away the Senate's ratifying power over treaties.<sup>19</sup>

The legislation was approved despite Borchard's gross exaggeration.<sup>20</sup>

The recent conflict between the Senate and the administration concerning the ABM Treaty is also a political contest, in which some senators have gone beyond debating policy and charged the President and his legal adviser with attempting to violate established treaty principles. In fact, members of the Senate are challenging basic assumptions and recasting basic treaty principles. The so-called "ABM Treaty Interpretation Resolution,"<sup>21</sup> recently proposed by the Senate Committee on Foreign Relations, seeks to require that the President continue to adhere to the restrictive interpretation of the ABM Treaty, by saying that the President can interpret treaties only as they were understood by the Senate when it voted.

We told the committee about *Fourteen Diamond Rings v. United States*,<sup>22</sup> which holds that the Senate cannot affect the interpretation of a treaty, via a resolution passed after the Senate has given its advice and consent. The committee majority, nevertheless, has adopted a resolution that concludes that the development and testing of ABM systems based on other physical principles is inconsistent with the Senate's understanding at the time of ratification. Furthermore, the committee majority concludes that, according to section 8 of the resolution, such activity "would be inconsistent with the provisions of the Treaty and would require an amendment to the Treaty."<sup>23</sup> The committee asserts that "this section does not constitute a Senate interpretation of the ABM Treaty. The interpretation of treaties is the President's prerogative, so long as he interprets a treaty within constitutional parameters."<sup>24</sup> Notwithstanding the committee's assertion, section 8 is a declaration as to how the ABM Treaty should be interpreted. As such, it is an unprecedented interference with the Presi-

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19. *Id.* at 1313-19.

20. See *Joint Resolution*, *supra* note 16, at 379.

21. S. Res. 167, 100th Cong., 1st Sess., 133 CONG. REC. S3140-45 (daily ed. Mar. 12, 1987).

22. 183 U.S. 176 (1901).

23. See S. Res. 167, *supra* note 21, at 3140-41, §§ 2, 8(2).

24. See ABM TREATY INTERPRETATION RESOLUTION, *supra* note 3, at 46.

dent's power to interpret treaties, and is inconsistent with treaty practice and Supreme Court precedent.

The same theory of treaty interpretation is implied in Senator Sam Nunn's observation on our treatymaking process. He asserts that the Soviet Union, and other foreign countries, understand our treatymaking process so well that when an executive official says something to a senate committee about the meaning of that treaty, we can confront the Soviet negotiators thereafter and say: "I know you read our senate committee reports and our testimony, and therefore, you are bound by these interpretations because you didn't object."

There is absolutely no basis for this interpretation of the treaty power. The Soviets, themselves, have flatly contradicted Senator Nunn. Ambassador Gerard Smith, one of the ABM Treaty negotiators, testified in the 1972 ratification hearings on the meaning of the word "development." United States negotiator Colonel Charles Fitzgerald later argued to the Soviets, in 1981, that they had heard the Smith testimony about the meaning of the word "development" and had not objected. The Soviet negotiator, in effect, replied: "Why should we have to object about something that goes on in your internal processes? We are bound only by the treaty and what we said to each other about it." Thus, the theory that the President must interpret treaties in accordance with the understanding of the Senate when it voted has been rejected by both the United States and the Soviet Union.<sup>25</sup>

To conclude, both sides in this debate are going to behave the way senators and executive officials have behaved throughout American history: arguing about the treaty process itself in an effort to advance their respective political positions. But let us keep our wits about ourselves. Let us not get carried away in overstatement and political rhetoric. This is a hard fought debate over the President's power. At a minimum, let us wait until the President attempts to exercise power before we restrain him. Particularly, let us not restrain his ongoing negotiations with the Soviet Union. The number of strategic weapons that will be established by future treaties will be determined, in large part, by the President's strength at the bargaining table.

## II. HAROLD HONGJU KOH<sup>26</sup>

It seems particularly appropriate and timely that the Federalist

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25. OFFICE OF THE LEGAL ADVISER, U.S. DEP'T OF STATE, *The ABM Treaty Studies PART II: RATIFICATION PROCESS* 41 (May 11, 1987).

26. Portions of these remarks have been incorporated, in modified form, in Koh, *Why the*

Society should address the subject of the treaty power. For I can think of no area of separation of powers law in which recent executive practice has moved further from the original intent of the framers. Judge Sofaer has presented you with one version of how the treaty power has evolved over our Nation's 200-year constitutional history. Let me present a somewhat less sanguine, neo-Federalist account of what has happened to the treaty power over the last two centuries, and during the Reagan administration in particular.

My thesis has two points. First, during the last 200 years, but particularly since this administration took office, the executive branch has increasingly dominated the treaty process to the near exclusion of the other two branches of government. By the "treaty process," I refer to three different phases: first, "treatymaking;" second, "treatybreaking;" and third, "treatybending." Treatybending includes the type of treaty modification that occurred in April of 1984, when the executive branch temporarily modified our acceptance of the compulsory jurisdiction of the International Court of Justice.<sup>27</sup> It also encompasses the type of treaty "reinterpretation" that the administration has advocated in its attempt to accommodate the ABM Treaty with the development and testing of the Strategic Defense Initiative (SDI).<sup>28</sup>

My second point is that the executive branch's current domination of the treaty process, with only limited participation by the other branches, hardly complies with the framers' original intent regarding treatymaking. This result has done a disservice to the long-term interests of the institutional presidency and the nation, even if it has appeared to serve President Reagan's short-term interests.

#### A. *The Federalist Vision of the Treaty Power*

To support my thesis, let me briefly review the framers' original intent with respect to these three aspects of the treaty power. In the area of treatymaking, the historical record suggests strongly that the framers drafted the Constitution with two goals in mind: first, to establish the supremacy of the federal treaty power over actions of the States;<sup>29</sup> and second, to ensure that within the federal government,

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*President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255 (1988).

27. See 61 Stat. 1218 (1946) (initial U.S. acceptance of compulsory jurisdiction). The United States's modification of its acceptance of the Court's compulsory jurisdiction occurred on April 6, 1984. See Letter from Secretary of State George P. Shultz to Secretary-General of the United Nations Javier Perez de Cuellar (April 6, 1984), reprinted in 23 I.L.M. 670 (1984).

28. See *supra* notes 3-5, 21-25 and accompanying text.

29. See U.S. CONST. art. I, § 10; art. VI, § 2.



both the President and the Senate would participate in the treaty process before a treaty was concluded.<sup>30</sup> At various points during the Constitutional Convention, the delegates considered giving the treaty power solely to the Senate, or solely to the President. But Hamilton, Madison, and Jay all urged the Convention to adopt the current version of article II, which gives the President the “[p]ower, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”<sup>31</sup> In James Wilson’s words, this compromise was to guarantee that “[n]either the President nor the Senate, solely, can complete a treaty; they are checks upon each other, and are so balanced as to produce security to the people.”<sup>32</sup> Similarly, Hamilton concluded: “It must indeed be clear, to a demonstration, that the joint possession of the [treaty] power in question, by the [P]resident and [S]enate, would afford a greater prospect of security than the separate possession of it by either of them.”<sup>33</sup>

With regard to treatybreaking and treatybending, both the text and the constitutional history of article II are silent. But a careful reading of Federalist No. 64<sup>34</sup> suggests that the constitutional design reflected not only a legal judgment by the framers, but also their prudential judgment about what a wise treaty process would be. In their view, the process that would best balance the working operation of the political departments would allow the President to take the lead in treaty matters, but would require him to consult with the Senate. In John Jay’s words, this collaboration “provides that our negotiation for treaties shall have every advantage which can be derived from talents, information, integrity, and deliberate investigations [of the Senate], on the one hand; and from secrecy and dispatch [secured by Presidential action], on the other.”<sup>35</sup>

During our Constitution’s first one and one-half centuries, the major debates swirled around the supremacy of federal treaties and agreements over State law—a dispute that was not settled by the Supreme Court until the 1940’s.<sup>36</sup> With the rise of the United Nations and Bretton Woods systems, however, by the 1950’s and 1960’s, the battle for dominance over treaty-making within the federal

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30. See U.S. CONST. art. II, § 2, cl. 2.

31. *Id.*

32. II THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 507 (J. Elliot ed. 1896) (statement of James Wilson).

33. THE FEDERALIST No. 75 (A. Hamilton).

34. THE FEDERALIST No. 64 (J. Jay).

35. THE FEDERALIST No. 64, at 331 (J. Jay) (W. Kendall & G. Carey ed. 1966).

36. See *United States v. Pink*, 315 U.S. 203, 230-31 (1942); *United States v. Belmont*, 301 U.S. 324, 331 (1937); *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

government had taken center stage. And by the late 1960's, the President had largely won that battle by using a variety of techniques, particularly the executive agreement, to lead the United States into the era of multilateralism.

Two crucial features of this era are worth mentioning. First, with few exceptions, Congress authorized the presidential practices in the 1950's and 1960's: by Senate ratification, by prior or subsequent statutory approval, or by the appropriation of funds to implement United States participation in international organizations. Second, the Supreme Court ultimately validated this use of executive agreements on the merits, beginning with its 1937 and 1942 decisions, respectively, in *United States v. Belmont*<sup>37</sup> and *United States v. Pink*,<sup>38</sup> and concluding in 1981 with *Dames & Moore v. Regan*.<sup>39</sup>

### B. *Recent Executive Branch Treaty Practices*

When we look at the late 1970's and early 1980's, we witness a trend strikingly contrary to what we saw in the 1950's and 1960's. This recent trend reveals America's flight from, rather than toward, multilateral cooperation and international organizations. For if the 1950's was America's era of treatymaking, then the 1980's—the Reagan years—have just as surely been its years of treatybreaking and treatybending. As in the 1950's, the President has increasingly led the way in treaty affairs, generally without securing prior congressional consent, by developing a whole new range of treatybreaking and treatybending techniques.

These treatybreaking and treatybending years of the 1980's differ from the treatymaking years of the 1950's in three crucial aspects. First, in contrast to the 1950's, when the President used his power to enhance multilateral cooperation, the 1980's have seen the President terminate or break existing commitments unilaterally without consulting either the Congress or our treaty partners. Second, to a large extent, neither the Senate alone nor the Congress acting as a whole have authorized what the President has done. And third, the Supreme Court has not validated the President's techniques of treatybreaking or treatybending on the merits.

This third point becomes clear when one examines the Supreme Court's 1979 decision in *Goldwater v. Carter*.<sup>40</sup> In *Goldwater*, the Court refused to hear Senator Barry Goldwater's challenge to Presi-

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37. 301 U.S. 324 (1937) (upholding the Litvinov Assignment).

38. 315 U.S. 203 (1942) (upholding the Litvinov Assignment).

39. 453 U.S. 654 (1981) (upholding the Iran hostages executive agreement).

40. 444 U.S. 996 (1979).

dent Carter's decision to terminate unilaterally our mutual defense treaty with Taiwan.<sup>41</sup> Only one justice voted to uphold the President's authority on the merits, and even then, only because the case involved the President's plenary power regarding recognition.<sup>42</sup> Nevertheless, the Reagan administration has read *Goldwater* to stand for much more. After *Goldwater*, if the President has not liked a treaty, he has terminated it unilaterally without congressional consent. In this way, President Reagan terminated our acceptance of the compulsory jurisdiction of the International Court of Justice (ICJ),<sup>43</sup> our bilateral Treaty of Friendship, Commerce, and Navigation (FCN) with Nicaragua,<sup>44</sup> and our membership in UNESCO.<sup>45</sup> When a treaty's terms have required the United States to give six-months' notice before terminating it, the President has evaded that restraint by purporting to "modify" the treaty temporarily without congressional consent, as occurred, for example, when President Reagan "modified" our acceptance of the ICJ's compulsory jurisdiction just prior to our being sued there by Nicaragua.<sup>46</sup>

When the President has sought to ratify a treaty without really ratifying it, he has used the technique of non-ratification ratification—what I like to call the "Swiss cheese ratification." In such a case, the President submits the treaty to the Senate for advice and consent, but adds so many declarations, reservations, and understandings to it that the exceptions effectively gut the acceptance.<sup>47</sup> Recently, the executive branch has even used new executive agreements to undercut

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41. See Mutual Defense Treaty, Dec. 2, 1954, United States-Republic of China, 6 U.S.T. 433, T.I.A.S. No. 3178.

42. See *Goldwater*, 444 U.S. at 1006-07 (Brennan, J., dissenting).

43. See Letter from Secretary of State George P. Shultz to Secretary-General of the United Nations Javier Perez de Cuellar (Oct. 7, 1985), reprinted in 24 I.L.M. 1742 (1985).

44. See *Beacon Prods. Corp. v. Reagan*, 633 F. Supp. 1191, 1199 (D. Mass. 1986) (dismissing challenge to State Department's notice of termination of Treaty of Friendship, Commerce, and Navigation, Jan. 21, 1956, United States-Nicaragua, 9 U.S.T. 449, T.I.A.S. No. 4024), *aff'd*, 814 F.2d 1 (1st Cir. 1987).

45. Constitution of United Nations Educational, Scientific and Cultural Organization, November 16, 1945, 4 U.N.T.S. 276, 300; AMERICAN FOREIGN POLICY CURRENT DOCUMENTS, U.S. DEP'T OF STATE, PUB. NO. 9441, U.S. INTENTIONS TO WITHDRAW FROM UNESCO 283 (1985) (Letter from Secretary of State George P. Schultz to Director General of UNESCO Amadou Mahtar M'Bow (Dec. 28, 1983) (notice of U.S. intent to terminate its participation in UNESCO effective Dec. 31, 1984)).

46. See *supra* note 27.

47. See, e.g., the conditions attached to the U.S. ratification of the Genocide Convention, described in Leich, *Contemporary Practice of the United States Relating to International Law*, 80 AM. J. INT'L L. 612-22 (1986). Although some of these conditions were added at the urging of the Senate, the Reagan administration offered the Genocide Convention for advice and consent with more conditions than had been offered by any prior Administration. The Genocide Convention was adopted by the U.N. General Assembly on Dec. 9, 1948. See Convention on the Prevention of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 278.

existing multilateral treaties. This happened, for example, when the Commerce Secretary entered a side deal with Japan, authorizing that country's fishermen to evade the "zero quota" that the International Whaling Commission had previously imposed against the killing of whales.<sup>48</sup>

On the treaty-making side, this administration has been even more creative in developing techniques to amend or create treaty obligations without congressional review. When the President has not wanted to be bound by a multilateral treaty, he has refused to ratify it and then has selectively complied with various provisions as a matter of customary international law. This "line-item veto" approach to treaty compliance was pursued with respect to the 200-mile exclusive economic zone provisions of the Law of the Sea Convention,<sup>49</sup> and until last year, with respect to the warhead limits in the SALT II Treaty.<sup>50</sup> When the President has sought to evade congressional authority with respect to international trade, he has made an agreement and called it something other than an agreement, such as the "voluntary unilateral export restraints" that were concluded regarding Japan's import quota deals on cars and semiconductors.<sup>51</sup>

When the President has wanted to amend an existing treaty—the 1972 ABM Treaty<sup>52</sup>—to accommodate the development and testing of "Star Wars," he has done so by "reinterpreting it," without previously consulting with Congress, our Soviet treaty partners, or our Western allies. After interpreting the ABM Treaty narrowly during the entire first term of his administration, the President has now given the same language a broader reading, relying on a secret negotiating record not transmitted to the Senate when it first advised and consented to the treaty in 1972.<sup>53</sup> In short, during the last seven years,

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48. See *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 241-44 (1986) (Marshall, J., dissenting) (describing the deal with Japan).

49. President Reagan refused to sign the United Nations Convention on The Law of the Sea, opened for signature December 10, 1982, multilateral U.N. Doc. A/CONF. 62/122, reprinted in 21 I.L.M. 1261 (1982), but then announced that the U.S. would comply with a selected number of its provisions as a matter of customary international law. See United States Ocean Policy, 22 I.L.M. 464 (1983).

50. S. REP. NO. 14, 96th Cong., 1st Sess. 1 (1979). See *Over the TOP, The U.S. violates SALT II, TIME*, Dec. 8, 1986, at 43 (describing U.S. decision to discontinue observance of SALT II Treaty).

51. See J. JACKSON & W. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 617-22 (2d ed. 1986) (autos); see also 25 I.L.M. 1408, 1409 (1986) (semiconductors).

52. Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, United States-Union of Soviet Socialist Republics, 23 U.S.T. 3437, T.I.A.S. No. 7503.

53. See THE ABM TREATY INTERPRETATION RESOLUTION, S. REP. NO. 164, 100th Cong., 1st Sess. 26, 28 (1987).

we have witnessed a dramatic executive effort to aggrandize the treaty process, and to exclude Congress from all three phases of it.

### C. *Evaluating Recent Treaty Practices*

Even this brief historical review should make it clear that this administration's approach to the treaty power has strayed a great distance from the original Federalist vision of a constitutional process that involves both the Senate and the President acting together. The executive branch's unilateral acts, without congressional authorization or judicial validation, fit uneasily within both the framers' legal vision and prudential vision of a regime in which the President and the Senate "act as checks upon each other . . . so balanced as to produce security to the people."<sup>54</sup> Even if the executive branch's rejection of the Federalist vision has not been good for Congress, I wish I could say that it has been good for the country or for the executive branch. Unfortunately, I believe that the net effect has been quite the opposite.

We cannot forget that the United States is a party to a network of closely interconnected treaties. For that reason, apparently hasty administration decisions to bend or break one treaty have forced it into a vicious cycle of multiple treaty violations. For example, the administration's effort to divest the ICJ of jurisdiction over the *Nicaragua* case<sup>55</sup> through treaty modification—which would have been unnecessary had the Court truly lacked jurisdiction—weakened our jurisdictional case and may have contributed to our loss at the jurisdictional phase.<sup>56</sup> This loss, in turn, prompted the administration to withdraw from the case and later to break our acceptance of the Court's compulsory jurisdiction.<sup>57</sup> This course of action has now culminated in the Court's adverse judgment against us on the merits, and Nicaragua's new claim that the U.S. has breached its obligation to respect international judgments.<sup>58</sup>

Similarly, we premised our original decision to sign the SALT II Treaty with the Soviet Union—a treaty that sets numerical limits for offensive weapons—on the assumption that both parties would abide by the ABM Treaty, a pact barring future development and testing of territorial defensive weapons.<sup>59</sup> The underlying premise was that

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54. See *supra* note 32 and accompanying text.

55. Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 169, 1984 I.C.J. 392, 1986 I.C.J. 14.

56. See *Nicaragua*, 1984 I.C.J. at 442.

57. See *supra* note 43 and accompanying text.

58. See *Nicaragua*, 1986 I.C.J. at 14.

59. See *supra* note 52.

without territorial defensive weapons, neither side would need to engage in an offensive weapons buildup. By unilaterally reinterpreting the ABM Treaty to permit our development and testing of precisely such a defensive system, the Strategic Defense Initiative, the administration undercut its ability to challenge Soviet violations of the ABM Treaty, forced its own decision to abandon the limits on offensive weapons in SALT II, and prompted the Soviet Union's demand for strict compliance with the ABM treaty as a condition to entering into any START treaty on the reduction of long-range nuclear weapons.<sup>60</sup> In short, this wave upon wave of U.S. treatybreaking and treatybending has created a worldwide impression of a United States that is contemptuous of international treaties and institutions. Unfortunately, this negative impression has arisen at precisely the time when we need to mobilize those same institutions to help us address problems that we simply cannot solve by ourselves: for example, trade imbalances, currency coordination, international terrorism, joint sanctions against Iran and Libya, and security policy in the Middle East and the Persian Gulf.

Similarly, the administration's decisions to avoid consulting Congress before modifying, breaking, or amending treaties have alienated that institution at the time that the President needs it most to implement the most basic elements of his foreign policy. In the area of arms control, the ABM Treaty interpretation battle between the Senate and the administration has caused at least five counterproductive effects for the Executive. First, it has alienated key Senators who are crucial to the ratification of the Intermediate-Range Nuclear Forces (INF) Treaty,<sup>61</sup> or the two nuclear test ban treaties that are currently on the Hill.<sup>62</sup> Second, it has invited other Senators to delay ratification of the INF Treaty, by calling for the negotiating record of that treaty, and by threatening to attach understandings to its key provisions. Third, it has threatened to make major inroads into the appropriations of the Department of Defense, by encouraging both the House and the Senate to pass versions of the Department of Defense Authorization Act that require the President to respect the narrow ABM Treaty interpretation. Fourth, it has jeopardized the principle

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60. See Mann, *Moscow Summit Dims Chances for START Treaty This Year*, AVIATION WEEK & SPACE TECH., June 6, 1988, at 18.

61. Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, 27 I.L.M. 84 (1988).

62. Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Underground Nuclear Weapons Tests, July 3, 1974, 13 I.L.M. 906 (1974); Treaty Between the United States of America and the Union of Soviet Socialist Republics on Underground Nuclear Explosions for Peaceful Purposes, 15 I.L.M. 891 (1976).

of executive privilege by triggering waivers of the privilege on a whole range of secret negotiating documents. And fifth, it has limited the ability of future arms control negotiators to engage in off-the-record negotiations that might lead to breakthroughs in future arms talks.

The administration's position before the International Court of Justice in *Nicaragua v. United States*<sup>63</sup> has hamstrung its ability to participate constructively in the Central American peace process. Similarly, the Iran-Contra affair has damaged the President's ability to secure additional Contra funding.<sup>64</sup> In the area of international trade, where the President operates largely pursuant to authority delegated to him by Congress, Congress' growing distrust of the President has led to a new trade bill that imposes unprecedented constraints on the President's freedom to negotiate in the new General Agreement on Tariffs and Trade (GATT) round and may still lead to the scuttling of the United States-Canadian Free Trade Agreement.<sup>65</sup>

Perhaps most troubling, the administration's recent treaty conduct has considerably damaged the twin goals of multilateral cooperation at an international level and congressional-executive partnership at the domestic level—the vision that has guided both our economic and our political foreign policy in the postwar era. In the realm of international trade affairs, this administration still recognizes that world economic interdependence demands a bipartisan commitment to multilateral cooperation, in order to mitigate self-destructive cycles of trade retaliation and to promote world welfare through trade expansion. I find it peculiar that the administration has not respected fully the same logic when conducting its political and military affairs.

#### D. Conclusion

In sum, the administration's recent efforts to expand executive power in the treaty area have disserved the very ends that those efforts were designed to promote—the preservation of executive power in foreign affairs and the preservation of America's ability to lead in the community of nations. The Federalist Society has commonly applied three standards to judge both the constitutionality and the wisdom of government conduct: first, the fidelity of that conduct to the Federalist vision; second, the impact of that conduct on executive power; and third, the extent to which that conduct furthers the national interest.

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63. Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 169, 1984 I.C.J. 392, 1986 I.C.J. 14.

64. See Pearson, *The Iran Crisis May Doom The Reagan Doctrine—As Well As The Contras*, BUS. WK., Jan. 5, 1987, at 51.

65. See France, *Why Congress is Hobbling Reagan's Drive for Free Trade*, BUS. WK., May 26, 1986, at 56.

Under each of these three standards, this administration's treaty practices have failed.

Unlike some, I do not believe that the framers' original intent must be slavishly followed. I do believe, however, that there was considerable wisdom in the framers' original insight that both the President and Congress should play an important role in the treaty process. Of course, the President must speak for the Nation and lead it in its external affairs. He should do so, however, only after close consultation with Congress, which is closer to the American people and more attuned to how foreign policy initiatives will affect other areas of national concern. It is unfortunate that this administration's failure to heed the framers' legal and prudential insights has helped to hamper the President in his relations with both Congress and our treaty partners at this very critical time in our nation's history.

### III. JOHN NOWAK

I will leave it to others to debate the constitutionally "correct," or "wise," division of decisionmaking responsibility between the President and Congress concerning the ratification, interpretation, or termination of treaties, or the use of executive agreements as alternatives to treaties. Instead, I would like to focus on judicial interpretation of the Constitution and the role of the judiciary in limiting either presidential, or congressional, action in the area of the treaty power.

We know, but sometimes forget, that there are really two questions that should be addressed by a Justice when he considers a constitutional issue. First, the Justice must ask: What is the "correct" interpretation of the constitutional provisions at issue? The Justice may decide this question using his knowledge of the history of the Constitution, his analysis of our democratic process, or his assessment of the most just result. Anything goes when answering the first question. Second, the Justice must ask: Is the basis for the constitutional rule so clear that the judiciary is justified in overturning the actions of the democratically elected branches of government? This second question forces the Justice to decide whether he is confusing political philosophy with constitutional analysis. This dual-question approach to constitutional decisionmaking is especially important when the judiciary reviews the scope of the treaty power, or reviews presidential or congressional action in foreign affairs.

Historical evidence of the intentions of the framers of the Constitution cannot serve as the basis for judicial restriction of either presidential or congressional power in foreign affairs. A Supreme Court decision interpreting the scope of the treaty power based on "history"



or "original intentions" serves only to mask the political philosophy of the Justices and their inability to decide such issues with sound analytical reasoning. History provides no answers to such problems, even though there are sources available to "prove" constitutional principles, thereby justifying any and all judicial rulings. Justices favoring broad presidential power in foreign affairs could support their position by citing the articles written by Alexander Hamilton, under the name *Pacificus*.<sup>66</sup> Those Justices who believe the nation would be served best by a significant legislative role in foreign affairs and a limited executive authority could support their position with articles written by James Madison, under the name *Helvidius*.<sup>67</sup> Those preferring to keep the judiciary out of all issues regarding treaties and foreign affairs can cite passages from John Marshall's opinion in *Marbury v. Madison*.<sup>68</sup> Finally, those Justices asserting that there is historical support for a judicial role in resolving issues on the treaty power and disputes between the executive and legislative branches in foreign affairs can cite the fact that more than a dozen framers of the Constitution were members of the Congress that passed the Judiciary Act of 1789.<sup>69</sup> The Act gave the Supreme Court jurisdiction over cases in which treaties had been invalidated by a lower court.<sup>70</sup>

The judiciary can avoid both the problem of historical uncertainty and the tendency to confuse personal, political views with constitutional analysis by separating the constitutional issues that may arise in cases involving treaty power and foreign affairs into three categories: (1) the federalism issues; (2) the separation of powers issues; and (3) the enforcement of specific limitations on the federal government's powers that are set out in the text of the Constitution, or its amendments. The Justices cannot avoid cases that involve treaty power or foreign affairs questions, but they can properly limit the judicial role in these areas by using this "categories approach."

How would the Justices use these categories to decide cases? The judiciary should review treaties, executive agreements, or legislation related to foreign affairs only to determine if the government action at issue violates a specific limitation set out in the text of the Constitu-

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66. See A. HAMILTON, *Pacificus No. 2*, in THE PAPERS OF ALEXANDER HAMILTON (H. Syrett, ed. 1969) (The "Pacificus" articles are dated between June 29, 1793 and July 27, 1793.).

67. See J. MADISON, *Helvidius Essays*, in THE PAPERS OF JAMES MADISON (T. Mason, R. Rutland, J. Sesson, eds. 1985) (The "Helvidius" articles are dated between August 24, 1793 and September 18, 1793.).

68. 5 U.S. (1 Cranch) 137, 165-66 (1803) (The opinion indicates that the judiciary should not inquire into inherently political decisions similar to those in foreign affairs.).

69. Ch. 20, 1 Stat. 73 (1789).

70. *Id.* at 73 n.(a).

tion or its amendments. They should reject any role in reviewing the constitutionality of any treaty or executive agreement if the argument for invalidity of the treaty or executive agreement is based on a federalism or separation of powers claim.

The judiciary has no role in reviewing any treaty, executive agreement, or executive action based on the principles of federalism because the judge will be unable to define the scope of federal-versus-state power by any means other than personal political philosophy. This position was endorsed in 1920 by Justice Holmes, who wrote for a unanimous Court in *Missouri v. Holland*.<sup>71</sup> Note the date: 1920. This opinion was not written at a time when the Supreme Court was endorsing broad federal power over the states in domestic matters. Rather, it was written at a time when the Court was defending "state's rights" more strongly than at any other point in our nation's history. Nevertheless, the Court rejected dicta in cases from the previous century and found that there was no constitutionally mandated subject matter restriction on the nature of treaties, or the power of Congress to enact statutes effectuating treaties.<sup>72</sup>

The federal government must be able to make or break treaties and other international agreements without the President or Congress worrying that the nation's actions in the international arena will be restricted by judicial conceptions on the relative federal and state spheres of authority.<sup>73</sup> The judiciary should end debate in this area by ruling that all federalism questions regarding treaties, executive agreements, or related legislation are political questions.

Does my position mean that the courts would have to uphold an executive agreement, or treaty, that gives away a portion of the State of Texas to Mexico? No, because not all issues relating to treaties or foreign affairs should be ruled to be political questions. The judiciary must enforce the limitations on federal government power that are specifically addressed in the Constitution, or its amendments. The

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71. 252 U.S. 416, 435 (1920).

72. There had been dicta concerning possible federalism limits on the subject matter of treaties in *Geofroy v. Riggs*, 133 U.S. 258, 266-67 (1890). Even at the time that *Geofroy* was decided, it seemed to be inconsistent with the Supreme Court's view of the federal power in foreign affairs. See *Hauenstein v. Lynham*, 100 U.S. 483, 488 (1879); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 324-26 (1816). The reserved state powers argument was clearly rejected in Justice Holmes' opinion for the Court in *Missouri v. Holland*, 252 U.S. 416, 435 (1920).

73. For a more complete examination of the growth of the federal power in international affairs, see J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 189 (3 ed. 1986) [hereinafter NOWAK & ROTUNDA]; 1 R. ROTUNDA, J. NOWAK & J. YOUNG, *TREATISE ON CONSTITUTIONAL LAW, SUBSTANCE AND PROCEDURE* ch. 6 (Supps. 1986 & 1988) [hereinafter ROTUNDA, NOWAK & YOUNG].

Constitution specifically denies the federal government the power to change the boundaries of a state without the state's consent.<sup>74</sup> Similarly, the fifth amendment protects each person and State from having his property taken by the federal government without just compensation.<sup>75</sup> But if the treaty, executive agreement, or related legislation does not violate such a specific textual limitation on federal power, it should not be invalidated because of the Justices' view of the proper sphere of federal authority.

The second category of constitutional attacks on treaties, executive agreements, or legislation relating to foreign affairs involves questions concerning the separation of powers principle. The separation of powers principle is not expressed in the Constitution. Judges have based this principle on the structure of the Constitution. It is based on the belief that the excessive blending of powers between the branches of government blurs the responsibility each branch owes to the electorate and endangers individual freedoms by permitting the unchecked exercise of power by each branch of the government. The Supreme Court's decisions rendered between 1933 and 1936, prohibiting "excessive delegation" of legislative power to the executive branch were based, in part, on this separation of powers principle.<sup>76</sup>

There are two reasons for rejecting any separation of powers limitation on presidential or congressional action regarding foreign affairs. First, articles I and II of the Constitution blend executive and legislative authority regarding foreign affairs. Legislative participation in foreign affairs is assured not only by the Senate's role in the ratification of treaties, but also by the fact that most treaties cannot be implemented without legislation. The President's article II roles as treaty negotiator, receiver of ambassadors, and Commander-in-Chief often depend upon Congress' willingness to exercise its article I powers. For example, the President through an executive agreement, or the President and the Senate through a treaty, could make a commitment to give one billion dollars per year to another country. Yet neither the executive agreement nor the treaty could authorize the expenditure of funds because article I requires the House of Representatives' partici-

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74. U.S. CONST. art. IV, § 3, cl. 1.

75. U.S. CONST. amend. V (State and local governments are entitled to the protection of the just compensation clause.); see *United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984).

76. See, e.g., *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (Congress cannot transfer essential legislative functions.); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (The delegation of legislative power exceeded the power of Congress to regulate interstate commerce.).

pation in appropriations legislation.<sup>77</sup> The legislative process set out in article I, and the specific textual checks on the federal government's power in article I, section 9, provide adequate safeguards against the abuse of power by either the President or the Congress.

Second, issues involving separation of powers in foreign affairs should be considered political questions. Although this political question approach goes beyond prior decisions of the Supreme Court, it is supported in large measure by the *Curtiss-Wright* decision.<sup>78</sup> That 1936 decision came at a time when the Court was invoking the separation of powers principle to limit delegations of domestic legislative authority.<sup>79</sup> Similarly, in *Dames & Moore v. Regan*,<sup>80</sup> the Court recognized that the judiciary should refrain from invalidating executive action in foreign affairs in the absence of any clear legislative, or constitutional, check on the executive action.<sup>81</sup>

Some persons might argue that this policy of judicial restraint on political question, separation of powers issues is equivalent to endorsing unlimited presidential authority. This argument, however, is not true. Without intervention by the judiciary, Congress is left with a variety of powers that, if exercised, will result in a practical demarcation between executive and legislative power. If a clear majority in Congress disagrees with the terms of an executive agreement, or a previously ratified treaty, or presidential action based on that treaty, Congress can pass statutes inconsistent with the executive agreement, treaty, or presidential action; thereby, effectively overriding the executive agreement or treaty. Congress can pressure the President into

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77. U.S. CONST. art. I, § 7. For a thorough explanation of the required legislative process, see ROTUNDA, NOWAK & YOUNG, *supra* note 73, at ch. 10.

78. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-22 (1936).

79. The *Curtiss-Wright* decision upheld a broad delegation of authority to the President on the imposition of tariffs and embargoes against foreign goods. *Id.* at 333. The majority opinion was written by Justice Sutherland, champion of state's rights during the period from 1933 to 1937. During this period, the Supreme Court used both the tenth amendment and the separation of powers restriction on "excessive delegations" to limit the scope of federal authority, in general, and the delegations of Congressional authority to the executive branch, in particular. See, e.g., *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (Congress cannot transfer essential legislative functions.); *Railroad Retirement Board v. Alton R.R.*, 295 U.S. 330 (1935) (The power of Congress to regulate interstate commerce is subject to the guaranty of due process.); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (The delegation of legislative power exceeded the power of Congress to regulate interstate commerce.). For an examination of the Court's shift in its view of the tenth amendment and excessive delegation restrictions on the scope of federal legislative authority in domestic matters, see NOWAK & ROTUNDA, *supra* note 73, at ch. 4.

80. 453 U.S. 654 (1981).

81. *Id.* at 674. See Nowak & Rotunda, *A Comment on the Creation and Resolution of a "Non-Problem": Dames & Moore v. Regan, The Foreign Affairs Power, and the Role of the Court*, 29 U.C.L.A. L. REV. 1129 (1982).

changing a decision in the foreign affairs area by refusing to pass legislation that the President needs, or favors. Congress can resort to the ultimate weapon of impeachment.

Federalism and the separation of powers issues, at least when they relate to foreign affairs, should be considered political questions because the interaction of the President and Congress gives our country needed flexibility in foreign affairs and allows us to arrive at practical accommodations that best serve our national interests. There is no indication in the text of the Constitution or its amendments that the judiciary is authorized to create a fixed, "legal" delineation of the roles of the President and Congress in foreign affairs.

The judiciary, in my opinion, should only restrict presidential or congressional action in foreign affairs when specific, textual constitutional limitations exist. The judiciary should not subject the Federal Government to "international law," unless Congress, or the President, acting with congressional authorization, has clearly made our country's actions in a specific area subject to international law, or to international tribunals.<sup>82</sup> If we allow the judiciary to use international law to restrict the actions of either the President, or Congress, then we would be abandoning the constitutional process. The Constitution does not indicate that international law ranks with the Constitution, as a limit on the actions of the elected branches of our federal government.

The Supremacy Clause of article VI states that treaties are superior to state legislation,<sup>83</sup> but the Supreme Court has never attempted to equate treaties with the Constitution itself. When a treaty conflicts with a federal statute, the "last in time" prevails.<sup>84</sup> Some legal scholars would like the "last in time" rule reversed, so that treaties and, perhaps, international law would prevail over federal statutes; others

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82. This remark refers to the courts' power to subject the United States to treaties that are not self-executing. Action in this area can only be taken by the executive or legislative branches. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111, comment h (1986).

83. U.S. CONST. art. VI states:

This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

*Id.*

84. The Supreme Court established this principle in the nineteenth century. *Chae Chan Ping v. United States*, 130 U.S. 581, 602 (1889). See *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (Congressional acts should not be construed to violate the law of nations.); *Cook v. United States*, 288 U.S. 102, 120 (1933) (Ambiguous congressional action does not repeal a treaty.); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (If a treaty is last in time, it prevails.).

have argued that the judiciary should consider treaties or international law as theoretically superior to federal statutes even though the judiciary lacks the authority and power to enforce international law.<sup>85</sup> Such views must be based on the jurisprudential argument that the law of nations limits the actions of each country in the same way that natural law limits the actions of every legislative or executive body.

This part of my speech will serve as a good point to recall the dual-question approach to constitutional issues. The arguments for making treaties or international law superior to our national legislation may be theoretically correct. There is no text in the Constitution, however, that would justify judicial invalidation of executive or legislative acts based on international law. It is not the judiciary's role to pursue correct political philosophy, or concern itself with the consequences of this country's treatybreaking or treatybending actions. The arguments for use of natural law in the resolution of domestic issues may find support in the liberty provisions of the fifth, fourteenth, or ninth amendments; however, there is no textual basis in the Constitution that makes international law superior to either presidential or congressional action.

The Constitution's specific checks on the federal powers, in article I, section 9, the Bill of Rights, or elsewhere, are checks that could arise in cases brought by individuals suffering a clear injury, or states invoking a specific textual provision of the Constitution. Under no circumstances should standing be granted to members of Congress to attack executive agreements or executive actions in the area of foreign affairs.<sup>86</sup> An attempt by members of Congress to challenge executive actions in court is no more than an attempt to have the judiciary resolve separation of powers issues by considerations not set forth in the Constitution. Indeed, such actions will almost certainly be brought by persons who are in a minority, or a slim majority, in Congress. If members of Congress who oppose the executive action are in

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85. For overviews of, and insights into, the debate on this issue, see Henkin, *Lexical Priority or "Political Question": A Response*, 101 HARV. L. REV. 524 (1987); Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853 (1987); Paust, *Rediscovering the Relationship Between Congressional Power and International Law: The Exceptions to the Last In Time Rule and the Primacy of Custom*, 28 VA. J. OF INT'L L. 393 (1988); Westen, *The Place of Foreign Treaties in the Courts of the United States: A Reply to Louis Henkin*, 101 HARV. L. REV. 511 (1987). *Author's note*: I took the liberty of adding these citations to these excellent articles in this law review version of the Federalist Symposium. Three of the articles were published after the date of the symposium and were not relied upon in the preparation of my remarks.

86. Lower courts are divided on the issue of whether members of Congress should be able to bring suit to enforce or challenge federal statutes or executive actions. The Supreme Court, however, has not definitively ruled on this matter. For citations to the cases in this area, see R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 73, at § 2.13(f)(4).

a clear majority, then they could take action to force the President to give in to their will. The granting of congressional standing would give losers in the political process the chance to unite with the judiciary to overrule actions endorsed by the President and a majority of Congress and that do not conflict with any specific check on federal power set forth in the Constitution or its amendments.

In cases where the Supreme Court has jurisdiction, the Court should always uphold executive agreements, absent any clear conflict between the executive agreement and a specific provision in a treaty, a statute, or the Constitution, or its amendments. This position goes well beyond the presumption of validity of executive agreements, endorsed by the Court in *Dames & Moore v. Regan*.<sup>87</sup> The basis for judicial invalidation of executive agreements that violate specific provisions of the Constitution is too obvious to require further explanation. The rationale for court enforcement of the terms of a federal statute, or a treaty, over an executive agreement is quite simple: Only those two processes are clearly recognized in the Constitution. The absence of reference to executive agreements in the Constitution, however, does not give the Supreme Court the authority to restrict the scope of executive agreements or the use of executive agreements as alternatives to treaties. Because the Constitution sets forth the legislative and treaty-making processes, and does not mention executive agreements, the Court prefers federal statutes and treaties to executive actions.

A court is justified in invalidating an executive agreement only when there is a clear conflict between the executive action and the specific words of a federal statute, treaty, or the Constitution or its amendments. For example, if a bank is confronted by a claim to specific funds in the bank from person *A*, who claims the money under an executive agreement, and person *B*, who claims the funds under a federal statute or treaty, the need arises for a judicial determination regarding who gets the money. Assume that a court has jurisdiction in the "Bank vs. *A* vs. *B*" case and that the executive agreement clearly conflicts with a federal statute or treaty. The judiciary must then base its ruling on the statute or treaty and award the money to person *B*. If, however, the federal statute or treaty is unclear, the judiciary must uphold the executive agreement and award the money to person *A*.

I realize that my view of the judiciary's role in defining the treaty power and federal authority in foreign affairs removes the judiciary from a vital function that our nation may appear to need in times of

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87. 453 U.S. 654, 682 (1981). See NOWAK & ROTUNDA, *supra* note 81, at 1155.

international strife, or when the scope of federal power is unclear, or when the President and Congress are deadlocked. The Supreme Court acts within its proper sphere only when it enforces specific checks on the federal power similar to article I, section 9, and the Bill of Rights, or when it enforces specific treaty or statutory provisions. Furthermore, the interaction between the President and Congress—the political process—is better suited than the judicial process to give us a clear definition of the scope of federal power in foreign affairs and the division of federal power between the executive and legislative branches. The judiciary has no special wisdom in foreign affairs, and it is not needed to keep federal power in check. To paraphrase Judge Learned Hand: If this country is committed to constitutional principles and justice, we will not need the Court to save us in those times of national turmoil or international problems. If this country turns its back on constitutional principles, however, no court will be able to save us.<sup>88</sup>

#### IV. GROVER JOSEPH REES

Hardly anyone would disagree with the observation that “during the past 200 years . . . the executive branch, has increasingly dominated the treaty process.”<sup>89</sup> Nor is it easy to find fault with Professor Koh’s argument that such domination was not contemplated by those who framed and ratified the Constitution.<sup>90</sup> With his selection of the Reagan administration as an example of a uniquely voracious and creative usurper of legislative prerogatives,<sup>91</sup> however, it is not so difficult to disagree. It gets even easier, for in any parade of imperial executive horrors, the President’s refusal to be bound by a senate resolution<sup>92</sup> interpreting a treaty<sup>93</sup> fifteen years after its ratification must surely be

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88. Judge Hand’s remark seems particularly appropriate when considering the need for judicial review of congressional or presidential action in foreign affairs. The quotation before my paraphrasing read as follows:

[T]his much I think I do know—that a society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.

H. HAND, *THE SPIRIT OF LIBERTY, PAPERS AND ADDRESSES OF LEARNED HAND* 164 (I. Dilliard 3d ed. 1960). This quotation is from the reprinted version of a 1942 speech by Judge Hand, entitled “The Contribution of an Independent Judiciary to Civilization.” *Id.* at 155.

89. Remarks of Harold Hongju Koh, *supra* p.107.

90. *Id.*

91. *Id.*

92. S. Res. 167, 100th Cong., 1st Sess., 133 CONG. REC. S3140-45 (daily ed. Mar. 12, 1987).

93. See Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, United States-USSR, 23 U.S.T. 3437, T.I.A.S. No. 7503.



regarded as a sideshow. The main event, in my opinion, has been the entire circumvention of the constitutional role of the Senate by the use of executive agreements.

### A. *Treaty Interpretation*

In most conflicts between coordinate branches of government, it is hard to tell the aggrandizer from the aggrandizee. Boundary disputes between the co-holders of a shared power are inevitable. In the case of a dispute between the President and the Senate over their respective roles in the treaty process, the scope of reasonable disagreement is widened by the impracticality of judicial resolution of such conflicts.

This impracticality, in turn, has to do with the difficulty of getting such disputes into court without mangling some of our traditional ideas about what constitutes a lawsuit. It should be distinguished from what is known as the political question doctrine. In its pure form that doctrine represents a gaping hole in the principle of *Marbury v. Madison*.<sup>94</sup> It posits certain "sensitive" areas in which courts should not "second guess" a result reached in the rough and tumble of the political arena, even when this result would otherwise be held to infringe private rights.<sup>95</sup> Even without the political question doctrine, however, disputes over the distribution of the treaty power will generally be nonjusticiable precisely because they are not about private rights. Rather, they concern institutional prerogatives for which the Constitution provides safeguards other than judicial review.<sup>96</sup>

These safeguards themselves consist of entrenched institutional arrangements. In battles over prerogative—as King Charles would have known if he had listened to Professor Nowak—legislatures have

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94. 5 U.S. (1 Cranch) 137 (1803).

95. See Henkin, *Is There A Political Question Doctrine?*, 85 YALE L.J. 597, 599 (1976). Professor Henkin stated:

A meaningful political question doctrine . . . implies something more and different: that some issues which prima facie and by usual criteria would seem to be for the courts, will not be decided by them but, extra-ordinarily, left for political decisions. . . . [T]he courts say to the petitioner in effect, "Although you may indeed be aggrieved by an action of government, although the action may indeed do violence to the Constitution, it involves a political question which is not justiciable, not given to us to review."

*Id.*

96. See remarks of John Nowak, *supra* p. 117. Some treaties and other international agreements do include provisions that create or modify private rights. If a plaintiff can show that he has been deprived of life, liberty, or property by what he claims to be a violation of such a provision, it may be appropriate for a court to interpret the agreement or even to decide whether it has been adopted in accordance with law.

many weapons at their disposal. Assuming a reasonably tenacious legislature and a chief executive who is even minimally law-abiding, recourse to the courts is an altogether unnecessary addition to any arsenal that includes the power not to appropriate funds. And if an Executive were audacious enough to ignore an unambiguous exercise of the sort of power Congress can wield on its own, the option of going to court would not seem a very useful one.

Each branch of government is sometimes obliged to interpret the Constitution and the laws for itself. This happens whenever the Legislature or Executive is thinking about doing something that has not been declared lawful by a court.<sup>97</sup> In most cases the legislative or executive interpretation is tentative: Anyone who believes that the result of such interpretation deprives him of life, liberty, or property can try to persuade the courts to adopt a contrary interpretation that will then bind the other branches of government.

When a legislative or executive action impinges not on life, liberty, or property but on the perceived power of another branch of government, the competing entities' own interpretations of their powers and limitations matter more. The President and the members of Congress have taken an oath to uphold the Constitution.<sup>98</sup> The problem is that people have different ideas about what the Constitution and other laws, including treaties, demand. Since the courts will not ordinarily order either the Legislature or the Executive to recede from its position, each branch may feel free—indeed, may feel obliged—to conduct its own operations consistently with its own considered interpretation of the Constitution and its own best judgment. Occasional conflict, or at least impasse, seems inevitable.

International relations is not the exclusive preserve of the Executive, but the conduct of such relations comprehends some functions that are executive in nature. One such function is negotiating with foreign governments. In the course of such negotiations, the President must look to the constraints imposed by existing treaties and must form an opinion about their meaning. In the case with the delightful name *Fourteen Diamond Rings v. United States*,<sup>99</sup> the Supreme Court held that the President was not bound by a senate resolution declaring retrospectively what the Senate understood a treaty to mean at the time it was ratified.<sup>100</sup> Such a resolution might

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97. See Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975).

98. U.S. CONST. art. VI, cl. 3.

99. 183 U.S. 176 (1901).

100. *Id.* at 180. The Supreme Court stated: "The meaning of the treaty cannot be controlled by subsequent explanations of some of those who may have voted to ratify it." *Id.*

or might not be persuasive evidence of what the treaty did mean, but if the President is not persuaded then he is not bound.

The power "to say what the law is"<sup>101</sup> comprehends a duty to try to figure out what the law means.<sup>102</sup> In arriving at legal interpretations, the President and Congress have the same duty that a court would have to consider all the evidence and all the arguments. This is especially true when the interpretation is one that is unlikely to be "second-guessed" by the courts, such as an interpretation of an anti-ballistic missile treaty. Insofar as Judge Sofaer can be taken to mean that the deliberations of the Senate when it advises and consents to a treaty contribute to the meaning of the treaty only when manifested in explicit formal "reservations" and "understandings,"<sup>103</sup> I part company with him. A treaty is the supreme law of the land<sup>104</sup> in part because the Senate voted for it.<sup>105</sup> Evidence of what lawmakers thought they were voting for should be respected, regardless of its label. Of course, the evidence alluded to by Judge Sofaer is also important. The Senate was only one of the entities whose consent was necessary to the formation of the treaty. It also matters what the President thought and what the Russians thought. This is only to say, however, that evidence of Senate understandings not formally so designated is not always dispositive, not that such evidence is irrelevant.

It is important to remember that Senators and Representatives are no more bound by the President's interpretations than he is by theirs. The successful conduct of foreign relations, as Professor Koh reminds us, sometimes requires the participation of the Legislature.<sup>106</sup> When a question of legal interpretation not subject to judicial resolution becomes relevant to the conduct of a legislative function, the interpretation accepted by a majority of the legislators becomes the governing one. On questions whose regulation requires the appropriation of funds, whichever body adopts the most restrictive interpretation has the power to insist on it.<sup>107</sup> If fifty-one Senators really believe that development and testing of the Strategic Defense Initiative (SDI) would violate our treaty obligations, it is within their power to ensure that such development and testing will not happen. They cannot bind

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101. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

102. Indeed, *Marbury* spoke of the interpretive function not as a "power" but as a "duty." *Id.* The duty exists because constitutional provisions have meaning and because that meaning was meant to be "a rule for the government of courts, as well as of the legislature." *Id.* at 180.

103. See remarks of Abraham D. Sofaer, *supra* p. 106.

104. U.S. CONST. art. VI, cl. 2.

105. See U.S. CONST. art. II, § 2, cl. 2.

106. See remarks of Harold Hongju Koh, *supra* p. 107.

107. See U.S. CONST. art. I, § 9, cl. 7.

the President to their interpretation with a "sense of the Senate" resolution any more than he could bind them with a "sense of the President" statement.<sup>108</sup> But no weapon can be built without an appropriation, and no appropriations bill can pass with fifty-one Senators voting against it.<sup>109</sup>

Professor Koh finds it disturbing that such legislative intransigence may be the only effective remedy for executive expansionism. His objection is not that non-cooperation as a technique of policy-making is unconstitutional in any sense of the word—for Professor Koh is devoted to the framers, and the framers were devoted to checks and balances—but that it makes it harder for the United States to become involved in multilateral agreements and international organizations.<sup>110</sup>

Indeed, this turns out to be the principal way in which the Reagan administration's attitude toward the treaty power is uniquely bad. Earlier administrations "had largely won" the "battle for dominance over treaty-making" by "using a variety of techniques, particularly the executive agreement, to lead the United States into the era of multilateralism."<sup>111</sup> The Reagan administration, on the other hand, has used many of these same techniques to slow or reverse that trend, a phenomenon that Professor Koh calls "treatybreaking" and "treatybending."<sup>112</sup>

Reasonable people can differ, however, on the merits of being led into multilateral eras. In any case, most questions about the demarcation of legislative and executive power are questions of constitutional law<sup>113</sup> that ought to be judged on some other criteria than whether they get us into more treaties and organizations, even good ones. Applying constitutional rather than ideological criteria, senatorial irritantism with regard to the treaty power could find more obvious targets than the President's disagreement with the Senate—or his con-

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108. See *Fourteen Diamond Rings v. United States*, 183 U.S. 176, 180 (1901).

109. Voting against an appropriations bill is, of course, a higher stakes enterprise than voting for a sense of the Senate resolution. Legislators frequently vote for bills containing items they dislike (and Executives frequently sign such bills) when it has become procedurally impossible to separate these items from other items they deem desirable and important. But this is precisely the point: The Constitution gives each branch of government limited powers. For the Legislature as well as for the Executive, decisions about which points of controversy are important enough to insist upon will often be difficult. If a branch decides not to use its constitutional powers in order to get its way on a particular question, the power to decide the question may shift to another branch.

110. See remarks of Harold Hongju Koh, *supra* p. 107.

111. *Id.* at pp. 108-09.

112. *Id.* at p. 107.

113. This is usually referred to in multilateral circles as "municipal law."

duct of executive functions in accordance with his own views rather than someone else's—on a close question of treaty interpretation.

### B. *Executive Agreements*

Concern about the erosion of senate authority to participate in treaty-making would seem more productively directed at executive agreements. Such agreements are constitutionally unproblematic when they are genuinely incidental to a power delegated to the Executive by the Constitution. Actions the President has the clear authority to take—whether or not anyone else wishes him to—such as receiving ambassadors<sup>114</sup> or removing our troops from foreign soil,<sup>115</sup> surely do not become unconstitutional at the moment Canada consents to them. Executive agreements on such matters as postal relations and international trade, that do not bind the United States to do anything that Congress could not have done by legislation,<sup>116</sup> would also seem to be valid when authorized or ratified by Congress.

There must, however, be something that can be done in a treaty, the President and two-thirds of the Senate concurring, which could not be done by the President acting alone. This would seem to be the narrowest plausible interpretation of the constitutional commitment to the Senate of a share in the treaty power.<sup>117</sup> When the Constitution prohibits a conviction for treason except on the testimony of two witnesses<sup>118</sup> it surely must be construed also to prohibit the creation of a crime called quasi-treason, which is identical to treason in every respect, except that conviction requires only one witness. Similarly, a provision requiring that treaties receive the advice and consent of the Senate is meaningless if it does not preclude, or at least limit, resort to quasi-treaties that are exactly like treaties except that they have not received the advice and consent of the Senate.

One such quasi-treaty was the Litvinov Assignment. It consisted of an exchange of letters between President Roosevelt and the Soviet Commissar for Foreign Affairs, and it was recognized by the Supreme Court as the " 'Law of the Land.' "<sup>119</sup> In *United States v. Belmont*<sup>120</sup> and *United States v. Pink*,<sup>121</sup> the Court held this agreement to have

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114. U.S. CONST. art. II, § 3.

115. U.S. CONST. art. II, § 2, cl. 1.

116. See U.S. CONST. art. II, § 8.

117. See U.S. CONST. art. II, § 2.

118. U.S. CONST. art. IV, § 3.

119. *United States v. Pink*, 315 U.S. 203, 230 (1942).

120. 301 U.S. 324 (1937).

121. 315 U.S. 203 (1942).

modified the law that would otherwise have determined the ownership of property in New York.

*Belmont* and *Pink* were the result of President Roosevelt's decision in 1933 to recognize the Soviet Union.<sup>122</sup> Prior to that time the Soviet government had purported to nationalize various assets, including some that were located in the United States.<sup>123</sup> The courts of New York had held that the assets located in that state belonged to their original owners rather than to the Soviet proletariat.<sup>124</sup> On the same day that the United States recognized the Soviet Union, President Roosevelt agreed with Commissar Litvinov that the United States would become the assignee of all Soviet claims against assets located in the United States.<sup>125</sup> The United States then relitigated the ownership of these assets. The New York courts followed their earlier holdings: The United States stood in the shoes of its assignor, and as a matter of property and contract law the money still belonged to the people who owned it before the assignment.<sup>126</sup>

The Supreme Court of the United States reversed and held the Litvinov Assignment to have the effect of a federal law or a treaty, although it did not have the advice and consent of the Senate.<sup>127</sup> This was partly because the assignment was regarded as incidental to recognition of the Soviet Union,<sup>128</sup> and partly because this is a big world in which there are complex and delicate problems. In both *Belmont* and *Pink*, the Court's language swept even more broadly than its holding: "Effectiveness in handling the delicate problems of foreign relations requires no less" than that "[n]o such obstacle [as the common law of New York] can be placed in the way of rehabilitation of relations between this country and another nation . . . ." <sup>129</sup> Executive agreements "have a similar dignity"<sup>130</sup> to that of treaties. With

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122. See *Pink*, 315 U.S. at 211.

123. *Id.* at 210.

124. *Beha v. Russian Reinsurance Co. of Petrograd*, 255 N.Y. 415, 175 N.E. 114 (1931).

125. See Letters between Maxim Litvinoff, Soviet Commissar for Foreign Affairs, and Franklin D. Roosevelt, President of the United States (Nov. 15, 16, 1933), reprinted in II FOREIGN RELATIONS OF THE UNITED STATES, U.S. DEP'T OF STATE, PUB. NO. 3663, DIPLOMATIC PAPERS 804-14 (1933).

126. See *United States v. Pink*, 284 N.Y. 555, 32 N.E.2d 552 (1940); *Moscow Fire Ins. Co. v. Bank of New York & Trust Co.*, 280 N.Y. 286, 20 N.E.2d 758 (1939).

127. See *United States v. Pink*, 315 U.S. 203, 229 (1942) ("The powers of the President in the conduct of foreign relations included the power, without consent of the Senate, to determine the public policy of the United States with respect to the Russian nationalization decrees."); *United States v. Belmont*, 301 U.S. 324, 330 (1937) ("[A]n international compact, as this was, is not always a treaty which requires the participation of the Senate.")

128. See *Pink*, 315 U.S. at 229; *Belmont*, 301 U.S. at 330.

129. See *Pink*, 315 U.S. at 229-30.

130. *Id.* at 230.

regard to matters addressed by such agreements, "the State of New York does not exist."<sup>131</sup>

It is tempting to argue that *Pink* and *Belmont* are limited to their facts, in which the President's letter-writing power was held to invalidate a mere state law rather than a federal statute or treaty. This limitation, however, is inconsistent with the reasoning of the opinions. If executive agreements are the supreme law of the land,<sup>132</sup> then they supersede not only state laws but also prior federal statutes and treaties. In 1953, a circuit court held an executive agreement illegal on the ground that it conflicted with a prior federal statute.<sup>133</sup> The case, however, has been criticized as inconsistent with *Belmont* since it denies executive agreements equal dignity with treaties.<sup>134</sup> It is generally conceded that the domestic effects of an executive agreement would be overridden by a later federal statute,<sup>135</sup> but this concession is made precisely because it also applies to the domestic effects of treaties.

The doctrine may be even broader. *Pink* and *Belmont* relied on a power whose existence had recently been announced in *United States v. Curtiss-Wright Export Corp.*:<sup>136</sup> "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."<sup>137</sup>

The President's "sole organ" power, according to *Curtiss-Wright*, exists apart from the powers specifically granted to him by the Constitution. It consists of certain "attributes of sovereignty" that are implicit in the concept of nationhood.<sup>138</sup> They are not granted by the Constitution,<sup>139</sup> but were derived from the King of England.<sup>140</sup> No nation is completely sovereign without them.<sup>141</sup> These attributes simply have to be somewhere. Since they clearly do

131. See *Belmont*, 301 U.S. at 331.

132. See *Pink*, 315 U.S. at 230.

133. *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955).

134. See L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 186 (1972); Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 *YALE L. J.* 345, 386-87 (1955); see also *Etlimar Societe Anonyme of Casablanca v. United States*, 106 F. Supp. 191 (Ct. Cl. 1952) (An executive agreement is the supreme law of the land, effectively amending prior federal law that would have allowed the plaintiff to bring an action in federal court for the price of property taken by the United States.).

135. See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

136. 299 U.S. 304 (1936).

137. *Id.* at 320.

138. *Id.* at 318.

139. *Id.*

140. *Id.* at 316-17.

141. *Id.*

not belong to the states, they must belong to the federal government.<sup>142</sup> Moreover, the Court's paean to the President as a "sole organ" has been interpreted to mean not just that the federal government possesses such extraconstitutional attributes of sovereignty as formerly belonged to the Crown, but that many of them belong exclusively to the President.<sup>143</sup>

In my opinion, the argument of *Curtiss-Wright* is not merely unconstitutional but anti-constitutional. This term is selected not as an index of the depth of my disagreement but as a precise descriptive term for the Court's method of analysis. *Curtiss-Wright* is not like other decisions that might be criticized for giving an unduly loose construction to the enumerated powers of the government. On the contrary, by positing a source of power apart from, and prior to, the Constitution, it simply denies the constitutional premise that the national government is one of limited and enumerated powers.<sup>144</sup> As extended by *Belmont* and *Pink*, the argument then locates some of the extraconstitutional attributes of sovereignty—not only the unenumerated ones, but also an enumerated power that the Constitution appears to have delegated partly to the Senate—in the Executive alone, not so much on the basis of any further analysis as because it is in the nature of things.<sup>145</sup>

All of this amounts to the denial of what I take to be the central theme of the Constitution: the limitation and distribution of sovereignty, perhaps even in ways that might have resulted in a government less powerful and efficient than King George or Metternich would have thought appropriate to a modern state. The provision giving the Senate a veto power over treaties suggests one way in which our constitutional republic was intended to differ from other governments. Yet *Curtiss-Wright* affirmed "the power to make such international agreements as do not constitute treaties in the constitutional sense,"<sup>146</sup> since otherwise the United States would not be "equal" to

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142. *Id.*

143. *Id.* at 319 ("[T]he President alone has the power to speak or listen as a representative of the nation.").

144. *See id.* at 315-16.

145. *See id.* at 319. *Belmont* seems not only to have been the first case to rely on *Curtiss-Wright*, but also to have announced an important extension of it. The term "sole organ," as used in the sources cited by the Court in *Curtiss-Wright*, meant only that Congress could not tell the President how to conduct negotiations. *Id.* The *Curtiss-Wright* Court used the term in a different but not necessarily more ambitious sense, to justify a delegation of power by Congress to the President. *Id.* *Belmont* seems simply to assume that if the President is the "sole organ," he can make rules of law that have domestic effects without any delegation from Congress. *Belmont*, 301 U.S. at 330.

146. *Id.* at 318.



"other members of the international family."<sup>147</sup>

If the legal effect of the Litvinov letter was attributable to an extraconstitutional power of the President to be the sole organ of the United States in matters affecting foreign nations, then it arguably invalidated not only contrary state law and prior federal law, but also any subsequent federal statute. The "sole organ" power was not said to exist only at the sufferance of Congress. On the contrary, it was described as both "plenary" and "exclusive."<sup>148</sup>

Another justification offered for the Litvinov Assignment, somewhat narrower than the "sole organ" reasoning, was that the assignment was incidental to the recognition of the Soviet Union.<sup>149</sup> Since the President has the constitutional power to decide what government is to be regarded as the government of Russia, he also has the power "to determine the policy which is to govern the question of recognition."<sup>150</sup> This includes the power to remove "impediments to friendly relations."<sup>151</sup> In other words, the power to recognize a foreign government includes the implied power to abolish any domestic law to which the foreign government objects.

It should be kept in mind that the only thing the Constitution has to say about recognition of foreign governments is that the President "shall receive ambassadors."<sup>152</sup> It is not impossible that the receiving ambassadors clause was meant simply as a road map for the ambassadors in question, telling them where to report when they got to Washington. Ours was to be a new form of government, and at the time of the Constitutional Convention many such practical questions had yet to be resolved. To say that the President receives ambassadors is to give him one of the attributes of a head of state. It does not say that he is, for all purposes, the head of government. In England, the Queen receives ambassadors, but she does not decide which of two competing ambassadors she will receive. The power to choose between rival governments is no more obviously implicit in the receiving ambassadors clause than in the treaty power, or in the power of Congress to make such laws as are necessary and proper to carry out the powers vested in the government.<sup>153</sup>

Even if the power to receive ambassadors does imply the power

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147. *Id.*

148. *Id.*

149. *See* *United States v. Pink*, 315 U.S. 203, 229 (1942); *United States v. Belmont*, 301 U.S. 324, 330 (1937).

150. *See Pink*, 315 U.S. at 229.

151. *Id.* at 231.

152. U.S. CONST. art. II, § 3.

153. U.S. CONST. art. II, § 3; *see also* U.S. CONST. art. I, § 8, cl. 18.

to recognize governments, it hardly follows that the designated receiver also has absolute discretion to modify domestic law whenever this would lead to better relations with another nation. As Justice Stone pointed out in his dissent in *Pink*, the New York law was not an officious attempt by a state to meddle in international affairs. The property was located in New York, and the state court was obliged to decide to whom the property belonged. In refusing to give domestic effect to a foreign transfer of title, the New York court was following a rule of long standing in the courts of England, in the other state courts, and in the Supreme Court itself.<sup>154</sup> Refusal to give effect to such transfers had “[n]ever . . . been considered inconsistent with the most friendly relations with the recognized foreign government, or even with an active military alliance at the time of the transfer.”<sup>155</sup> And yet President Roosevelt was able, by writing a letter, to turn this question of state law into a question with respect to which “the State of New York does not exist.”<sup>156</sup> Although the power to partly abolish New York is not without appeal, its inclusion within the power to receive ambassadors requires a justification not given.

Justice Brennan’s opinion in *Goldwater v. Carter*<sup>157</sup> carries the “incident to recognition” rationale even further. *Goldwater* concerned a treaty with the Nationalist Chinese government.<sup>158</sup> President Carter decided to recognize a new Chinese government and therefore found it necessary to break relations with the old one.<sup>159</sup> When we had entered into the treaty with the Nationalists, however, there were already two rival Chinese governments. The treaty ensconced as “the supreme law of the land” the proposition that we would do certain things for the Nationalist Chinese precisely because of the existence of the rival government.

The treaty with Nationalist China also provided that the United States could terminate it—not the President, but “the United States.” It said nothing about the internal procedure the United States should follow in order to terminate it. The usual way in which a law is repealed is by another law: a subsequent statute or treaty. And yet the implied power of the President to make “incidental” law was

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154. See *Pink*, 315 U.S. at 246-47 (Stone, C.J., dissenting).

155. *Id.* at 246.

156. See *Belmont*, 301 U.S. at 331.

157. 444 U.S. 996 (1979).

158. Mutual Defense Treaty, Dec. 2, 1954, United States-Republic of China, 6 U.S.T. 433, T.I.A.S. No. 3178.

159. *Goldwater*, 444 U.S. at 997. (Brennan, J., dissenting) (Although Justice Brennan’s opinion was technically a dissent, he reached the same result as the majority on a different theory.).

found to allow him to undo a deliberate "non-incidental" decision made in accordance with the procedures provided explicitly by the Constitution for the making of supreme law with respect to international relations. This is even more water than the receiving ambassadors clause was formerly made to carry.

There is a third possible justification for executive agreements, even when they concern matters outside the scope of the President's enumerated powers and have not been authorized by statute. This justification is found in Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>160</sup> Justice Jackson's argument is that if the President has done something affecting international relations and Congress has not complained about it, then Congress is deemed implicitly to have ratified the President's action.<sup>161</sup> This analysis seems far more "moderate" and far more consistent with the idea that the power to make international agreements is a shared power, than either of the two other arguments I have described. It leads, however, to another thicket: Is a "congressional-executive" agreement always a complete constitutional substitute for a treaty?

Justice Holmes found it "obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could."<sup>162</sup> In other words, there are some matters which might come to affect our foreign relations, and yet, which are outside the scope of the enumerated powers of Congress. Assuming that these matters are also outside the enumerated powers of the President, the only way to reach an international agreement on them is by treaty. The problem with attempting to apply this analysis today is that Holmes left the Supreme Court too soon. It is difficult to imagine anything that might conceivably become the subject of an international agreement that the Court would not, in accordance with its current body of precedents, feel obliged to shoehorn into some enumerated power other than the treaty power.

This is not to say that the President should choose between a treaty, a congressional-executive agreement, and a sole executive agreement on the basis of what he thinks he can get away with. It has long been argued, for instance, that the President and the Senate would be acting unconstitutionally if they made a treaty with a complaisant foreign nation on a domestic matter that was of no genuine concern to that nation, simply in order to eliminate the need for the

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160. 343 U.S. 579 (1952).

161. *Id.* at 637 (Jackson, J., concurring).

162. *Missouri v. Holland*, 250 U.S. 415, 433 (1920).

concurrence of the House of Representatives. One can pose similar questions about an end run around the constitutional requirement that a treaty must be approved by a two-thirds majority in the Senate. This end run would be in the form of a statute authorizing an executive agreement to do something Congress and the President would never want to do except in order to settle a dispute with another nation.

Precisely because the courts will be unlikely to overrule its judgment on this kind of question, the Executive has an unusually strong duty to police itself. Suppose that the President believes he could persuade a simple majority in each house of Congress to approve the resolution of a dispute with a foreign nation but doubts he could persuade two-thirds of the Senate. Suppose further that he believes the proposed resolution to be good for the Nation and for the world. He might nevertheless have a duty to present it to the Senate as a treaty. The President must abide by the answer to the constitutional question, or by his honest estimate of the answer, even if this answer is unlikely to be imposed on him by the courts.

We often hear that the Constitution is not a suicide pact. By this it is not usually meant that the country will literally be destroyed if the speaker's views do not prevail. More often it amounts to a back-hand concession that there may be some minor constitutional problems with what the speaker proposes to do, but that we had better do them anyway because, otherwise, things will be one hell of a mess. In other words, people who say the Constitution is not a suicide pact often mean that it is not an inconvenience pact. The Constitution, however, is precisely an inconvenience pact. That is the definition of a constitution. Where it imposes limits, even inconvenient ones, on the conduct of foreign relations, these limits should be enforced at least in the forum of executive and congressional conscience.

## V. QUESTIONS AND ANSWERS

**SPEAKER:** I am not sure from Judge Rees' analysis whether he would agree with Professor Nowak. I don't think Professor Koh would.

**JUDGE REES:** I have written against the political question doctrine. I think the political question doctrine as a separate doctrine, that has announced that if some part of the Constitution is not very important to me and mine, the courts should stay out of it and should let the political process control—that is an audacious and dangerous doctrine. The political question doctrine has been invoked

most frequently in areas in which the Constitution was clearly being violated, but there was no way around it except for the courts to abstain entirely. I think that the doctrine is impossible to reconcile with the premise of *Marbury v. Madison*, with which premise I agree.

I thought that was what Professor Nowak was going to say when I heard the preface of his speech. He hedged about it, however, with enough qualifications that I think I agree with him. One reason the political question doctrine has become necessary, or is thought to be necessary, is the erosion of all the traditional limitations on what gets into court. Most cases that have been decided as political question cases either should not have gotten into the court because of lack of standing, ripeness, or mootness; or once in court, the plaintiffs clearly should not have won because they did not state cognizable claims.

**SPEAKER:** Judge Rees, would you two [Judge Rees and Professor Nowak] disagree on the *Pink* and *Belmont* cases?

**JUDGE REES:** It is always hard to tell whether the Court is talking about its decisionmaking power, or whether it is talking about the merits. I interpret *Pink* and *Belmont* as having more to do with the merits. The Court did not just say that the President may be acting unconstitutionally, but we are going to stay out of it. Rather, the Court said that the President somehow acted constitutionally because he has got this vast implicit executive power. In that case, I would say the Court should have reached the merits and held that the President did not have that power.

**PROFESSOR NOWAK:** I would point out that there was no specific federal statute regarding who owned the property. The *Belmont* and *Pink* opinions noted that the creditors' claims had been satisfied. Thus, none of the property had, in fact, been taken without just compensation. Otherwise, the just compensation clause of the fifth amendment would have been an enforceable limitation in the executive agreement at issue. But, in the absence of any specific conflict with the statute, or a taking of property under the just compensation clause, the executive agreement could not be invalidated. I agree with Judge Rees, in that the Court's opinion should have simply stated that there was no basis for judicial invalidation, and therefore, the federal action prevailed. But the actual Court opinion indicated that the correct view of original framing of the Constitution was contrary to Judge Rees' view. Thus, we do differ to some extent.

**PROFESSOR KOH:** If the question is whether the courts can resolve treaty questions, then that reminds me of the Southern Baptist minister who is asked: "Do you believe in total immersion baptism?" He says: "Believe in it? Well, hell, I have seen it done."

Do we believe that the Court can resolve treaty questions? Well, hell, we've seen it done in a whole variety of cases. The important thing to notice, however, is that almost every time the Court has ruled on treaty questions at the President's request, it has ruled in favor of the President. When somebody else has challenged the President's conduct, the Court has usually not reached the merits.<sup>163</sup>

**SPEAKER:** Professor Koh, you accused Judge Sofaer and the administration of illegally bending the ABM Treaty. If I understood Judge Sofaer's last point, it was that it would be inconceivable for the ABM Treaty to develop inconsistent obligations on the Soviet Union and the United States. That is to say, the same document, like a contract, could not impose obligations that were asymmetrical. The Soviet Union could not possibly be obligated by the communications between the Executive and the Senate after the signing of the treaty. Therefore, the communications between the Executive and the Senate could not modify the agreement between the United States and the Soviet Union. Do you agree with that Professor Koh?

**JUDGE SOFAER:** As a matter of international law?

**SPEAKER:** Yes.

**PROFESSOR KOH:** In commenting on the ABM reinterpretation debate, I did not spend a lot of time on the merits. The main point that I was making was that the net effect of the administration's reinterpretation of that Treaty has been counterproductive to the executive branch in its dealings with both Congress and our allies. But if you want to go to the merits of the reinterpretation, the simple point to be made is that the language and structure of the treaty clearly favor the so-called "narrow" interpretation. This seems to be the belief of six Secretaries of Defense, eight of the nine negotiators of the ABM Treaty, and President Reagan during his first term. If the treaty is clear on its face, then the negotiating history should be irrelevant.

Even if the negotiating history was relevant, then the question would become: "Why is the negotiating history relevant, rather than the negotiating record to which the Senate advised and consented?" Just imagine the following scenario, which is essentially what Judge Sofaer puts to us. The Soviet Union says: "We really wanted a narrow interpretation of the Treaty, but the U.S. didn't want one, and therefore, we do not have to abide by the narrow view and are entitled to develop radar at Krasnoyarsk." We would say: "Where did you get your evidence about *our* intent?" By making arguments about

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163. See Koh, *supra* note 26, at 1306-17.

what the Soviets intended, I think we have opened up a Pandora's box. Such an approach will make the negotiating record relevant to every treaty. This means that on the INF Treaty,<sup>164</sup> 100 Senators are going to be digging into six years of INF negotiating records and placing understandings on every line of text. Needless to say, I find the prospect of this sort of treaty interpretation extremely disturbing.

**JUDGE SOFAER:** There have been a lot of extremely erroneous things said about the treaty at a time when the administration was still putting its case together because the early statements by some administration officials caused a lot of legislators to get into high gear before the administration had really stated its position.

Our position, however, is not at all as Professor Koh has said. Krasnoyarsk has absolutely nothing to do with any of this. Krasnoyarsk was a violation long before 1985. The Soviets have never accepted the restrictive interpretation. People should pay attention to what is going on in the world, rather than calling an interpretation, that has never been accepted by the other side in a bilateral treaty, a "traditional" interpretation. It is the most preposterous characterization I have heard in my professional life.

The Soviet Union did articulate throughout the negotiations, and right up to 1978, when we started publishing our plans for strategic defense, a view of the ABM Treaty that presented a very limited scope for restrictions under the treaty-limited, in that it did not cover unknown devices. Thereafter, the Soviets started to articulate a much more restrictive view of the treaty than we had ever accepted, and that is why I referred to Ambassador Smith's statement in the Senate hearings. Gerry Smith said we could develop things until we got to field testing. When we presented the Soviet Union with that theory in 1981, they flatly rejected it.

Senator Nunn, a serious and honorable man, was on a television interview just a week ago. When he was presented with the assertion that "the Soviets have always accepted the restrictive interpretation," he stopped the interviewer and said: "Now wait a second. We all know the Soviet Union's position on the ABM Treaty is absurd. They have always had this absurd position that we could not even do research and laboratory testing." In that context, is it inappropriate for the President to ask his lawyer: "What is the scope of my obligation under this treaty?" Of course not.

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164. See *supra* note 61.