

## Review Essay

### Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation

Way Out There in the Blue: Reagan, Star Wars and the End of  
the Cold War.

By Frances Fitzgerald<sup>†</sup>

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According to Reagan administration officials, the crusade to develop a shield against nuclear missile attack began during Ronald Reagan's second Presidential campaign. In July 1979, the future President visited the North American Aerospace Defense Command (NORAD), the high-tech command center built deep in the granite core of Cheyenne Mountain, Colorado (p. 20). NORAD's elaborate system of computers, communication, and early warning systems for ballistic missile attack would later serve as the stage for the movie *War Games* (p. 99). During the trip, the future President apparently was shocked to learn that nothing could be done to stop even a single Soviet missile fired at an American city. "We have spent all that money and have all that equipment, and there is nothing we can do to prevent a nuclear missile from hitting us," Reagan reportedly said on the flight home to Los Angeles. Reflecting on this terrible dilemma, Reagan then declared "We should have some way of defending ourselves against nuclear missiles" (p. 20).

And so was born the quest to render nuclear missiles obsolete. This controversial effort, which began with Reagan's famous March 23, 1983 speech announcing the Strategic Defense Initiative (SDI), continues to roil

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American politics even today, more than a decade after Reagan left office. Throughout President Clinton's second term, congressional leaders pressured the executive branch to accelerate deployment of a modest anti-missile system that could counter an accidental launch or the attack of a rogue state. According to missile defense advocates, the collapse of the Soviet Union has raised the chances of unintentional missile launches, while the proliferation of missile and nuclear technology has increased the number of potential nuclear threats to the United States.<sup>1</sup> In the fall of 2000, however, after several halting tests, the Clinton administration delayed construction of the first component of such an anti-missile system, a powerful early-warning radar system in Alaska.<sup>2</sup> One of our new President's most important decisions will be whether to deploy a national missile defense system and how quickly to do so.

Looming over the missile defense controversy is the Anti-Ballistic Missile Treaty (ABM Treaty).<sup>3</sup> The ABM Treaty generally prohibits both the United States and the Soviet Union from deploying any anti-missile defense, with the exception of a single system around the nation's capital or another designated site. Ratified in 1972, the treaty was both premised on and designed to promote the strategy of mutually-assured destruction (MAD). The theory of MAD was that neither superpower would ever launch a first strike against the other as long as both lacked a defense that would allow them to survive a retaliatory second strike. Arms control advocates generally consider the ABM Treaty to be one of the most successful arms control agreements of the postwar period, leading to the elimination of an entire class of weapons and enhanced strategic stability between the superpowers.<sup>4</sup> Its limitations, however, have emerged as one of the chief obstacles to the development of an ABM system, now known as National Missile Defense (NMD), in the coming decade.

The nation's stance on the ABM Treaty, therefore, has become a proxy for attitudes toward NMD, and an important issue in national politics. For instance, during the summer and fall of 2000, public attention focused on whether President Clinton would interpret the ABM Treaty to allow the construction of the first NMD system components. During the recent presidential campaign, Al Gore argued in favor of delaying any deployment to allow for modification of the Treaty and to conduct further

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1. See, e.g., *Ballistic Missiles: Threat and Response: Hearings Before the Senate Comm. on Foreign Relations*, 106th Cong. 2, 8 (statements of Chairman Jesse Helms and Former Defense Secretary Caspar Weinberger).

2. Press Release, White House Office of Communications, Remarks by President on National Missile Defense (Sept. 1, 2000), 2000 WL 1239313.

3. Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3435, T.I.A.S. No. 7503 [hereinafter ABM Treaty].

4. See Comm. On Foreign Aff., U.S. House, Subcommittee on Arms Control, International Security and Science, ABM Treaty Interpretation Dispute, 99th Cong., 1st Sess. (Oct. 22, 1985) at 145-56.

testing.<sup>5</sup> George W. Bush, on the other hand, spoke out against the delay and promised to “develop and deploy an effective missile defense system at the earliest possible date.”<sup>6</sup> Earlier he had declared, “Now is the time, not to defend outdated treaties, but to defend the American people.”<sup>7</sup> Rarely in recent American politics has the issue of treaty interpretation become so salient.

Part I will review the history of the first ABM Treaty interpretation controversy, in light of the new information provided by Frances Fitzgerald’s book, *Way Out There in the Blue: Reagan, Star Wars, and the End of the Cold War*. It will discuss the Reagan administration’s efforts to reinterpret the Treaty so as to permit the testing of a space-based missile defense and that effort’s impact on the separation of powers. It will show that the dispute embodied very different visions not only of the allocation of powers between the branches, but also of the nature of treaties in the American legal system. Part I will conclude by asking if the legal considerations surrounding the ABM Treaty, and its treatment as a law rather than as a political agreement, distorted American arms control and nuclear weapons policy.

Part II will analyze the treaty interpretation question by considering whether it is appropriate to subject treaties, such as the ABM Treaty, to the same doctrines and presumptions that apply to laws. It will argue that the design of the constitutional system strongly suggests that treaties and laws should be treated differently, and that Presidents have broader powers of treaty interpretation than has been commonly understood. Part II will show that both a formalist and a functionalist approach to the separation of powers in foreign affairs recommends in favor of concentrating the authority to interpret, and reinterpret, treaties in the President. Part II will argue that different theories of statutory interpretation ought to be taken into account in resolving the controversy over presidential treaty interpretation. Both textualist and purpose-oriented approaches further reinforce the notion that the President should enjoy substantial freedom in interpreting treaties to comport with national foreign policy goals.

Part III will further illuminate these issues by tracing the development of the treaty power during the framing and early national periods. It will argue that the framing generation likely understood the treaty power as an exclusively executive power, and hence that those who established our constitutional system believed the President should have the power to in-

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5. Marc Lucry, *Clinton’s Missile Decision: The Next President*, N.Y. Times, Sept. 2, 2000, at A8.

6. Statement by Governor George W. Bush Regarding President Clinton’s Announcement on a National Missile Defense System (Sept 1, 2000), at <http://www.georgewbush.com/News.asp?FormMode=NR&Search=1&ID=1173>.

7. Gov. George W. Bush, Speech Before the Veterans of Foreign Wars (Aug. 21, 2000), at [http://www.georgewbush.com/News/speeches/082100\\_vfw.html](http://www.georgewbush.com/News/speeches/082100_vfw.html).

interpret treaties. However, the Framers also believed that the treaty power and the legislative power were independent of one another. As a result, they would have expected Congress to use its plenary authority over spending and legislation to counter executive treaty interpretations with which it disagreed. Finally, Part III will demonstrate that the framing generation put these ideas into practice when, in the Neutrality Proclamation of 1793,<sup>8</sup> President Washington interpreted the 1778 treaty with France as not requiring American entry into the Napoleonic Wars. While scholars often view the Neutrality Proclamation as an early instance of the relationship between international and domestic law, it is far more valuable as the first example of treaty interpretation by the executive branch.

Part IV will apply these lessons current fight over NMD. I will argue that while the Reagan administration enjoyed far more constitutional authority to interpret the ABM Treaty than scholars have commonly recognized, the Senate and House had substantial tools at their disposal to oppose presidential power. Conceiving of this struggle as legal rather than fundamentally political only confused our foreign policy-making process and may have impeded the national interest. Viewing the allocation of the treaty power as a political relationship, however, also indicates that the Clinton administration's respect for the ABM Treaty rested within the President's foreign affairs power, despite opposition from the Senate and House. This suggests that President George W. Bush may enjoy firm constitutional authority to declare either that the ABM Treaty is terminated or that it does not prohibit a limited NMD program. Moreover, because of the political nature of treaty interpretation, we can expect future inter-branch struggles over the ABM Treaty and NMD to mirror the earlier fights that Fitzgerald describes.

## I

### Way Out of there in the Blue: The History of the ABM Treaty Controversy

#### A. *Reagan's Strategic Defense Initiative*

A mythology surrounds the birth of SDI. Reagan's 1979 visit to NORAD set in motion a process that produced a simple yet powerful idea: America could build a space-based X-ray and laser weapons system that could shoot down Soviet missiles in flight. Reagan's famous 1983 speech launched a program intended to transform that idea into reality. Although fiercely opposed by Democrats in Congress, American scientists began work on the project two years later. This major defense

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8. George Washington, Proclamation, *reprinted in 1 Compilation of the Messages & Papers of the Presidents: 1789-1897*, at 156 (James D. Richardson ed., 1900).

effort, the largest military research program since the Manhattan Project, would reach an eventual cost of sixty billion dollars.

Even though the Pentagon never developed a feasible system, SDI forced the Soviets, who had spent the 1970s and early 1980s attempting to achieve superiority in nuclear weapons, to the negotiating table. SDI became one of the driving forces behind the Strategic Arms Reduction Talks (START), which produced the first significant reductions in the superpowers' nuclear arsenals. Ultimately, the economic strain of competing with a militarily resurgent and technologically superior America, one potentially protected by a nuclear shield, sparked the collapse of the Soviet Union and the end of the Cold War (pp. 473-74). Reagan's use of SDI to begin the easing of U.S.-Soviet tensions contributed to his sixty-eight percent job approval rating when he left office, the highest of any postwar President at the end of his term (p. 466). Ronald Reagan, symbolizing the simple but good American everyman, had cut through the Gordian knot of MAD with the common sense answer of strategic defense.

Most of this story, Frances Fitzgerald assures us, is pure bunk. In *Way Out There in the Blue*, the Pulitzer Prize-winning writer has sketched the first comprehensive political history of SDI. Although she has not conducted the type of detailed archival research preferred by diplomatic historians, Fitzgerald has woven together the details of memoirs by leading Reagan administration figures such as Caspar Weinberger (Secretary of Defense) and George Shultz (Secretary of State), contemporary newspaper accounts, public government documents, congressional hearings and reports, and some 41 interviews conducted for the book itself. After a painstaking 500-page reconstruction of the political intrigues behind the Reagan administration's foreign policy, Fitzgerald concludes that SDI represented a political maneuver to forestall the growing popularity of the nuclear freeze movement (p. 156). Rather than allow mass support for nuclear disarmament to threaten his proposals to rebuild America's nuclear and conventional forces, Reagan announced a daring proposal to the American people to make their homes safe from nuclear attack. This proposal, Fitzgerald claims, not only posed a destabilizing threat to nuclear security based on MAD, but also was scientifically impossible. In effect, it was nothing more than a sales pitch that provided cover for the Reagan military buildup.

Rather than contributing toward peace, SDI became an obstacle to nuclear arms control and to a more stable relationship with the Soviet Union (pp. 265-313). Soviet leaders quickly focused on SDI as a threat and made adherence to the ABM Treaty a condition for further arms control agreements. Reagan administration officials, however, such as Weinberger and his aggressive and able assistant, Richard Perle, convinced the President that the Star Wars program ought not to serve as a bargaining

chip in arms control negotiations with the Soviets. At the 1985 Geneva summit, for example, President Reagan ignored Gorbachev's entreaties to drop SDI research and development in exchange for deep reductions in the superpowers' stockpile of strategic nuclear weapons. Similarly, at the Reykjavik summit in 1986, Reagan refused a surprise Soviet proposal for mutual reductions in their ballistic missile strength within five years, to be followed by mutual elimination of all strategic nuclear weapons in their arsenals within ten years (the "zero option"), in return for a promise that SDI research remain in the "laboratory," (pp. 356-65).<sup>9</sup> Even at the end of his second term, Reagan refused to compromise on SDI, despite substantial evidence that military scientists were nowhere near development of an ABM defense that could shield the American population.

Fitzgerald's account, however, creates a puzzle for her to solve. Even though SDI was infeasible using 1980's technology, the Soviet Union nonetheless agreed to a succession of arms control agreements, beginning with the Intermediate Nuclear Forces (INF) Treaty, followed by the START I and START II treaties, that have sharply reduced the superpowers' stockpile of strategic nuclear weapons. The Soviet Union also agreed to restrictions on the deployment of conventional forces in Europe. When faced with revolution throughout Eastern Europe in 1989, the Soviet Union allowed its satellite nations to reject communism and break away from its oppressive control, rather than send in troops (as it had done in Hungary in 1956 and Czechoslovakia in 1968). Ultimately, the Soviet Union itself broke into fifteen independent states, all without any military action by the United States and its allies. If the collapse of the Soviet Union was not produced by the military re-armament and aggressive foreign policies of the Reagan administration, of which SDI was a central part, then why did it happen when it did?

According to Fitzgerald, the Cold War ultimately ended not because SDI and the American buildup bankrupted the Soviet economy, but because of the forces of reform unleashed by Gorbachev at home (pp. 473-75). Gorbachev needed arms control agreements that would allow him to divert funds from the Soviet military to the Soviet economy. He could not take those steps, however, so long as the United States might render itself invulnerable to the Soviet deterrent through a space-based anti-missile shield. Hence, early on, Soviet leaders linked reductions in nuclear arms to American disavowal of its SDI program. Fitzgerald claims that this deadlock was broken thanks to the intervention of one man, Andrei Sakharov, the Nobel-winning physicist and Soviet dissident (p. 409). Once released

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9. Though probably not in the United States' best interests, given the dependence of American strategy on a nuclear deterrent to offset enormous Soviet advantages in conventional weapons in Europe, Reykjavik's "zero option" would have qualified even by today's standards as the most sweeping arms control agreement in history.

from internal exile, Sakharov allegedly persuaded the Soviet scientific community that SDI was nothing more than a bluff, which could be easily and cheaply overcome by producing more offensive warheads (pp. 410-11). Convinced, Gorbachev proposed in February 1987 to de-link the Soviet position on SDI from progress on the INF and START agreements, leading to their ratification by Presidents Reagan and Bush (pp. 410-11). However, although he had sought to shore up the communist system by engaging in new policies of openness, Gorbachev's reform efforts succeeded only in undermining the Soviet bureaucracy and economic system to such an extent that the Soviet Union itself could no longer survive.

Despite its prodigious length, Fitzgerald's account is unsatisfying on these larger points. She claims that SDI had virtually no effect on the Soviets, and thus did not hasten the end of the Cold War, yet she has done little work on the Soviet side of the equation. It does not appear that she had any access to Soviet archives, nor did she conduct interviews with a single former Soviet official. Her conclusions about Soviet motives and intentions are purely speculative (for example, she does not support her claim of Sakharov's critical role with any real evidence), and they seem inconsistent with the public record. That record shows that the Soviets repeatedly sought to convince the United States to trade SDI for mutual reductions in strategic nuclear weapons. Reagan's failure to take Gorbachev up on these offers does not disturb their reflection of deep Soviet concern about the possibilities of American scientific research. Further, Fitzgerald develops her alternative account of the Cold War's end in an under-theorized, even off-hand, manner. She can only speculate about the causes of the Soviet Union's collapse; she certainly has not succeeded in the difficult task of proving that SDI played no role in it.<sup>10</sup>

Similarly, Fitzgerald's treatment of the other main theme of her book, the character of Ronald Reagan, is superficially attractive, yet ultimately hollow. Fitzgerald follows others in arguing that Reagan treated the presidency as yet another acting role, in which he repeated the lines prepared for him by others.<sup>11</sup> According to Fitzgerald, SDI and arms control policy represented an unending struggle between Weinberger and Shultz for the heart and mind of the President, rather than the consistent pursuit of national security goals through the implementation of a coherent policy (pp. 265-313). Fitzgerald claims that Reagan ultimately had little interest in policy or even politics, as demonstrated by his distant relationships with even his

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10. Fitzgerald's account makes even less sense today. Resurrecting the linkage between ABM and START, just this year Vladimir Putin made clear that if the United States were to attempt to deploy even a limited anti-missile shield, Russia would withdraw from the START II agreement. Michael R. Gordon, *In A New Era, U.S. and Russia Bicker Over An Old Issue*, N.Y. Times, Apr. 25, 2000, at A1. If the Russians shared the same position as the Soviets, that a continental ABM defense was scientifically impossible, then their opposition to NMD today makes little sense (except as a bargaining chip).

11. See, e.g., Lou Cannon, *President Reagan: The Role of a Lifetime* (1991).

most intimate aides. Apparently, Reagan blurred politics and show business to such an extent that he often repeated lines and plots from movies as if they were fact (pp. 22-29).

*Way Out There in the Blue's* account, however, shows that Reagan displayed a steadfastness (or stubbornness) in leadership that served as a crucial force in American foreign policy. It was Reagan who had long been fascinated by the idea of an anti-missile shield (allegedly, according to Fitzgerald, because of a movie he saw starring Paul Newman) (p. 23). It was Reagan who pushed the idea forward when his scientific advisers and the Joint Chiefs of Staff suggested that new technologies might make the shield a reality (pp. 197-98). It was Reagan who, over the objections of his Secretary of State, inserted the SDI proposal into his March 1983 speech (pp. 205-06). It was Reagan who decided that the object of the shield should be not to protect America's nuclear deterrent, but to make all nuclear weapons obsolete. It was Reagan who repeatedly refused to limit SDI only to laboratory research or to bargain SDI away, even in exchange for deep reductions in the Soviet nuclear stockpile. While Reagan's motives may have been simple, even naïve, they animated the bureaucracy in a unified fashion that contributed to the end of the Cold War. It seems that Reagan is due substantially more credit than Fitzgerald is willing to extend.<sup>12</sup>

#### B. *SDI and The Separation of Powers Controversy*

Unlike most other important moments in American foreign relations, constitutional law was a central ingredient in the controversy over SDI. The ABM Treaty's text appeared to bar the space-based anti-missile defenses that the Reagan administration was seeking to develop. Article V of the Treaty, for example, clearly prohibits the testing, development, or deployment of any anti-ballistic missile system based on sea, air, space, or mobile ground units.<sup>13</sup> In order to deploy SDI, therefore, it appeared that the Reagan administration would have to break the only significant arms control agreement that existed between the superpowers at the time, one with strong support in Congress and the American defense community. To escape this dilemma, Judge Abraham Sofaer, the legal adviser to the State Department, conducted a study in 1985 which concluded, based in part upon the classified negotiating history of the Treaty, that a "broad" interpretation of the ABM Treaty permitted research and development into ABM systems that relied upon "exotic" technologies not in existence in

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12. It is also ironic that Fitzgerald, whose famous book about the Vietnam War, *Fire In The Lake*, sharply criticized the establishment view of military strategy, should so fully embrace that establishment view here. See Frances Fitzgerald, *Fire In The Lake: the Vietnamese and the Americans in Vietnam* (1972).

13. ABM Treaty, *supra* note 3, art. V(1).



1972.<sup>14</sup> In October 1985, National Security Advisor McFarlane announced Sofaer's reading as administration policy, even though every President since 1972 had adopted an opposite interpretation and other lawyers within the administration had reached contrary conclusions (pp. 290-91).

The Reagan administration's effort to reinterpret the ABM Treaty sparked a full-blown controversy over the allocation of the treaty power. It became perhaps the most significant inter-branch conflict over treaties since the struggle between Federalists and Republicans during the Napoleonic Wars.<sup>15</sup> Congress held several hearings in which former negotiators and constitutional law scholars argued that Sofaer's reinterpretation was at odds with the Nixon administration's representations concerning the Treaty's meaning in 1972.<sup>16</sup> On the floor of the Senate, Senator Sam Nunn accused Sofaer of blatantly misrepresenting the negotiating and ratification records. Nunn warned that the administration would provoke a "constitutional confrontation of profound dimensions" if it reinterpreted the Treaty without the agreement of Congress.<sup>17</sup> Leading constitutional scholars such as Professors Louis Henkin and Laurence Tribe criticized Sofaer's reading before joint hearings of the Senate Foreign Relations and Judiciary Committees in March and April of 1987. They concluded that the administration's reinterpretation required the consent of the Senate because it essentially effected a change in the Treaty's meaning.<sup>18</sup> Numerous other academics criticized the reinterpretation in a flurry of law review articles and books.<sup>19</sup> Congressional and academic opposition joined protests from both the Soviets, who argued that the broad interpretation did not comport with their understanding of the Treaty, and from NATO countries, who feared either a renewed nuclear arms race or that they would be left outside the United States' space shield.

It is hard to see what the Reagan administration got for all of its troubles. In response to the outcry from our allies, the administration

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14. Sofaer publicly released a sanitized version of his study in congressional testimony and in the pages of the *Harvard Law Review*. See Abraham D. Sofaer, *The ABM Treaty and the Strategic Defense Initiative*, 99 *Harv. L. Rev.* 1972, 1978 (1986).

15. Discussed *infra*, Part III.C.

16. See, e.g., *ABM Treaty Interpretation Dispute: Hearings Before the Subcomm. on Arms Control, Int'l Security and Science of the House Comm. on Foreign Aff.*, 99th Cong. (1985); *Strategic Defense Initiative: Hearings Before the Subcomm. on Strategic and Theater Nuclear Forces of the Senate Comm. on Armed Servs.*, 99th Cong. (1985).

17. 133 *Cong. Rec.* 52, 971 (1987).

18. *ABM Treaty and the Constitution: Joint Hearings Before the Senate Comm. on Foreign Relations and the Senate Comm. on the Judiciary*, 100th Cong. 81-105 (1987) [hereinafter *Joint Hearings*].

19. See, e.g., Raymond L. Garthoff, *Policy Versus the Law: The Reinterpretation of the ABM Treaty* (1987); Abram Chayes & Antonia Handler Chayes, *Testing and Development of "Exotic" Systems Under the ABM Treaty: The Great Reinterpretation Caper*, 99 *Harv. L. Rev.* 1956 (1986); David Koplow, *Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties*, 137 *U. Pa. L. Rev.* 1353 (1989).

announced in late 1985 that while it considered the broad interpretation “fully justified,” it would adhere in practice to the narrow reading (pp. 291-92). Senator Biden, chairman of the Senate Judiciary Committee, introduced an ABM Treaty Interpretation Resolution that sought to freeze the treaty’s meaning to that which was understood by the Senate in 1972.<sup>20</sup> Although the full Senate never approved the Resolution, in 1987 congressional Democrats succeeded in imposing conditions upon Defense Department appropriations that forbade SDI tests that violated the narrow interpretation. That same year, the Senate Judiciary and Foreign Relations Committees issued a report that questioned Judge Sofaer’s integrity as a public servant and which claimed that the administration was intent on “corrupting our own institutions and constitutional processes.”<sup>21</sup> In 1988, the Senate attached a reservation to the INF Treaty, known as the Biden condition, which required the INF Treaty to be interpreted according to the shared understanding of the Treaty held by the President and Senate at the time of ratification, and that required Senate consent for any future reinterpretation.<sup>22</sup> Although the Reagan administration claimed the condition unconstitutionally infringed on the President’s power in foreign affairs,<sup>23</sup> it still ratified the INF Treaty with the condition attached. In classrooms since, the ABM reinterpretation controversy has been taught as an example of executive constitutional over-reaching.<sup>24</sup>

It has always been unclear why the Reagan administration incurred these high political and constitutional costs, especially in light of the SDI program’s lack of technological progress. As Fitzgerald’s work shows, the United States simply was nowhere near testing, let alone deploying, a space-based missile defense in the 1980s (pp. 370-76, 394). *Way Out There in the Blue* provides the first plausible answer to this question. Some initially believed that the broad interpretation was the work of hardliners in the Defense Department, who sought to sabotage any arms control

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20. S. 167, 100th Cong. (1987), reprinted in *Joint Hearings*, supra note 18, at 230.

21. Senate Comm. on Foreign Relations, *The ABM Treaty Interpretation Resolution*, S. Rep. No. 100-164, at 67 (1987).

22. 134 Cong. Rec. S6937 (May 27, 1988). Senator Biden defended the condition in Joseph R. Biden, Jr. & John B. Ritch III, *The Treaty Power: Upholding a Constitutional Partnership*, 137 U. Pa. L. Rev. 1529 (1989). The initial Biden condition sought to apply this principle as a matter of general constitutional law; a subsequent amendment by Senator Byrd limited the condition to the INF Treaty. See 134 Cong. Rec. S6724 (May 26, 1988). Some believe this change was significant because it showed a lack of consensus in the Senate as to general principles concerning the allocation of the treaty power between the President and Senate. See Phillip R. Trimble, *The Constitutional Common Law of Treaty Interpretation: A Reply to Formalists*, 137 U. Pa. L. Rev. 1461, 1468-72 (1989).

23. See Letter from Arthur B. Culvahouse, June 10, 1988, in 134 Cong. Rec. S8036 (June 16, 1988).

24. See, e.g., Louis Henkin, *Foreign Affairs and the United States Constitution* 184 (2d ed. 1996); Harold H. Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair* 154-55 (1990).

agreement with the Soviets that would limit SDI.<sup>25</sup> By comparing different memoirs, however, Fitzgerald makes a good case for a more sophisticated explanation: that National Security Advisor McFarlane, Secretary of State Shultz and Paul Nitze, Shultz's special adviser on arms control issues, had hoped to strike a grand compromise with the Soviets. In exchange for American agreement to remain within the ABM Treaty for a period of time, the Soviets would accept deep, mutual reductions in both nations' strategic arsenals (pp. 300-01). In this way, the reinterpretation of the ABM Treaty, which allowed the testing and deployment of a space-based missile defense, would give the administration a bargaining chip to convince the Soviets to trade weapons for continued adherence to the narrower interpretation of the treaty. If that were Shultz's plan, however, it backfired. Sofaer's position only hardened Reagan's SDI policy. Members of the administration, for example, began to refer to the broad reading of the ABM treaty as the "LCI": the "legally correct interpretation" (p. 391). President Reagan personally refused to budge from the broad interpretation in summit meetings with Gorbachev, despite the efforts of his aides to work out a grand SDI-for-missiles compromise (pp. 301, 311).

Fitzgerald shares the view of the Reagan administration's critics that the broad interpretation was illegal and unconstitutional. She accepts at face value the claims by arms control advocates and Democratic Senators that Sofaer's interpretation of the ABM Treaty was "absurd." She even goes so far as to suggest that Sofaer intentionally misled the Senate in claiming that parts of the ratification record (statements made by the executive branch to the Senate in 1972) supported the broad reading (pp. 396-97). Fitzgerald repeats some Senators' arguments that the ratification record, as well as post-ratification practice by the United States and the Soviets, conclusively supported the "narrow" reading of the Treaty. Even if Sofaer were correct that the negotiating record, the deals and understandings reached by the United States and the Soviet Union prior to signing the Treaty, permitted the broad interpretation, Fitzgerald argues that the "canons of international law" require interpretation to rely first upon the treaty text, and then practice (p. 395). Only if these sources were unclear, she argues, does the negotiating record become probative. Even in that event, she claims, the ratification record trumps the negotiating record: the representations made by the executive branch to the Senate control the treaty's meaning (p. 395). Borrowing heavily from speeches on the Senate floor that criticized the Reagan administration's reinterpretation, Fitzgerald maintains that the ratification record conclusively shows that the ABM

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25. See, e.g., Garthoff, *supra* note 19, at 7-9. This explanation, however, ignored that Judge Sofaer worked for the Secretary of State, while the general counsels of the Defense Department and the Arms Control Disarmament Agency had reached a contrary conclusion; it further overestimated the influence of the hardliners within the administration.

Treaty, as understood by the President and Senate in 1972, establishes the narrow interpretation.

Fitzgerald's examination of the constitutional and legal issues involved in the ABM controversy is marred by her unquestioning acceptance of much of the incendiary criticism of the Reagan administration's reinterpretation. Fitzgerald's reliance on the supporters of the narrow interpretation leads to two errors in her legal analysis. First, the congressional position, which she adopts, creates the very real possibility that a treaty can have two different meanings, one international and one domestic. Suppose, for example, that the American and the Soviet negotiators had agreed, as Sofaer and the Reagan administration claimed, that the ABM Treaty did not cover anti-missile technologies not yet in existence.<sup>26</sup> Suppose further that the President keeps this joint interpretation of the ABM Treaty text classified, fails to disclose it to the Senate, and that the Senate then approves the Treaty on the assumption that it bars all anti-missile systems. If Fitzgerald believes that the ratification record trumps the negotiating record in the interpretation of ambiguous treaties, then the same treaty could impose different legal obligations on the United States as a matter of domestic constitutional law (per the ratification record) than on the Soviet Union (per the negotiating record). This would create a bizarre situation in which the United States obligates itself to onerous treaty provisions, while simultaneously allowing the Soviets to operate more freely under a more forgiving agreement, all with the same treaty text. Not only does this make little sense as a matter of constitutional law, it makes for unacceptable foreign policy. It unilaterally limits the United States' ability to act effectively in international affairs with no reciprocal concessions from its treaty partners.

Second, Fitzgerald's one-sided reliance upon the Senate's point of view ignores the significant constitutional principles underlying the reinterpretation position. Regardless of the validity of Sofaer's reading of this bit or that bit of evidence from the negotiating and ratification records, the important questions at stake in the ABM Treaty debate centered on which branch possessed the power to interpret treaties under the separation of powers, and how far that power went. Fitzgerald seems to think that the broad interpretation raised too many international and constitutional "novelties," such as "the proposition that the President had the right to interpret treaties just as he saw fit" (p. 396). If Fitzgerald had examined the issue in a little more depth, she would have discovered that under standard understandings of the foreign affairs power, the President can do exactly

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26. An addendum to the ABM Treaty, known as Agreed Statement D, apparently formalized the agreement of the United States and Soviet negotiators that the treaty did not cover anti-missile technologies based on scientific principles not yet developed. See ABM Treaty, *supra* note 3, Agreed Statement D, 23 U.S.T. at 3456.

that. Sofaer's constitutional position thus was far from "absurd": in a symposium a few years after the ABM blowup, several legal scholars expressed agreement with him on this point.<sup>27</sup>

Indeed, the debate over the broad versus narrow interpretation of the ABM Treaty highlights the dangers of conceiving of foreign policy disputes in legal, rather than political, terms. In strictly political terms, we can make a decision about SDI and the ABM Treaty by balancing the advantages of continued adherence to the Treaty, and the benefits that would accrue to the nation's security if an ABM system could be devised, against the system's cost and its rate of success in stopping ICBMs. We can hold reasonable disagreements concerning the relative values of these different factors and how they balance against one another. Ultimately, policymakers can reach a compromise in terms of program direction, funding levels, and conduct on the ABM Treaty that will maximize national security goals and express the preferences of the political system and the electorate. It seems important that foreign policy makers enjoy such flexibility, as the stakes in foreign affairs are often higher than in domestic affairs, events move quickly, and the results might be resistant to later changes in policy.

Once a foreign affairs dispute becomes a legal question, however, the policy-making process loses its elasticity. It is one thing to claim that the SDI system does not provide enough effectiveness or coverage against ICBMs, that it is too expensive, that it is not worth destabilizing the strategic environment, or that it would anger the Soviet Union. It is an altogether different thing to claim that the President, in interpreting the ABM Treaty, has acted unconstitutionally or violated the law of the land, as opponents of the Reagan administration's SDI program claimed. Professor Tribe, for example, testified before the Senate Foreign Relations and Judiciary Committees that "the Constitution itself could become the first casualty of Star Wars, and that [SDI] is quite needlessly starting out with an offensive against the separation of powers and an assault on the Senate's constitutionally specified role in the treaty-making process."<sup>28</sup> When a foreign policy question becomes characterized in such legal terms, it is less likely that the opposing sides will be able to reach a political compromise. President Reagan could not give in on the broad interpretation; to do so would be tantamount to conceding that his effort to reinterpret the ABM Treaty had violated the Constitution. Similarly, allowing the testing of SDI

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27. See, e.g., Lawrence J. Block, Lee A. Casey & David B. Rivkin, Jr., *The Senate's Pie-in-the-Sky Treaty Interpretation: Power and the Quest for Legislative Supremacy*, 137 U. Pa. L. Rev. 1491 (1989); Eugene V. Rostow, *The Reinterpretation Debate and Constitutional Law*, 137 U. Pa. L. Rev. 1451 (1989); Trimble, *supra* note 22. However, as could be expected, other participants in the symposium sharply disagreed with Sofaer's constitutional analysis. See, e.g., Biden & Ritch, *supra* note 22; Koplów, *supra* note 19.

28. *Joint Hearings*, *supra* note 18, at 83.

would have forced the Senate Democrats to admit that they had interpreted the law and the Constitution incorrectly. Viewing SDI as a legal question forced the contending parties into discussing nonnegotiable principle rather than policy.<sup>29</sup>

## II

### Politics as Law?: the Constitutional Issues of Treaty Interpretation

While unearthing interesting behind-the-scenes tales about the political maneuverings in Washington, D.C., *Way Out There in the Blue* fails to grasp the complexity of the treaty interpretation issues involved. This is due, in part, to Fitzgerald's hasty reliance upon the analysis of SDI critics, who sought to transform a political dispute over missile defense into a full-fledged constitutional controversy. Fault also rests with the Reagan administration, which defended its claims about the broad interpretation by reference to obscure points concerning the ABM Treaty's negotiation. For some reason, the Reagan administration failed to make the stronger argument that the President has the sole constitutional power to reinterpret treaties on behalf of the nation, but instead fought over the original meaning of the 1972 agreement. Reagan essentially conceded to the Senate Democrats that a treaty's meaning remains set by the Senate's understanding held at the time of ratification, rather than claim his own power to change that meaning (limited, of course, by the boundaries of the treaty's text) to best serve American foreign policy interests.

This Part will explain how President Reagan could have asserted a broad constitutional authority to reinterpret the ABM Treaty. Part II.A will review the merits of the reinterpretation dispute. It will argue that, contrary to the claims of many international and constitutional law scholars in 1987, the ABM Treaty did not clearly and expressly ban the development of space-based missile defenses. Rather, the ABM Treaty's ambiguous text left substantial room for interpretation and negotiation with the Soviet Union over SDI. Part II.B will make the case that the separation of powers supports the President's power to interpret and reinterpret treaties. Both formalist and functionalist approaches to the separation of powers indicate that the President should enjoy substantial freedom in defining the meaning of international agreements. The Constitution's structure and the distinction it enforces between treaties and laws lend further support to this conclusion. Part II.C will provide yet another justification for presidential treaty reinterpretation by analyzing the question through the lens of

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29. Viewing treaty matters as fundamentally political rather than legal issues is possible in the context of arms control because agreements like the ABM Treaty create no domestic legal rights on the part of individuals. This might not be the case, however, with other types of agreements, such as those involving human rights.

different theories of statutory interpretation. Whether we apply textualist or dynamic notions of interpretation to treaties, it is clear that the President must enjoy the power to interpret international agreements on behalf of the nation.

A. *The Merits of Reagan's Reinterpretation of the ABM Treaty*

Before addressing the constitutional issues involved, it is useful at this point to describe the substance of the dispute over interpretation of the ABM Treaty. Short and concise by today's standards, the Treaty provides that neither the United States nor the Soviet Union would deploy anti-missile systems in defense of their national territories.<sup>30</sup> According to Article II of the Treaty, an ABM system is one "currently consisting of" ABM missiles, launchers, and radar.<sup>31</sup> Each side originally agreed to limit testing and deployment to two designated sites, and then later agreed to one.<sup>32</sup> Most importantly for the SDI controversy, Article V of the Treaty declared that neither nation could test, develop, or deploy an ABM system that was based in space, the sea, the air, or was mobile on land.<sup>33</sup> The Treaty does not completely eliminate all ABM defenses, however, because it still permits the development and deployment of a fixed ground-based ABM system.

Although the text of Article V would appear to have ruled out the Reagan administration's SDI plans, the Treaty language does have some ambiguity to it. Article II's definition of ABM systems as centered on anti-missile missiles leaves open the Treaty's application to non-missile technologies, such as directed-energy beams. One could read Article II's listing of missiles, launchers, and radar as either a decision to limit the ABM Treaty to those components, or as an illustrative description of an ABM system.<sup>34</sup> It is at this point that the negotiating record becomes important. As part of the ABM Treaty negotiations, the delegations of the two nations issued a document that contained "agreed statements, common understandings, and unilateral statements" regarding the Treaty. Agreed Statement D declares that "in the event ABM systems based on other physical principles . . . are created in the future," the United States and the Soviet Union would conduct negotiations and amend the Treaty, if necessary.<sup>35</sup>

This statement, issued simultaneously with the Treaty's signing in Moscow on May 26, 1972, suggests that the United States and Soviet

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30. ABM Treaty, *supra* note 3, art. I(2), 23 U.S.T. at 3438.

31. *Id.* art. II(1)(a)-(c), 23 U.S.T. at 3439.

32. Protocol to the Treaty Between the United States of America and the USSR on the Limitation of the AntiBallistic Missile System, May 24, 1976, U.S.-U.S.S.R., 27 U.S.T. 1645, TIAS8276.

33. *Id.* art. V(1), 23 U.S.T. at 3441.

34. See Sofaer, *supra* note 14, at 1974.

35. ABM Treaty, *supra* note 3, Agreed Statement D, 23 U.S.T. at 3456.

Union did not understand the Treaty text to explicitly prohibit ABM technologies that went beyond those in existence in 1972. If Article II's sweep were as broad as the restrictive interpretation claims, there would have been no need for Agreed Statement D: such technologies would have been prohibited anyway, and the parties could still have negotiated a modification to allow their use. Reading Agreed Statement D otherwise renders it virtually meaningless, a result that is to be avoided in construing any legal document. To take a less extreme view, Agreed Statement D might allow for the research and development of "exotic" Star Wars technology, but deployment of such a system would still require an amendment to the Treaty. In defending this reading of the Treaty, Judge Sofaer and a former head of the Arms Control Disarmament Agency, former Yale law school dean Eugene Rostow, claimed that the negotiating record, much of it still classified, indicated that the United States negotiators sought a complete ban on ABM systems based on any technology, but that the Soviet representatives refused. The compromise resulted in Statement D.<sup>36</sup>

From the same basic pool of evidence, Reagan's critics reached opposite conclusions. They argued that Article II's description of ABM system components could not itself override the same Article's general definition of such a system as "a system to counter strategic ballistic missiles or their elements in flight trajectory."<sup>37</sup> Article II's listing was only a description of functional components, not technologies.<sup>38</sup> Use of the phrase "currently consisting of," some claimed, underscored the argument that missiles, launchers, and radar was "illustrative, not restrictive."<sup>39</sup> Further, Article V's ban on development of all but ground-based ABM systems contains no exception for weapons based on exotic technologies. Agreed Statement D, which is prefaced with a declaration of intent to fulfill the ABM Treaty's goals, only addressed the right of each state to build a single ground-based ABM system. It makes clear that neither party could use exotic technologies to build their single system.<sup>40</sup> According to supporters of this narrow interpretation, there is only one exception to the Treaty's complete ban on ABM systems: a ground-based system located at the single site designated by the Treaty.

SDI critics reinforced their textual reading by resort to the ABM Treaty's ratification record. While it seems clear that neither executive branch representatives nor the Senators of 1972 anticipated the issues that would arise with SDI, a few isolated pieces of evidence suggest that some in the Senate might have understood the Treaty to bar all ABM systems

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36. See Sofaer, *supra* note 14, at 1979; Rostow, *supra* note 27, at 1456.

37. ABM Treaty, *supra* note 3, art. II(1), 23 U.S.T. at 3439.

38. See Chayes & Chayes, *supra* note 19, at 1958.

39. Garthoff, *supra* note 19, at 21.

40. See Chayes & Chayes, *supra* note 19, at 1962-63.



based on future technologies. On three or four occasions, executive branch officials told the Senate that the Treaty prohibited the development of laser ABM systems and space-based systems, unlike fixed, land-based systems.<sup>41</sup> Senator James Buckley of New York was one of only two Senators to vote against the Treaty because it “would have the effect . . . of prohibiting the development and testing of a laser-type system based in space.”<sup>42</sup> It seems fair to conclude after reviewing the evidence from the ratification process that neither the President nor any of his representatives offered anything approaching the 1980’s version of the broad interpretation to the Senate. Nonetheless, it is also fair to say that no extended discussion of a broad or narrow interpretation took place, that neither the executive branch nor the Senate conducted a systematic analysis of the question of future technologies, and that what legislative history there is consists of isolated, off-hand comments about the Treaty’s restriction on all space-based systems.<sup>43</sup>

Several constitutional issues arise from this dispute over the interpretation of the ABM Treaty. The relevance of different types of evidence turns on the nature and the allocation of the treaty interpretation power among the branches. During the SDI controversy, the political and academic combatants focused on whether the President enjoyed the power to interpret treaties at variance with the Senate’s alleged understanding of a treaty at the time of ratification. SDI critics argued that because a treaty represents the joint action of both the President and Senate, the Senate’s understanding must control. If the President and Senate shared a certain understanding of the treaty, then a presidential reinterpretation at odds with that understanding would amount to a change in the treaty text itself, and therefore required the formal consent of the Senate. As the Senate Foreign Relations Committee would claim in its report consenting to the INF Treaty, “as co-makers of a treaty for the United States, the Executive and the Senate share a common understanding of a treaty which has binding significance domestically as the treaty, upon ratification, becomes an integral part of United States law.”<sup>44</sup> Or, as the Committee put it more pithily, “the Senate cannot consent to that which it did not understand.”<sup>45</sup>

Surprisingly, the Reagan administration seemed to accept the idea that the Senate’s understanding of a treaty controlled its meaning. It only dis-

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41. See Garthoff, *supra* note 19, at 71-73 (describing the colloquy between Senator Jackson and a Defense Department official, testimony of a representative of the Joint Chiefs of Staff, and a written statement of the Secretary of Defense during advice and consent process).

42. *Id.* at 74.

43. See *id.* at 71 (admitting that the question of future technologies “was not envisaged by anyone either supporting or opposing the treaty at the time and was therefore not addressed directly in the hearings.”).

44. Senate Comm. on Foreign Relations, The INF Treaty, S. Exec. Doc. No. 15, 100th Cong. 92-93 (1988).

45. *Id.* at 92.

agreed about the methodology for determining that understanding. Responding to efforts by Senators to attach a coda of interpretation to the INF Treaty, the administration argued that executive statements could bind the Presidency as to a treaty's meaning "only when they were authoritatively communicated to the Senate by the Executive and were part of the basis on which the Senate granted its advice and consent to ratification."<sup>46</sup> While this standard raises the bar for proving that the Senate holds a certain understanding of a treaty, the Reagan administration's formulation conceded that an understanding not clearly expressed in the treaty text could fix a treaty's meaning at the time of ratification. A statement by an executive branch official, for example, before the Senate Foreign Relations Committee in 1972 describing the ABM Treaty's restrictions on space-based exotic weapons would have governed the Treaty's application to SDI, possibly trumping the Treaty text or the interpretation of the current administration.

In the end, the constitutional dispute over the ABM Treaty was reduced by all concerned parties into a question of how best to read the entrails of legislative intent. In this respect, the actors in the SDI drama shoehorned treaties into a common approach used for statutory interpretation. Treaties, like laws, were considered enactments whose meaning was divined from the legislative history generated by Congress or the Senate. This approach, however, fails to take into account the crucial differences between treaties and laws, in terms of their different characters and their varying treatment by the separation of powers. It is to those issues that we now turn.

*B. The Legitimacy of Presidential Reinterpretation under the Separation of Powers in Foreign Affairs*

Resolution of the first ABM Treaty controversy failed to address the more fundamental questions about the constitutional authority to interpret treaties. In analogizing the interpretation of treaties to that of statutes, the players in the SDI controversy did not take proper account of the President's superior constitutional role in foreign affairs. Indeed, transplanting notions of statutory interpretation into the treaty area distorts the constitutional structure by undermining the executive branch's powers and aggrandizing those of the Senate. This discussion will establish the foundations for a better approach to treaty interpretation. It will describe why both formalist and functionalist approaches to the separation of powers lead to the conclusion that the President ought to have the unilateral freedom to interpret and reinterpret treaties.

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46. President Ronald Reagan, Message to the Senate on the Soviet-United States Intermediate-Range Nuclear Force Treaty, 24 *Weekly Comp. Pres. Doc.* 779, 780 (June 10, 1988).

### 1. *Formal Analysis of the Treaty Power*

A textual examination of the Constitution indicates that the treaty power is fundamentally executive in nature. Article II, Section 1 provides that “[t]he executive Power shall be vested in a President of the United States.” Beginning with Alexander Hamilton, many have read this language to constitute a broad grant of an unenumerated executive power to the President.<sup>47</sup> By contrast, Article I’s Vesting Clause gives to Congress the legislative powers “herein granted.”<sup>48</sup> In order to give every word in the Constitution meaning, we should construe this “herein granted” language as limiting Congress’s legislative powers to the list enumerated in Article I, Section 8, while Article II’s Vesting Clause must refer to inherent executive and judicial powers unenumerated elsewhere in the document.

In addition to Article II, Section 1’s general grant of executive power, Article II, Section 2 specifies other powers, such as command of the military and the treaty power, that are executive in nature. These powers are included explicitly in Article II, Section 2, rather than implicitly subsumed within Article II, Section 1’s Vesting Clause, because parts of those once plenary executive powers either have been divided between the Executive and the legislature (as with the declare war and commander-in-chief powers) or have been altered by the participation of the Senate (as with treaties and ambassadors). Clearly, the Constitution does not establish a pure separation of powers in which each branch solely exercises all functions peculiar to it. Nonetheless, the Senate’s participation in treaty making and appointments merely indicates the dilution of the unitary nature of the executive branch, rather than the transformation of these functions into legislative powers.<sup>49</sup> The Constitution’s structure reflects this: where the Constitution gives the Senate authority, such as advice and consent, in the exercise of executive power, the power is still set out in Article II, which governs the Executive, rather than in Article I. Similarly, when the Constitution grants the Executive a legislative power, such as the veto over

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47. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 *Yale L.J.* 541, 570-71 (1994). A recent formulation of this idea is Justice Scalia’s statement that Article I’s grant “does not mean *some of* the executive power, but *all of* the executive power.” *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting). Similarly, Article III’s vesting clause of “[t]he Judicial Power” in one Supreme Court provides the federal judiciary with its powers; no other clause of the Constitution does so. See Steven G. Calabresi and Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 *Harv. L. Rev.* 1153, 1175 (1992).

48. U.S. Const. art. I, § 1 (“All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).

49. This point was famously made by Hamilton in his “*Pacificus*” replies defending the constitutionality of President Washington’s Neutrality Proclamation. See Alexander Hamilton, *Pacificus No. 1*, June 29, 1793, *reprinted in 15 Papers of Hamilton* 39 (Harold C. Syrett ed., 1962).

statutes, it does so in Article I, not in Article II, because Article I alone describes the finely balanced method for making federal laws.<sup>50</sup>

Thus the Treaty Clause's placement in Article II, Section 2 indicates that the power to make treaties, and by extension to interpret them, remains an executive one. The Senate's advice and consent power does not transform the treaty power into a legislative function; instead, it makes the Senate part of the executive branch for purposes of making international agreements. Due to Article II's Vesting Clause, that exception to the structural unity of the Presidency is to be read narrowly. Any other executive powers, such as the power to interpret treaties, must remain within the President's control.

Unlike with the making of treaties, the Constitution's text might be read as failing to specifically address the interpretation of treaties. However, making and interpreting treaties, as we will see in Part III, was traditionally considered an executive function by Anglo-American constitutional theory of the eighteenth century. If Article II, Section 2 fails to allocate a specific foreign affairs power, then Article II, Section 1's general grant of the executive power serves as a catch-all provision that makes it clear that the President possesses any residual foreign affairs powers that inhere in the federal government. Rather than assume, as some foreign affairs scholars would have it, that a critical federal foreign affairs power either is missing completely from the Constitution,<sup>51</sup> or vests somehow in Congress (despite Article I's specific enumeration of powers),<sup>52</sup> this view anchors the treaty reinterpretation power in the Executive through a straightforward textual reading of the Constitution.

## 2. *Functional Analysis of the Treaty Power*

A functional analysis of the President's role in foreign affairs bolsters this formalist reading of the constitutional text. Courts and many scholars have long favored presidential control of foreign affairs because of the executive branch's clear structural superiorities in the conduct of international relations. To understand why, it is helpful to examine the theories developed by some political scientists and economists that attempt to model international relations. Put simply, these scholars begin with the

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50. While no one can deny that the executive branch also makes law through administrative regulations, this occurs due to the delegation of authority by Congress, subject to clear and manageable standards, rather than by direct constitutional authorization. *See, e.g., Clinton v. New York*, 524 U.S. 417 (1998); *Mistretta v. United States*, 488 U.S. 361, 372 (1989). Of course, whether the "intelligible principle" standard of these cases actually imposes a real check on executive discretion in public administration is another question. *See* Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 *Col um. L. Rev.* 369, 380-85 (1989).

51. *See, e.g., Henkin, supra note 24*, at 13-14.

52. *See, e.g., John Hart Ely, On Constitutional Ground* 149 (1996); Francis Wormuth & Edwin Firmage, *To Chain the Dog of War: The War Power of Congress in History and Law* 177 (1986).

assumption that the international system is one governed by anarchy in which nations seek to maximize their security and power.<sup>53</sup> This theory, known as realism, treats states as unitary actors and the relevant unit in international relations. States in this approach are interested primarily in power and security, with power being the primary influence on international affairs.<sup>54</sup> The main competing school, known as institutionalism, believes that states can cooperate in a wide variety of ways that allow them to escape the prisoner's dilemmas created by international anarchy.<sup>55</sup> Yet even these scholars assume that the primary actors in international affairs are rational, unitary actors who interact in an anarchic world.<sup>56</sup>

Regardless of whether one is a realist or an institutionalist, these models depend on the assumption that nation-states employ a rational actor approach to national security decision making. The primary requirement for the study of national strategy, according to Thomas Schelling, is "the assumption of rational behavior - not just of intelligent behavior, but of behavior motivated by a conscious calculation of advantages, a calculation that in turn is based on an explicit and internally consistent value system."<sup>57</sup> The nation-state ideally is a rational, unitary decision maker who can identify threats, develop responses, and evaluate the costs and benefits that arise from different policy options.<sup>58</sup> The rational actor translates broad national security interests into more discrete goals, which it then seeks to achieve by adopting value-maximizing policies and actions.<sup>59</sup>

Only a limited set of institutional structures can lead to the most effective exercise of power in achieving foreign policy goals. Nation-states require a form of organization that permits them to recognize which values and objectives are to be maximized; to identify and compare the costs and benefits of different policy options; to collect and evaluate information; to communicate policy decisions to arms of the state; to communicate with other nations; and to evaluate results and receive feedback. As Schelling writes, a nation-state would want "to have a communications system in good order, to have complete information, or to be in full command of

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53. See generally Kenneth N. Waltz, *A Theory of International Politics* (1979).

54. Jack L. Goldsmith and Eric A. Posner, *A Theory of Customary International Law*, 66 U. Chi. L. Rev. 1113 (1999); Joseph M. Grieco, *Anarchy and the Limits of Cooperation*, 42 Int'l. Org. 485 (1988).

55. See, e.g., Robert Axelrod and Robert O. Keohane, *Achieving Cooperation Under Anarchy*, 38 World Pol. 226 (1985).

56. There is a third, growing school of international relations theory known as liberal theory. See, e.g., Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 Am. J. Int'l L. 205 (1993). While this theory does focus on sub-national actors, it is unclear at this time whether liberal theory will succeed in presenting a viable alternative to neo-realism or institutionalism.

57. Thomas C. Schelling, *The Strategy of Conflict* 4 (1960).

58. See Graham T. Allison, *Essence of Decision: Explaining the Cuban Missile Crisis* 32-33 (1971).

59. *Id.*

one's own actions or of one's own assets."<sup>60</sup> While this model is undoubtedly difficult to achieve in the real world because bureaucratic or political imperatives may distort policy, or certain issues may allow domestic interests to overcome the national interest, it remains an ideal that ought to guide an effective foreign policy. It seems obvious that it is only the Presidency that meets the requirements for rational national action in the modern world.

One can see the influence of this ideal in the American legal system even before its formal expression in recent political science. In *United States v. Curtiss-Wright Export Corp.*, for example, the Supreme Court famously observed: "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation."<sup>61</sup> Quoting from a Senate report, Justice Sutherland further explained that "[t]he nature of transactions with foreign nations . . . requires caution and unity of design, and their success frequently depends on secrecy and dispatch."<sup>62</sup> Such ideas have been present in American political thought at least as far back as Alexander Hamilton, who wrote in *The Federalist No. 70* that "[d]ecision, activity, secrecy, and despatch will generally characterize the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished."<sup>63</sup> Because of the unitary Executive's perceived superiority to other approaches for addressing the dangers of the international world, the Framers maintained the Executive's commander-in-chief power, its power to make (with the advice and consent of the Senate) treaties, and its power to conduct diplomatic relations. As Harold Koh describes it, "[h]is decision-making processes can take on degrees of speed, secrecy, flexibility, and efficiency that no other governmental institution can match."<sup>64</sup>

As a result, both the structural advantages of the executive branch and the functional exigencies of international politics have led to the centralization of foreign affairs power in the President. The history of American foreign relations has been the story of the expansion of the Executive's power thanks to its structural abilities to wield power quickly, effectively, and in a unitary manner.<sup>65</sup> To be sure, prominent academics such as John Hart Ely, Louis Henkin, and Harold Koh have decried this expansion in the

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60. Schelling, *supra* note 57, at 18.

61. 299 U.S. 304, 319 (1936).

62. *Id.*

63. *The Federalist No. 70*, at 356 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

64. See, e.g., Koh, *supra* note 24, at 119.

65. See, e.g., *id.* at 118-23; Arthur M. Schlesinger, Jr., *The Imperial Presidency* (1973).

President's foreign affairs powers.<sup>66</sup> Yet, they cannot ground their arguments in the text and history of the Constitution, and thus can provide no overriding reason why we ought to alter a system that has arisen and been tested over time through the interaction of the political branches of government. While foreign affairs functionalists, who recommend increasing congressional participation in setting foreign policy, often elevate certain values (such as increasing public accountability or enhancing checks and balances) over others (such as speed and secrecy), they can adduce little evidence that proves that their favorite systems would work more effectively than the one that has developed over our constitutional history.

### 3. *Presidential Dominance Over Foreign Affairs*

Doctrines surrounding the creation and termination of treaties illuminate the textual and structural dominance of the President in foreign affairs. Under *United States v. Curtiss-Wright Export Corp.*,<sup>67</sup> as well as executive and legislative practice reaching to the very beginnings of the Republic,<sup>68</sup> the President enjoys a constitutional monopoly over the conduct of diplomatic relations with other nations. The President, not the Senate, chooses to trigger the treaty process, and the President can still refuse to make a treaty even after the Senate has approved it.<sup>69</sup> In contrast to the conditional executive veto over statutes, neither the Senate nor Congress can formally force the President to adopt an international agreement he opposes.<sup>70</sup> During its advice-and-consent process, the Senate can attach reservations that essentially modify the treaty's text, but these are almost always added with the cooperation of the President, and the President can always refuse the reservation and not make the treaty.<sup>71</sup>

The President retains this superior constitutional position at the end of a treaty's life. Although the constitutional text is silent on the issue, most commentators, courts, and government entities believe that the President may terminate a treaty unilaterally.<sup>72</sup> The President retains this authority

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66. See, e.g., Koh, *supra* note 24, at 117-33; John Hart Ely, *War and Responsibility* ix, 47-67 (1993); Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs* 26 (1990).

67. 299 U.S. 304 (1936).

68. See, e.g., 10 *Annals of Cong.* 613 (1800) (statement of John Marshall before the House of Representatives) (arguing that President is "sole organ" of the nation in its communications with foreign nations); Thomas Jefferson to Edmond Charles Genet, Nov. 22, 1793, in 27 *Papers of Thomas Jefferson* 414 (John Catanzariti ed., 1997) (asserting that President is the "only channel of communication" between United States and foreign nations).

69. Henkin, *supra* note 24, at 184.

70. See John C. Yoo, *Laws as Treaties?: the Constitutionality of the Congressional-Executive Agreement*, 99 *Mich. L. Rev.* \_\_\_\_ (forthcoming 2001), draft at n.201.

71. See Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 *U. Pa. L. Rev.* 399, 443 (2000).

72. See *Goldwater v. Carter*, 481 F. Supp. 949 (D.D.C.), *rev'd*, 617 F.2d 697, 716 (D.C. Cir. 1979), *vacated as moot*, 444 U.S. 996 (1979); *Restatement (Third) of the Foreign Relations Law of the United States* § 339 (1990); Henkin, *supra* note 24, at 214. Some once thought that

due to his leadership in foreign affairs (the D.C. Circuit, for example, upheld President Carter's unilateral termination of the Taiwan treaty due to the President's plenary authority over recognition of foreign governments)<sup>73</sup> and his structural superiority in conducting international relations. He need not receive the Senate's consent to end a treaty, and it appears that the Senate itself cannot formally terminate a treaty without the participation of the President or the full Congress.

These doctrines, which recognize the President's constitutional and structural superiority in conducting foreign affairs, suggest that the Senate's understandings should have little binding effect as to a treaty's meaning. Not only does the President unilaterally control the initiation of the treaty process and the termination of treaties, he also enjoys plenary authority over the conduct of international relations. As part of this responsibility, it is generally recognized that the President exercises the authority to interpret international law.<sup>74</sup> Therefore, the federal courts generally accord the President almost absolute deference on a variety of foreign affairs questions, including the interpretation of treaties.<sup>75</sup> Further, courts and commentators have concluded that the President may violate international law and treaties, if he so chooses.<sup>76</sup>

Granting the President the power to interpret treaties without the Senate's consent goes little beyond the existing executive power to interpret, and even violate, international law in the course of executing foreign policy. Just as the President must interpret international law in the course of managing international relations, so too must the President interpret our treaties as part of the day-to-day execution of foreign affairs. Both functions flow from the President's constitutional and functional position in foreign affairs. Even in the administration of domestic statutes, where the rights of Congress are more clearly established than is the case with treaties, the courts grant the executive branch substantial discretion in interpreting ambiguous laws due to its superior expertise and its democratic accountability.<sup>77</sup> Oddly, critics of ABM Treaty reinterpretation sought to impose limits on presidential power in foreign affairs at its zenith, the execution of foreign policy, rather than at other moments, such as treaty for-

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breaking treaties required the consent of two-thirds of the Senate. See Stefan Riesenfeld, *The Power of Congress and the President in International Relations*, 25 *Calif. L. Rev.* 643, 658-65 (1937).

73. See *Goldwater*, 617 F.2d at 707-08.

74. See, e.g., *Restatement (Third) of the Foreign Relations Law of the United States* § 112, cmt. c (1990); Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 *Va. L. Rev.* 649, 707-15 (2000).

75. See Bradley, *supra* note 74, at 701-07.

76. See John C. Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 *U. Pa. L. Rev.* 1673, 1725-29 (2000); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453-55 (11th Cir. 1986); *The Paquete Hobarca*, 175 U.S. 677, 700 (1900).

77. See *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 865-66 (1984).



mation or termination, where the Senate has a better claim to joint participation.

In light of such overwhelming executive dominance in foreign affairs, there seems to be little constitutional reason to privilege Senate understandings of the text over those promoted by the President. To be sure, the Senate's advice and consent is necessary before the President can make a treaty. But the Senate votes on the treaty text, expressing its own understandings during the advice and consent process. To give the Senate's understandings of the treaty independent force, especially when the Senate does not directly express those understandings in the treaty text through reservations, allows one party to the treaty-making process to avoid the supermajoritarian hurdles imposed by the Treaty Clause. It also allows the Senate to intrude into the management of international relations by projecting its unenacted wishes into the nation's future conduct under the treaty.

Another way to view this question is to analogize it to the federal common law.<sup>78</sup> Federal courts often face gaps in statutes, either because Congress neglected to complete a statutory scheme or because it did not anticipate the statute's application to future circumstances. Courts will attempt to fill those gaps by inferring how Congress would have completed the statute, or how it would have applied the statute to an unforeseen case. Because Congress often cannot act in such situations, it falls upon the courts to exercise some law-making authority, but constrained by the legislature's intentions as expressed in other statutory provisions and the law's structure. When courts act to fill gaps, however, questions about the extent of their policy-making authority often arise, especially when Congress provides little guidance concerning the policies to be promoted by a federal common law rule.

Treaty reinterpretation involves the same basic issues as those surrounding the federal common law. Treaties often have gaps, as statutes do. For example, our review of the SDI dispute indicates that both the President and the Senate failed to make a conclusive argument that the Treaty text supported its interpretive position. In 1972, neither the United States nor the Soviet Union anticipated or considered the possibilities of futuristic weapons systems. Thus, the reinterpretation fight boiled down to

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78. On the nature of the federal common law, see Bradford A. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245 (1996); Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1 (1985). On the controversy over whether customary international law constitutes federal common law, see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815 (1997); Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 Fordham L. Rev. 371 (1997).

a struggle over which branch would have the authority to fill that gap in the ABM Treaty. In the federal common law context, courts ordinarily would look to indications of the legislature's intentions, in part because Congress's institutional barriers to enacting legislation prevent it from addressing every issue as it arises. In the treaty context, however, the situation is quite different. Often treaty matters will call on the President rather than the courts to adapt the text to new circumstances.

Further, the President does not suffer from institutional handicaps that might prevent him from creating a treaty "common law" rule. Because of his participation in the treaty process and his constitutional role as representative of the nation in foreign affairs, the President both can read the text of a treaty in line with its intentions and harmonize that interpretation with current foreign policy demands. He does not suffer from the problems of legitimacy that beset the federal courts in their common law-making role, as the President is both nationally elected and constitutionally-charged with conducting the nation's foreign relations.

Finally, the President's control over the interpretation of treaties makes sense when viewed in light of the combination of the Executive's foreign affairs and treaty powers. At a functional level, reinterpretation of the ABM Treaty only served as a shortcut to a goal that President Reagan could have achieved under his other executive powers. In the absence of any treaty at all, President Reagan possessed the commander-in-chief and sole organ powers, which would have allowed him to declare that the United States would conduct research and development into Star Wars-style ABM systems but would restrain itself from deploying any traditional ABM technologies so long as the Soviet Union did the same. The President further possessed the power to engage in executive agreements without the approval of the Senate or Congress.<sup>79</sup> Even in the presence of the ABM treaty, the President could have terminated the agreement, or even selected portions of it.

Instead of reinterpreting the ABM Treaty, President Reagan could have abrogated it, or abrogated only those portions that seemed to restrict SDI. He then used his other constitutional powers to declare that the United States would adhere unilaterally to the treaty's non-SDI-related terms as long as the Soviets did. In fact, the Reagan administration pursued a similar course in regard to SALT II: while both Presidents Carter and Reagan declined to seek Senate ratification in the wake of the Soviet invasion of Afghanistan, the Reagan administration promised to adhere to SALT II's

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79. See, e.g., *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937). If the President seeks to reach agreements outside of his plenary constitutional powers, however, the agreement cannot exercise domestic legal effects. See Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. Rev. 134 (1998).

limits on strategic nuclear weapons as long as the Soviets did.<sup>80</sup> An approach combining termination with unilateral declaration would have reached the same functional result as treaty reinterpretation. President Reagan would even have been free to negotiate a sole executive agreement with the Soviets that would have kept much of the ABM Treaty's restrictions on current technologies intact. Allowing the President to reinterpret treaties simply provides the Executive with a more effective method that bears more benefits for American foreign policy, without incurring the international political costs of formally breaking a treaty.

*C. The Problem With Reliance on Legislative History in Treaty Interpretation*

Critics of presidential treaty reinterpretation feel that the deference shown to the Executive in foreign affairs ought to give way before clear evidence of the Senate's understanding of a treaty. One obvious criticism of this approach is the question of what constitutes clear evidence: as we saw in the SDI controversy, pro-Senate advocates relied upon a few snippets of legislative history to claim that the Senate understood the ABM Treaty as completely barring all space-based systems.<sup>81</sup> More importantly, however, adopting this legislative history approach to treaty interpretation fails to appreciate the significant differences between treaty making and law making. These differences make the adoption of doctrines of statutory interpretation inappropriate in the treaty context.

The Senate's understanding of an enacted statute is clearly important, because Congress's intent controls the meaning of that text. Yet even in that context, as described below, the use of legislative history remains controversial. Proponents of a greater Senate role in treaty interpretation must carry the additional burden of showing why such legislative history ought to matter in an area over which the President has enhanced competence and authority. Examining the more sophisticated theories of statutory interpretation, in fact, demonstrates that privileging legislative history is even more illegitimate in the treaty context than it might be in the statutory context.

To understand the problems with using legislative history in treaty interpretation, we should recall the vast differences between treaties and statutes as instruments of national policy. An obvious distinction arises in their process of enactment. The process for statutes is familiar. After members of Congress introduce bills on the floor, they are referred to the relevant committees. Committees hold hearings on legislation, analyze and

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80. Phillip R. Trimble and Jack S. Weiss, *The Role of the President, the Senate and Congress with Respect to Arms Control Treaties Concluded by the United States*, 67 *Chi.-Kent L. Rev.* 645, 661 (1991).

81. See text accompanying notes 41-43 *supra*.

amend their provisions, and report them to the floor for full consideration. If a bill receives majority votes in both chambers, and undergoes further adjustment in conference committee between the Houses, it is sent to the President for approval. If the President vetoes the bill, the House and Senate may override his veto by re-passing the law by a two-thirds vote. Only passage of a second, repealing statute can terminate a statute. Because of this process, the center of gravity of the legislative process naturally settles in Congress, which acts as the initiator of legislation, terminates legislation, and can enact legislation even without the approval of the President.

The process for the enactment of treaties is quite different. The President decides to initiate an international agreement. The President, due to his monopoly over the conduct of diplomatic relations, controls the drafting of treaty provisions. The President supervises treaty negotiations, and the President decides whether to even submit a completed agreement to the Senate for its consent. The President's control over the process is so complete that he may refuse to make a treaty even after the Senate has given its advice and consent. Unlike the repealing of statutes, Senate participation is not needed to terminate a treaty: the President can do it unilaterally. In an almost reverse mirror image of the process for statutes, the treaty process shifts the center of gravity to the President, who initiates and terminates treaties, and who exercises an unconditional veto over their making. This difference in process and in institutional arrangements indicates that, rather than privileging Senate understandings of a treaty, the President's positions ought to control the interpretation of an international agreement.

Vesting unilateral authority to reinterpret treaties in the President appears even more sensible upon closer examination of the leading theories of statutory interpretation. When viewed in light of the ongoing academic work on statutory interpretation,<sup>82</sup> the debate that took place during the ABM controversy over the standards for judging the extent of the Senate's understandings reveals itself to be far too narrow. Arguing over whether a treaty meaning was "understood" (the narrow interpretation) or whether it was "generally understood" (the broad interpretation) is like wondering whether the hearing questions of a committee chairman or the floor statements of a Senator in the leadership bear more importance in interpreting a statute. Both questions ignore the more fundamental issue at stake: whether we should resort to legislative history at all in giving meaning to a treaty. In the treaty context, the case for using legislative history is far more dubious than in the statutory context. Not only do

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82. For the latest salvos, see John F. Manning, *Textualism and the Equity of the Statute*, 101 *COLUM. L. REV.* 1 (2001); William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation: 1776-1806*, 101 *COLUM. L. REV.* \_ (forthcoming 2001).

textualist arguments appear to carry even more force when applied to treaties, but the treaty context is so different that the focus of the interpretive process naturally rests with the President, rather than with Congress or even the courts.

There is an ongoing debate in legal academia over the value and legitimacy of legislative history, such as committee reports and floor statements, in the interpretive enterprise. Textualists, such as Professors John Manning and Adrian Vermeule, urge courts to abjure reliance upon legislative history for several reasons, including its lack of approval by majority vote, its unreliability, and judicial incompetence in its use.<sup>83</sup> Critics of the “new textualism,” such as Professors William Eskridge and Philip Frickey, respond that legislative history provides the necessary context without which an effort to give meaning to a text would be futile.<sup>84</sup> This debate has significant, yet largely overlooked, implications for the dispute over treaty interpretation.<sup>85</sup>

The most compelling argument on behalf of the textualist theory is that legislative history is at odds with the structural Constitution. Statutory text is the clearest indicator of congressional understanding because the text alone received the approval of both Congress and the President. Relying upon legislative history conflicts with the constitutional structure because it gives legal effect to materials that do not undergo the bicameral approval and presentment required for all statutes by Article I of the Constitution.<sup>86</sup> Permitting unenacted legislative history to determine the meaning of statutes allows groups within Congress to usurp the power of Congress as a whole, or, as Manning has put it, allows Congress to

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83. See, e.g., John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 *Colum. L. Rev.* 673 (1997); Adrian Vermeule, *Interpretive Choice*, 75 *N.Y.U. L. Rev.* 74 (2000).

84. See William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 *Mich. L. Rev.* 1509 (1998); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 *Stan. L. Rev.* 321 (1990).

85. As far as I can tell, only one author has attempted to explore in any detail the relationship between treaties and the recent debates over statutory interpretation. See Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 *U. Pa. L. Rev.* 687 (1998). Professor Van Alstine argues that no commonalities exist between domestic canons of statutory interpretation and treaties because of the special nature of treaties, especially in the private international commercial area. He argues that such treaties “delegate” to the federal courts the law-making power to fill in gaps in treaties, and that the courts should perform this task in harmony with the courts of other nations. *Id.* at 693. Professor Van Alstine’s account, however, suffers from his failure to identify any constitutional authorization for such an enormous transfer of power from the treatymakers to the courts, one that would arguably violate the Constitution if undertaken domestically. Professor Van Alstine’s approach also attempts to read into the Constitution treaty interpretation theories developed at the international level, but without demonstrating any domestic legal authorization for such a move.

86. See, e.g., Antonin Scalia, *A Matter of Interpretation* 34-35 (1997); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 *Harv. J.L. & Pub. Pol’y* 61, 68 (1994); Manning, *supra* note 83, at 706-37.

delegate to itself law-interpreting functions constitutionally vested in the judiciary and the executive branch.<sup>87</sup>

Related to this argument is the textualists' claim that the use of legislative history expands the judicial function beyond its proper boundaries. While they admit that gaps exist in statutes, textualists claim that gaps alone do not authorize courts to resort to legislative history in filling them. Rather, the separation of powers requires that judges defer to Congress to fill in statutory gaps.<sup>88</sup> As public choice theories have made clear, it is notoriously difficult to claim that collective bodies such as Congress have any unified intention at all, which provides yet another reason to focus exclusively on the statutory text. Even if such intent did exist, legislative history may be an unreliable indicator of that intent because it is the product of compromise and political maneuvering, and judges may be incompetent at construing it properly.<sup>89</sup> As Justice Scalia recently wrote, legislative history "is more likely to produce a false or contrived legislative intent than a genuine one."<sup>90</sup>

The arguments against using legislative history to interpret statutes apply with equal, if not greater, force in the treaty context. Floor colloquies or hearing statements about treaties never undergo approval by two-thirds of the Senate or ratification by the President. Part of the reason that the Framers established the two-thirds supermajority requirement for treaties was to render treaties difficult to make and to protect the interests of the states.<sup>91</sup> Allowing treaty-related legislative history to escape that requirement defeats the Framers' substantive purposes in erecting a difficult procedural hurdle. In this sense, the use of treaty-related legislative history may represent an even greater affront to the Constitution than the use of statutory legislative history, because in the former situation the unenacted materials evade an even higher vote requirement.

Legislative history avoids yet another barrier that does not apply to statutes. Treaties involve not just the President and Senate, but a third party, our treaty partner. Legislative history does not become part of the treaty text, and it is never formally communicated to the other nation as part of the documents that are ratified by both nations. Thus, the few pieces of legislative history expressed in the Senate concerning futuristic ABM systems never made it into the ABM Treaty text and therefore cannot be said to have received Senate consent, presidential ratification, and Soviet agreement. President Reagan's approach to treaty reinterpretation can be seen as an effort to give effect to meanings drawn solely from the Treaty

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87. See Manning, *supra* note 83, at 706-37.

88. See Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 544 (1983).

89. See Vermeule, *supra* note 83, at 129-39.

90. Scalia, *supra* note 86, at 31-32.

91. See John Yoo, *Globalism and the Constitution*, 99 Colum. L. Rev. 1955, 2023-38 (1999).

text. The broad interpretation can also be understood as an outright rejection of any use of legislative history as failing to meet the supermajority requirements of the Treaty Clause.

Other standard textualist arguments against the use of legislative history carry equal, if not greater, force in the treaty setting. It is difficult to know whether the Senate had any unified understanding of the ABM Treaty. Even proponents of the Senate's prerogatives in treaty interpretation could identify only a few isolated incidents when the subject of futuristic anti-missile technologies arose. It calls for a leap of faith to attribute the thoughts expressed in those sparse interchanges, between two or three Senators and hearing witnesses, to a collective legislative body with 100 members. Even if the Senate could be of one mind on the fine points of the ABM Treaty, it is difficult to be sure that we today are properly reading the legislative history of 1972. It may be a danger (as with all legislative history) that such materials merely provide a useful arena for interested parties to read their own policy preferences into the treaty. Rather than search for an uncertain, possibly non-existent, collective Senate intent, textualism suggests that interpretation ought to focus on the treaty text, as read by the democratically responsible branch vested with the day-to-day management of foreign affairs. That branch, of course, is the executive.

Textualism, of course, does not appeal to everyone. Other approaches to interpretation, often at odds with textualism, yield similar results in this specific case; indeed, they may militate even more strongly in favor of a presidential power of treaty reinterpretation. The main intellectual response to the new textualism has arisen in the dynamic interpretative theories developed by Eskridge and Frickey, who argue that statutory interpretation is a continuous process in which the courts exercise substantial discretion in reaching policy solutions.<sup>92</sup> Judges do not leave gaps unfilled for Congress, nor do they seek to find the right answer as evidenced by congressional intent. Rather, judges use a wide variety of contextual sources, influenced by their own policy values and those of the political and legal climate around them, to inform their practical reasoning about the meaning of statutes.<sup>93</sup> Statutes do not retain forever the fixed understandings held by the lawmakers at the time of enactment. Rather, their meanings evolve as federal courts adapt the law to new situations in line with changing public and legal values.<sup>94</sup>

In the world of dynamic statutory interpretation, the role of continual interpreter of the law rests with the federal courts. If we were to accept the Eskridge and Frickey model, it seems clear that in the treaty world this function would fall upon the President rather than the judges. Just as courts

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92. Eskridge & Frickey, *supra* note 84, at 345-53.

93. *Id.*

94. See William N. Eskridge, *Dynamic Statutory Interpretation* 179-83 (1994).

must interpret statutes in the course of fulfilling their constitutional function of resolving disputes, the President's constitutional role as manager of American foreign policy requires him to continually interpret treaties to apply to new international situations. As the functionally superior actor in foreign relations, the executive branch can more effectively harmonize new readings of treaty texts in light of the United States' changing national security goals and the geopolitical context. As head of the most democratically accountable branch in the national government, the President can better ensure that current treaty interpretations comport with publicly supported foreign policies. Ultimately, the people can hold the President directly accountable for his interpretation of a treaty, something that the polity can do only indirectly with the courts in the statutory interpretation context.

President Reagan's effort to reinterpret the ABM Treaty fits easily within this approach to interpretation. Whether one agreed or disagreed with the new defense policy, SDI was an effort by a democratically elected president to pursue a new national security goal. It relied upon exotic technologies that were not fully anticipated in 1972 and changed theories of deterrence in a world of nuclear parity between the superpowers. Rightly or wrongly, the SDI controversy represented the Reagan administration's attempt to reinterpret a treaty in line with new public values that took into account changed practical circumstances. In short, the Reagan administration sought to do exactly what Eskridge and Frickey expect federal courts to do in the process of interpreting statutes. Differences in the procedures for treaty making and the President's enhanced constitutional role in foreign affairs, however, require us to replace the judiciary with the executive branch in order to extend dynamic theories to treaty interpretation.

### III

#### The Original Understanding: The Framers' Perspective on Treaty Interpretation

The Framers' original understanding of the treaty power provides a necessary backdrop for the sketch of the treaty interpretation power set forth above. Without such a backdrop, one might erroneously presume, based on both textual and structural readings of the President's treaty power, that the Executive is wholly unchecked in foreign affairs. While much work on the original understanding of the treaty power has recently appeared, it has focused on such issues as the scope of the treaty power vis-à-vis the states<sup>95</sup> or the effect of treaties as domestic law.<sup>96</sup> Other work

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95. See Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390, 394 (1998) (arguing that treaty power ought to be subject to federalism limitations); David Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075 (2000) (taking the contrary view).



has centered on whether the meaning of Senate “advice and consent” is consistent with today’s system, in which the President monopolizes the negotiation of treaties, while the Senate’s role is limited to one of virtually no advice and after-the-fact approval.<sup>97</sup> Scholars of the Framing have not devoted as much investigation to the question of the allocation of power among the branches after the ratification of a treaty. Part III seeks to discover the likely original understanding on this issue.

I will argue that two themes emerge from the historical materials. First, it seems clear that the Framers understood the treaty power to be an executive power related to the President’s general authority over foreign affairs. They viewed the vesting of the treaty power in Article II as a restoration of a fundamentally executive power, one enjoyed by the British Crown, to the President. As a result, the President would have been seen as the primary actor in the interpretation of treaties. Second, the Framers knew that this power would not be unfettered. The treaty power, and other executive authority in foreign affairs, was widely understood to be counterbalanced by core parliamentary powers over legislation and finance.<sup>98</sup> Anglo-American constitutional practice had allowed the legislature not only to enact foreign affairs legislation or provide funds for policies with which it agreed, but also to exercise these powers freely to frustrate treaties that it opposed. While the Framing supports the notion that the President enjoys the unilateral authority to reinterpret treaties, it also shows that this power is balanced by Congress’s authority over domestic legislation.

#### A. *Origins of the Treaty Power in Anglo-American Thought*

Because the Framers had lived within the British political and legal system, the British constitution of the eighteenth century serves as a useful point of departure for our analysis. The British constitution’s allocation of power over treaties, as well as the writings of Locke, Montesquieu, and Blackstone, provided the context within which the Framers understood

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96. See Yoo, *supra* note 91 (arguing that original understanding supports doctrine that treaties are non-self-executing in American domestic law); John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 *Col um. L. Rev.* 2218 (1999) (arguing that text and structure justify non-self-execution). *But see* Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land,”* 99 *Col um. L. Rev.* 2095 (1999); Carlos Manuel Vázquez, *Laughing at Treaties*, 99 *Col um. L. Rev.* 2154 (1999).

97. See, e.g., Arthur Bestor, “Advice” From the Beginning, “Consent” When the End is Achieved, 83 *Am. J. Int’l L.* 718 (1989) [hereinafter Bestor, *Advice*]; Arthur Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties - The Original Intent of the Framers Historically Examined*, 55 *Wash. L. Rev.* 1 (1979) [hereinafter Bestor, *Respective Roles*]; Jack N. Rakove, *Solving a Constitutional Puzzle: The Treatymaking Clause as a Case Study*, 1 *Persp. in Am. Hist.* (n. s.) 233 (1984).

98. See Yoo, *supra* note 91, at 1982-2074.

their own Constitution.<sup>99</sup> A review of these materials indicates that eighteenth-century Anglo-American constitutional thought distinguished between the Executive's foreign affairs power on the one hand, and Parliament's authority over legislation on the other.

In his *Second Treatise of Government*, John Locke first distinguished between the legislative power and the executive power and then differentiated the functions of the executive power itself. Both powers derived, according to Locke, from man's abilities in the state of nature. The legislative power traced its roots to the individual's power to do as he pleased. The executive power originated in the individual's right to punish crimes against natural law. In a modern commonwealth, the legislative power included the authority to establish rules of conduct, while the executive power, a "power always in being," bore the responsibility to "see to the execution of the laws that are made and remain in force."<sup>100</sup>

As to foreign affairs, Locke identified a "federative" power within the executive authority which existed to govern "the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth."<sup>101</sup> While the federative and executive powers were usually vested together, Locke observed that they were "really distinct in themselves."<sup>102</sup> The executive power included "the execution of the municipal laws of the society within itself upon all that are parts of it." The federative power assumed "the management of the security and interest of the public without, with all those that it may receive benefit or damage from."<sup>103</sup>

Locke's differentiation of the federative from the executive power is significant. He envisioned the executive power as an agency of government that, since it was always in being, could faithfully execute laws enacted by an intermittently sitting legislature. Executives would be subject to the laws passed by the Parliament, which should establish rules to anticipate most domestic contingencies. Foreign affairs, by contrast, "are much less capable to be directed by antecedent, standing, positive laws" because "what is to be done in reference to foreigners," since it was dependent on their actions, "must be left in great part to the prudence of those who have

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99. The writers of *The Federalist Papers*, for example, sometimes quoted long passages from Montesquieu's *Spirit of the Laws*. See, e.g., *The Federalist* No. 9 (Alexander Hamilton). Blackstone's *Commentaries* had great appeal for the Founding generation as the authoritative treatise on many different areas of law. See Bernard Bailyn, *The Ideological Origins of the American Revolution* 31 (1967); Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 10-18 (1969).

100. John Locke, *The Second Treatise of Government* § 143-144 (Peter Laslett ed., Cambridge University Press 1988) (1690).

101. *Id.* § 146.

102. *Id.* § 147.

103. *Id.*

this power committed to them.”<sup>104</sup> Because foreign affairs are not easily controlled by prior legislation, when the Executive acts abroad it is not actually executing the law. Instead, the Executive is exercising the federative power by leading a united society in its relations with other societies, governed only by the law of nature.<sup>105</sup>

Montesquieu followed Locke’s example in distinguishing between war and peace on the one hand, and domestic legislation on the other. His famous discussion of the English constitution in *Spirit of the Laws* begins with the declaration that “[i]n every government there are three sorts of powers: the legislative; the executive in respect to things dependant on the law of nations, and the executive in regard to matters that depend on the civil law.”<sup>106</sup> Like Locke, Montesquieu understood the Executive to exercise both the foreign affairs power and the separate authority to execute domestic law. Montesquieu observed that the executive “makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions.”<sup>107</sup> In contrast, legislative power encompasses the authority to declare the “voice of the nation” and the rules of conduct that citizens owe one another.<sup>108</sup> The legislature maintains a check on the Executive through its funding power, particularly in the area of foreign affairs.<sup>109</sup> Montesquieu adhered to Locke’s basic vision of an executive foreign affairs power clearly distinct from domestic legislation.

In his *Commentaries on the Laws of England*, William Blackstone merged Locke’s federative function into the executive power. Blackstone agreed that the Executive’s functional superiority meant it ought to exercise the entire foreign affairs power. Because “[i]t is impossible that the individuals of a state, in their collective capacity, can transact the affairs of that state with another community equally numerous as themselves,” Blackstone observed, “[w]ith regard to foreign concerns, the sovereign is the delegate or representative of his people.”<sup>110</sup> Hence, the people vested their foreign affairs power in the King because “[u]nanimity must be wanting to their measures, and strength to the execution of their counsels.”<sup>111</sup> As a result, Blackstone argued that the King had the sole power to make treaties, for in addition to the King’s functional advantages, he served in this area as the sovereign representative of the nation. “What is done by the royal authority, with regard to foreign powers, is the act of

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104. *Id.*

105. See M.J.C. Vile, *Constitutionalism and the Separation of Powers* 66-67 (2d ed. 1998).

106. Charles Louis de Secondat, Baron Montesquieu, *Spirit of the Laws*, bk. 11, ch. 6, at 151 (Thomas Nugent trans., 1949) (1748).

107. *Id.*

108. *Id.*

109. *Id.* at 160-61.

110. 1 William Blackstone, *Commentaries* \*245.

111. *Id.*

the whole nation," Blackstone concluded.<sup>112</sup> For Blackstone, there was little doubt that the Executive held the power to make, break, and interpret treaties, for these were mere subsets of the general foreign affairs power vested exclusively in the King.

Contemporaneous British political history, however, suggested that in practice the Crown's power was not absolute. The contest between Crown and Parliament for primacy in foreign affairs was a critical element of the Civil War and the constitutional settlement.<sup>113</sup> While the Crown formally exercised absolute authority over treaty making, Parliament used its control over finances to win significant influence over the course of foreign policy. For example, though it had no formal role in the treaty-making process, the seventeenth-century Parliament used its powers over supply to force King James I to alter his diplomatic strategy to one of hostility toward the Catholic powers, France and Spain.<sup>114</sup>

From the restoration of the monarchy in 1660 through the end of the Seven Years' War in 1763, Great Britain engaged in at least seven major conflicts which involved the making, interpreting, or breaking of treaties that required Parliament either to provide funds or enact commercial legislation.<sup>115</sup> In 1698 and 1700, parliamentary opposition prevented William III from fulfilling what were known as the Partition Treaties,<sup>116</sup> and in 1713 Parliament refused to implement an Anglo-French commercial treaty viewed as crucial to the nation's foreign relations.<sup>117</sup> Parliament's funding

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112. *Id.*

113. In the English Civil War, the monarch was deposed and eventually replaced by Cromwell as Lord Protector. *The Stuart Constitution 1603-1688: Documents and Selected Commentary* 189-97 (J.P. Kenyon ed., 1st ed. 1966). After a restoration and the Glorious Revolution, in which Parliament replaced Charles II with William and Mary, a new constitutional settlement was agreed upon. *See* David L. Keir, *The Constitutional History of Modern Britain, 1485-1951*, at 232-36 (1953).

114. In 1621, Parliament petitioned James to terminate his alliance with Spain and attack her in order to slow down the pace of Catholic victories in the Thirty Years' War, offering him a small subsidy in return. *See* Commons Petition (Dec. 3, 1621), *reprinted in The Stuart Constitution*, *supra* note 113, at 43-47. While he initially resisted what he saw as legislative overreaching, three years later James terminated treaties with Spain and went to war against his former allies in Germany, in exchange for new grants of funding that were contingent on his following Parliament's wishes. *See* Subsidy Act of 1624, *reprinted in The Stuart Constitution*, *supra* note 113, at 76-80.

115. *See* Jeremy Black, *British Foreign Policy in an Age of Revolutions, 1783-1793*, at 472-518 (1994); Jeremy Black, *British Foreign Policy in the Age of Walpole 75-89* (1985); Jeremy Black, *Natural and Necessary Enemies: Anglo-French Relations in the Eighteenth Century* 93-133 (1986); Jeremy Black, *A System of Ambition?: British Foreign Policy 1660-1793*, at 12-58 (1991) [hereinafter *Black, System of Ambition*]. Black makes clear the manner in which Parliament's constitutional powers allowed it to play an influential role in the setting of British foreign policy. The other significant line of work on British foreign relations during this period, which emphasizes the decisions and personalities of individual ministers and diplomats, acknowledges the importance of Parliament and its constitutional powers. *See, e.g.,* H.M. Scott, *British Foreign Policy in the Age of the American Revolution* 19-22 (1990).

116. *See* Black, *System of Ambition*, *supra* note 115, at 46-48.

117. *See id.* at 49.

powers gave it a functional veto over any treaties requiring military spending, financial subsidies to other powers, or commercial regulations. Yet, just as parliamentary resistance could frustrate the Crown's foreign policies, parliamentary support could enhance them. Parliament's financial and political support allowed the Crown to act with a stronger hand abroad by signaling domestic stability and access to resources to carry out threats and promises.<sup>118</sup>

By the time of the Framing, the British constitutional system had reached an accommodation concerning the royal prerogative over treaties that provided the legislature with a significant role. While the Crown formally enjoyed an absolute monopoly over treaty making, Parliament retained the authority to make any changes in domestic law or to raise the revenue needed to comply with the agreement.<sup>119</sup> As one British diplomatic historian acknowledged, Parliament's authority over implementing legislation and financial support allowed it to "[exert] a more direct influence over foreign policy" than the formal allocation of constitutional powers would suggest.<sup>120</sup>

This allocation of powers between the Executive and the legislature continued through the colonial and early national American periods. Until the early 1760s, London sought to avoid interference in internal colonial affairs, while the colonies acknowledged the Crown's control over foreign policy.<sup>121</sup> The colonial assemblies exercised full legislative powers within their jurisdictions and were able to enjoy substantial influence upon the governor's control over foreign affairs through their control over the purse.<sup>122</sup> When the Crown sought to alter this arrangement by imposing direct taxes in the colonies, the future Framers began the resistance that would lead to revolution. They sought to restore the assemblies' authority over funding and legislation, while still recognizing the Executive's power over foreign affairs.<sup>123</sup> The Articles of Confederation maintained this balance of powers by granting the Continental Congress the functions of the Crown, including the sole power to make treaties. The national government, however, still relied upon the states to carry out treaties and to fund national obligations.<sup>124</sup>

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118. Yoo, *supra* note 91, at 2002.

119. See G.C. Gibbs, *Laying Treaties Before Parliament in the Eighteenth Century*, in *Studies in Diplomatic History* 116-37 (Ragnhild Hatton & M.S. Anderson eds., 1970).

120. Scott, *supra* note 115, at 20.

121. Jack P. Greene, *Peripheries and Center: Constitutional Development in the Extended Politics of the British Empire and the United States, 1607-1788*, at 237 (1986).

122. See, e.g., Jack P. Greene, *The Quest for Power: The Lower Houses of Assembly in the Southern Royal Colonies 1689-1776*, at 297-306 (1963) (showing how the lower houses influenced foreign affairs through sharing the exercise of military powers, enabled by the power of the purse).

123. Yoo, *supra* note 91, at 2007.

124. *Id.* at 2009-10.

Executive authority was treated differently at the state level. As Gordon Wood has shown, state constitutions demonstrated a marked effort to reduce executive authority in favor of the legislature.<sup>125</sup> Many of these efforts, however, sought to eliminate the independence and unity of the governor's office, rather than to shift substantive executive powers to the state assemblies. While the Framers chose to restore unity and independence to the executive branch, they did not have to engage in a similar rethinking about the nature of substantive executive power.<sup>126</sup> Further, after the initial burst of pro-legislative constitution-making immediately after independence, other states such as New York, Massachusetts, and New Hampshire established governors who enjoyed the unity, independence, and broad executive powers that would presage the Presidency.<sup>127</sup> These later examples left the power to conduct international relations in the Executive, thereby conforming to more traditional Anglo-American understandings about the allocation of the foreign affairs among the different branches of government.

*B. The Evolution of the Treaty Clause at the Constitutional Convention*

When the Framers met in Philadelphia to draft a new Constitution, the nation's inability to effectively pursue a unified foreign policy was at the top of their agenda. Allowing the federal government rather than the states to enforce treaties initially absorbed more of the Framers' attentions than the allocation of the treaty power within the national government. The first general proposal for a Constitution, the Virginia Plan, did not even address the question specifically, but instead vested in the national executive all of the executive powers of the Continental Congress.<sup>128</sup> Some delegates protested this aspect of the plan because they feared that "the Executive powers of [the Continental] Congress might extend to peace & war & which would render the Executive a Monarchy, of the worst kind, to wit an elective one."<sup>129</sup> Both James Wilson and James Madison agreed that the executive power ought not include the powers over war and peace.<sup>130</sup> In the

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125. Wood, *supra* note 99, at 138.

126. See Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* 271 (Rita & Robert Kimber trans., 1980). More recent historical work claims that Wood overstates the case, and that concepts of a separation of powers with an independent executive emerged earlier than the Federal Convention. See Marc W. Kruman, *Between Authority & Liberty: State Constitution Making in Revolutionary America* 109-30 (1997); Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 80-86 (1985).

127. See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 *Calif. L. Rev.* 167, 228-34 (1996).

128. 1 *The Records of the Federal Convention of 1787*, at 21 (Max Farrand ed., 1911) [hereinafter *Farrand*].

129. 1 *id.* at 64-65 (summarizing the position of Charles Pinckney).

130. 1 *id.* at 65-67.

New Jersey Plan, delegates from the smaller states proposed vesting the treaty power in the legislature. By the end of June, the delegates seemed to generally agree that the treaty power ought to be vested in either a Senate or the legislature as a whole. Only Alexander Hamilton dissented, making a lonely proposal to give the Executive the power to make treaties, while vesting “the power of advising and approving all Treaties” in a Senate.<sup>131</sup>

Then, on August 6, 1787, the Committee on Detail placed its draft of the Constitution before the Convention, proposing that the Senate “shall have power to make treaties, and to appoint Ambassadors, and Judges of the supreme Court.”<sup>132</sup> Between late June and early August, however, a crucial change had undermined the notion of a senatorial monopoly over treaties. As originally conceived, the Senate would have served as a sort of council of state, similar to those that shared executive power with the state governors.<sup>133</sup> Its members were to be selected by the House, which was elected solely in proportion to population. But on July 16, the delegates had resolved the dispute between the large and small states over representation in Congress by agreeing to a bicameral legislature composed of a popularly elected House of Representatives and a state-selected Senate.<sup>134</sup> What was to have been a small body chosen to participate in the executive power with the President was suddenly transformed into a larger branch of the legislature representing state interests.

Once the Convention had based representation in the Senate on the states, it began to shift executive responsibilities to the President. The redesigned Senate would be so large, initially twenty-six members, that it could not exercise the wisdom and secrecy required for executive action. Also, as a body more representative of the states than the people, the Senate might be more devoted to sectional concerns than to the national interest. When the Convention turned to the Treaty Clause on August 23, delegates began an effort to dilute the Senate’s sole authority, which included attempts to require legislative approval of treaties and to give the President a share of the treaty power.<sup>135</sup> According to Madison, “the Senate represented the States alone, and that for this as well as other obvious reasons it was proper that the President should be an agent in treaties.”<sup>136</sup> One of these “obvious reasons,” as Professor Jack Rakove has argued, was the President’s democratic accountability to the national electorate.<sup>137</sup> After some debate, in which several other members criticized the Senate’s sole authority over treaties, the Convention sent the Treaty Clause to the

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131. See 1 *id.* at 244 (New Jersey Plan); 1 *id.* at 292 (Hamilton’s proposal).

132. 2 *id.* at 183.

133. Yoo, *supra* note 91, at 2031.

134. 2 Farrand, *supra* note 128, at 15-16.

135. See 2 *id.* at 392-93.

136. 2 *id.* at 392.

137. Rakove, *supra* note 97, at 240-41.

Committee on Postponed Parts for further resolution.<sup>138</sup> The August debates demonstrate that the original allocation of the treaty power in June no longer represented a consensus in favor of senatorial or legislative control of treaty making, and that the delegates were searching for a method to reconcile a desire for popular control over foreign relations with the Senate's new basis for representation.<sup>139</sup>

*1. Emergence of the Executive's Dominant Role*

On September 4, 1787, the Committee on Postponed Parts produced the version of the Treaty Clause that we have today: presidential power over the making of treaties with the advice and consent of two-thirds of the Senate.<sup>140</sup> It also transferred the provision from the article governing the Senate's power to the part of the Constitution that would become Article II. At this point, a flurry of proposals ensued, some to reduce the two-thirds requirement to a simple majority, some to make treaties even more difficult to reach. None, however, received the support of a majority of the delegates.<sup>141</sup> With the end of the Convention's summer deliberations soon approaching, the delegates approved the clause unchanged, with three states dissenting on September 8, only nine days before the Convention's adjournment.<sup>142</sup>

Some commentators claim that this record points to the Senate's equal, if not dominant, role in the exercise of the treaty power, implying an equal power over treaty interpretation as well. Arthur Bestor, for example, has argued that the President's late inclusion shows that the Framers still considered the treaty process to be dominated by the Senate, and they acknowledged presidential participation only because of the unitary Executive's control over the appointment of ambassadors.<sup>143</sup>

Other evidence, however, points in a different direction. During the ratification, some delegates to the Federal Convention explained that the Executive's participation in treaties arose because the President "was the ostensible head of the Union," subject to consent by the Senate as the representatives of the States.<sup>144</sup> Furthermore, during the days just before approval of the Treaty Clause, the Convention revised the structure of the electoral process to de-emphasize the Senate. The power to choose the President, in the event that the Electoral College could not reach a decision,

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138. 2 Farrand, *supra* note 128, at 392-94.

139. *See id.* at 241.

140. 2 Farrand, *supra* note 128, at 498-99.

141. 2 *id.* at 538, 540-41, 544-50.

142. 2 *id.* at 540-41 (rejecting amendments to Treaty Clause); 547-50 (approval of Treaty Clauses, with North Carolina, South Carolina, and Georgia voting no).

143. Bestor, *Respective Roles*, *supra* note 97, at 88, 108-09.

144. 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 265 (Jonathan Elliot ed., 2d ed. 1854) (Charles C. Pinckney) [hereinafter *The Debates*].



migrated from the Senate to the House of Representatives.<sup>145</sup> Several delegates argued in favor of eliminating the Senate's role because of its non-representative nature; the resulting change freed the President from political and constitutional dependence on the Senate.<sup>146</sup>

Professor Rakove concludes that this electoral change meant that the President would become more than merely an agent of the Senate in the making of foreign policy.<sup>147</sup> I would go farther and suggest that in rendering the President politically and constitutionally independent, the Framers deliberately allowed for substantial freedom and discretion on the part of the President in foreign affairs and treaty making. Even if one finds this evidence inconclusive on the scope of the President's role, the text itself now gave the President the primary lead on treaties, which was consistent with traditional Anglo-American understandings of the executive power. By acting within this tradition, the Framers had laid the textual basis for broad executive power over the interpretation of treaties.

When the Constitution went to the states for ratification, criticism of the Treaty Clause focused not on the President, but on the Senate. Anti-Federalists viewed the Senate as an aristocratic body whose participation in the treaty power would corrupt the executive branch and violate the separation of powers.<sup>148</sup> This attack pressed the Federalists to emphasize the President's involvement in the treaty power. In the first major public defense of the Constitution, James Wilson declared that the treaty power did not violate the separation of powers, noting: "[I]n its executive character, [the Senate] can accomplish no object, without the concurrence of the President."<sup>149</sup> In the Pennsylvania ratifying convention, Wilson emphasized that the treaty power remained primarily an executive one, with the Senate assuming a secondary role. "The Senate can make no treaties; they can approve of none unless the President lay it before them," Wilson said. "With regard to their power in forming treaties, they can make none; they are only auxiliaries to the President."<sup>150</sup>

In New York, Federalists similarly emphasized the President's leading role in the management of foreign relations and treaty affairs. In *Federalist No. 64*, John Jay as Publius argued that successful diplomatic negotiations required the "perfect secrecy and immediate dispatch" enjoyed by the President, not the multitudinous Senate.<sup>151</sup> The Senate, as a body charac-

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145. 2 Farrand, *supra* note 128, at 527.

146. See, e.g., 2 Farrand, *supra* note 128, at 513, 523-24.

147. Rakove, *supra* note 97, at 246.

148. See Yoo, *supra* note 91, at 2039-40.

149. James Wilson, Speech at Public Meeting in Philadelphia (Oct. 6, 1787), *reprinted in* 13 *Documentary History of the Ratification of the Constitution* 341 (John P. Kaminiski & Gaspare J. Salerdino eds., 1986) [hereinafter *Documentary History*].

150. 2 *Documentary History*, *supra* note 149, at 480, 491.

151. *The Federalist No. 64*, at 327 (John Jay) (Gary Wills ed., 1982).

terized by “talents, information, integrity, and deliberate investigation,” was better able to provide guidance to the President about the larger foreign policy goals to be pursued.<sup>152</sup> In *Federalist No. 75*, Hamilton also emphasized the President’s functional superiority in conducting foreign relations. Hamilton explained:

The essence of the legislative authority is to enact laws, or in other words to prescribe rules for the regulation of the society. While the execution of the laws and the employment of the common strength, either for this purpose or for the common defence, seem to comprise all the functions of the executive magistrate. The power of making treaties is plainly neither the one nor the other. It relates neither to the execution of the subsisting laws, nor to the enactment of new ones, and still less to an exertion of the common strength. Its objects are CONTRACTS with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department, and to belong properly neither to the legislative nor to the executive. The qualities elsewhere detailed, as indispensable in the management of foreign negotiations, point out the executive as the most fit agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a part of the legislative body in the effect of making them.<sup>153</sup>

Hamilton believed that to the extent that treaties are the product of relations between states, they are executive in nature. Senate involvement is only necessary to provide some safeguard on executive power, because some treaties may operate as domestic laws. The President, however, maintains the upper hand: the treaty power is fundamentally executive in nature, and the President’s qualities are “indispensable in the management of foreign negotiations.” While some have read *Federalists No. 64* and *No. 75* as acknowledging an equal if not greater voice in treaties for the Senate,<sup>154</sup> it seems that they foresee a greater role for the President as the initiator of treaty making, with the Senate playing a more amorphous, domestic role in working to set broader foreign policy.

The first North Carolina convention provides the final historical evidence regarding the original understanding of the allocation of the treaty power. Federalist William Davie justified the Executive’s role not merely because the President would enjoy “secrecy, design, and dispatch,” but more importantly because he was also less subject to factionalism, and

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152. *Id.* at 328.

153. *The Federalist No. 75*, at 380 (Alexander Hamilton).

154. *See Rakove, supra* note 97, at 255.

“being elected by the people of the United States at large, will have their general interest at heart.”<sup>155</sup> Therefore, “it would seem that the whole power of making treaties ought to be left to the President.”<sup>156</sup> The Convention, however, had to allocate a role to the Senate due to the concerns of the small states, which had demanded “an absolute equality in making treaties.”<sup>157</sup> To assuage their concerns, it was “indispensable to give to the senators, as representatives of the states, the power of making, or rather ratifying treaties.”<sup>158</sup> Davie, like Wilson, thus justified a broad role for the President in treaty making and in conducting international relations on his democratic accountability to the nation as a whole.

This evidence from the Framing provides two important clues as to the original understanding of the treaty power, treaty interpretation, and the separation of powers. First, it shows that the common understanding that prevailed during the British, colonial, and early national periods located the power to make treaties and to conduct international affairs firmly in the executive branch. Treaty interpretation would have been seen as an ancillary subset of one or both of these powers. The novel innovation of the text was not presidential participation, but rather its provision of any role to the Senate. The ratifiers of the Constitution probably understood the Senate’s function as a limitation on a broader executive power in foreign affairs, rather than the creation of a joint presidential-senate role throughout foreign affairs. The Senate’s ancillary role both safeguarded the interests of the states and checked presidential power in the making of treaties. Nonetheless, the general textual vesting of the executive power in the President would have led the framing generation to understand Article II as giving the President substantial discretion in the conduct of foreign affairs, including the interpretation of treaties.

Second, it seems relatively clear that the Framers at the Philadelphia Convention became disenchanted with their original proposal of centering the treaty power in the legislature. Even vesting the power in the Senate represented an early compromise against legislative participation in treaty affairs; originally, the Senate was to have been an executive council of state selected by the House.<sup>159</sup> Once the delegates had reached the Great Compromise over state representation in Congress, they sought to leaven the power over treaties, and foreign policy more generally, with a democratic element. As the Presidency evolved into a unitary, independent institution, it became the natural locus for the conduct of foreign relations. When the Constitution moved into the ratifying conventions, the Framers

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155. 4 Debates, *supra* note 144, at 119-20.

156. 4 *id.*

157. 4 *id.*

158. 4 *id.*

159. See text accompanying *supra* notes 132-139.

emphasized the Executive's functional advantages in foreign affairs, notably its ability to act with energy, secrecy, and dispatch. Though it would be going too far to say that the Framers intentionally chose to give the executive branch an utterly complete and total monopoly over foreign affairs to the exclusion of the Senate, the ratification evidence suggests that the Framers came to understand that they had created a system whose structure would allow the President to assume the primary initiative in the conduct of foreign relations. While the Senate would have a checking role in the making of treaties, and have a voice in the setting of broad foreign policy goals, the President's functional advantages and his more direct accountability justified expanding his powers. Reading the evidence as anticipating an equal Senate role in treaty interpretation would contradict the general movement toward executive power during the Federal Convention and the ratification, and would undermine the goals of the Framers in vesting the bulk of the foreign affairs power in the President.

## 2. *A Continuing Role for the Legislative Branch*

For the most part, the Framers were silent on how they anticipated the interaction between the branches to take shape in the realm of foreign affairs. We can draw some inferences, however, from their views on the domestic implementation of treaties. As the Framers well knew from recent British history, treaties represented political agreements between sovereigns that required legislation from Parliament before they could be implemented at home. Parliament could influence foreign policy by refusing to enact laws or vote supplies necessary for the Crown to make and execute treaty obligations. As I have argued above and elsewhere, the Framers' understanding of the Constitution, as expressed in the executive treaty power's location in Article II and its separation from the federal legislative power of Article I, continued this distinction between the treaty and the legislative power.<sup>160</sup> One implication of this separation is the non-self-executing nature of treaties that regulate matters within Congress's Article I powers.<sup>161</sup> Yet another result of this structure is Congress's freedom to frustrate presidential foreign policy and treaty initiatives through legislation and appropriations. If the Executive were to use its powers over treaty interpretation to change foreign policy, that would not be the end of the matter. Like the British Parliament, the Senate and House could use their legislation and funding powers to oppose a new treaty reinterpretation. Political struggle by the political branches, using their plenary

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160. See generally Yoo, *supra* note 91 (arguing that the non-self execution of treaties promotes the original understanding's preservation of the separation of Article II treaty power from Article I legislative power).

161. See Yoo, *supra* note 96, at 2233-43.

constitutional powers, is not itself unconstitutional; on the contrary, it is the way the Framers designed the system to work.

The resolution of the ABM Treaty reinterpretation debate ultimately followed the model that the Framers envisioned. In response to the Reagan administration's attempt to establish a new, broader interpretation of the Treaty, Congress pursued a variety of informal and formal political strategies that sought to advance its own foreign policy preferences. One can view the Senate hearings and floor speeches condemning the illegality of the broad reading of the Treaty as a form of political pressure to stop the expansion of the SDI program. The Senate further expressed its foreign policy preferences by placing conditions on the INF Treaty to effectuate its preferred method of treaty interpretation. Although probably unconstitutional, the conditions raised the political pressure on the administration to follow the narrow interpretation of the ABM Treaty favored by the Senate. The implicit threat was, of course, that if the administration did not hew to the narrow interpretation, the Senate would not cooperate in approving future arms control agreements. Congress also used its formal constitutional powers by conditioning Defense Department spending on a requirement that all SDI research and development be consistent with the narrow interpretation.<sup>162</sup> The executive branch remained free to interpret the ABM Treaty as it saw fit, but functionally could not take any concrete actions that went beyond the Senate's preferences or the House's spending limitation.

After the Soviet Union's demise, SDI seemed to lose its urgency, and President Clinton downgraded the program when he took office (pp. 490-91). Rather than coming to a legalistic conclusion, the ABM reinterpretation debate ultimately was resolved through the political interaction of the branches, which used their plenary constitutional powers to reach a settlement of the issue.

### *C. The Neutrality Proclamation: An Early Example of Treaty Interpretation*

The Framers' understanding that the President would have an independent power to interpret treaties was borne out by the actions of President Washington in issuing the Neutrality Proclamation of 1793. Many of the leading figures in the administration and in Congress were members of the Federal Convention or the state ratifying conventions, most notably George Washington, Alexander Hamilton, and James Madison. The Framers' understandings of the Constitution, as reflected in their decisions on foreign affairs, are significant for our present interpretive enterprise. Perhaps more importantly, the Washington administration set many

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162. See Koh, *supra* note 24, at 155.

of the precedents that guide the interaction of the branches of government to this day. Early post-ratification history suggests that those who first put the Constitution into practice believed that the President had plenary authority to interpret treaties.

Washington's issuance of the Neutrality Proclamation put the President's power over treaty interpretation on full display.<sup>163</sup> After beheading King Louis XVI, revolutionary France declared war on Great Britain and Holland on February 1, 1793. The new regime's ambassador to the United States, the notorious Edmund Genet, landed in early April, about the same time that news reached the United States of events on the Continent. The news threw the American government into a quandary concerning its obligations under the 1778 treaties with France, which had been crucial to the success of the American Revolution. Article 11 of the 1778 Treaty of Alliance called upon the United States to guarantee French possessions in America, which meant that France could now call for American defense of the French West Indies from British attack.<sup>164</sup> Article 17 of the separate 1778 Treaty of Amity and Commerce gave French warships and privateers the right to bring prizes into American ports, while denying the same right to her enemies.<sup>165</sup> Article 22 of the same agreement prohibited the United States from allowing the enemies of France to equip or launch privateers or sell prizes in American ports.<sup>166</sup>

Washington's cabinet was deeply split over whether to observe these treaty obligations. Upon learning of the French declaration of war, Treasury Secretary Hamilton, "with characteristic boldness," began to press for a suspension of the French treaties.<sup>167</sup> Hamilton feared that providing military assistance to the French, or even allowing France to use the United States as a base for naval warfare, would provoke British retaliation against the United States.<sup>168</sup> He argued that while a change in government did not automatically void treaties with another state, the uncertain status of the French government and the dangerous wartime situation allowed the

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163. The historical details in this Part rely upon Stanley M. Elkins & Eric L. McKittrick, *The Age of Federalism* 303-73 (1993); Forrest McDonald, *The Presidency of George Washington* 113-37 (1974); *Editorial Note, Jefferson's Opinion on the Treaties with France, reprinted in 25 The Papers of Thomas Jefferson* 597-602 (John Catanzariti et al. eds., 1992); Letter from Alexander Hamilton to John Jay (Apr. 9, 1793), in *14 Papers of Alexander Hamilton* 297, 298 n.4 (Harold C. Syrett et al. eds., 1969). These events are also discussed in David P. Currie, *The Constitution in Congress: The Third Congress, 1793-1795*, 63 *U. Chi. L. Rev.* 1, 4-16 (1996).

164. Treaty of Alliance, Feb. 6, 1778, U.S.-Fr., Treaty Series 82, art. XI, 7 *Bevans* 777, 1778 U.S.T. Lexis 11.

165. Treaty of Amity and Commerce, Feb. 6, 1778, U.S.-Fr., 8 *Stat.* 12., art. XVII.

166. *Id.* art. XXII.

167. *Notes on Washington's Questions on Neutrality and the Alliance with France*, May 6, 1793, reprinted in *Papers of Thomas Jefferson*, *supra* note 163, at 665-66.

168. *Id.*

United States to suspend the 1778 agreements.<sup>169</sup> While Secretary of State Jefferson agreed that American military participation in the European war was out of the question, he favored observance of the 1778 agreements because of his sympathy toward the French Revolution and his suspicion of political ties with Britain.

On April 18, Washington sent a list of thirteen questions concerning the position to take on the war to Hamilton, Jefferson, Secretary of War Henry Knox, and Attorney General Edmund Randolph, and ordered a cabinet meeting for their discussion the next day.<sup>170</sup> Almost all of Washington's questions involved the interpretation of the 1778 French treaties. Question four, for example, asked: "Are the United States obliged by good faith to consider the Treaties heretofore made with France as applying to the present situation of the parties."<sup>171</sup> Washington also requested the cabinet to consider whether Article 11 of the Treaty of Alliance applied to an offensive war by France, whether the United States could observe the treaties and remain neutral, and under what conditions the United States could suspend or terminate the 1778 agreements. While most scholars today discuss the Neutrality Proclamation as an example of executive declaration of international law, or of the integration of international and domestic law,<sup>172</sup> they have failed to realize that the neutrality debate was at its core a question of treaty interpretation.

Washington's questions produced a deceptive unanimity in the cabinet. Everyone answered Washington's first question by stating that, yes, a proclamation of neutrality should be issued, but in order to assuage Jefferson's concerns, the word "neutrality" was not used. Washington issued the proclamation, drafted by Randolph, on April 22.<sup>173</sup> Acknowledging a state of war between France and the other European powers, he declared that the United States "should with sincerity and good faith adopt and pursue a conduct friendly and impartial toward the belligerent [sic] Powers."<sup>174</sup> President Washington further saw fit to "declare the disposition of the United States to observe the conduct aforesaid towards those Powers respectfully" and "to exhort and warn the citizens of the United States carefully to avoid all acts and proceedings

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169. See Letter from Alexander Hamilton to John Jay (Apr. 9, 1793), in *14 Papers of Alexander Hamilton*, *supra* note 163, at 297-98.

170. Letter from President George Washington to Alexander Hamilton, Thomas Jefferson, Henry Knox, and Edmund Randolph (Apr. 18, 1793) [hereinafter Washington to Hamilton], in *14 Papers of Alexander Hamilton*, *supra* note 163, at 326-27.

171. *Id.* at 326.

172. See, e.g., Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 *Vand. L. Rev.* 819 (1989); Douglas J. Sylvester, *International Law as Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 *N.Y.U. J. Int'l L. & Pol.* 1 (1999).

173. George Washington, Proclamation, reprinted in 1 *Compilation of the Messages and Papers of the Presidents: 1789-1897*, at 156 (James D. Richardson ed., 1900).

174. *Id.*

whatsoever, which may in any manner tend to contravene such disposition.”<sup>175</sup> The Proclamation also stated that the federal government would prosecute those who “violate the law of nations, with respect to the Powers at war.”<sup>176</sup> Everyone in the cabinet realized that the United States was in no position to be anything but neutral, and there was immediate agreement to issue the proclamation.<sup>177</sup>

Two other questions met with unanimous answers. The cabinet agreed on Washington’s second question, stating that the President should receive Genet. Finally, the Cabinet decided unanimously, and apparently with little discussion, in the negative in response to Washington’s last question: “Is it necessary or advisable to ask together the two Houses of Congress with a view to the present posture of European affairs? If it is, what should be the particular objects of such a call?”<sup>178</sup> Adjourning the meeting without reaching the other ten questions, Washington asked his advisers to submit written responses on the suspension or termination of the 1778 treaties.

In his response of April 28, Jefferson argued that nothing in international law allowed for the suspension or annulling of a treaty simply because of a change in government.<sup>179</sup> He also argued that France was unlikely to ask the United States to fulfill its obligation to defend the West Indies, and that it would be better to wait for a request before deciding whether to terminate the treaty.<sup>180</sup> Hamilton, joined by Knox, argued on May 2 that the uncertain outcome of the civil war in France justified the United States in temporarily suspending the operation of the Treaty.<sup>181</sup> They also argued that the treaty applied only to defensive wars, not one in which France had declared war first, and that international law would justify termination of the treaties due to the dangerous circumstances.<sup>182</sup> Randolph’s opinion, entered on May 6, agreed with Jefferson. Telling Jefferson the next day that he “never had a doubt about the validity of the treaty,” Washington decided against suspension.<sup>183</sup> On the question of the Article 11 obligation to defend the French West Indies, Washington decided to remain silent, a wise choice, as Jefferson’s prediction that the French would not affirmatively invoke the provision proved correct.

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175. *Id.*

176. *Id.*

177. Elkins & McKittrick, *supra* note 163, at 338.

178. Washington to Hamilton, *supra* note 170, at 327.

179. Opinion on the Treaties with France, Apr. 28, 1793, in 25 Papers of Thomas Jefferson, *supra* note 163, at 608-18.

180. *Id.* at 610-11.

181. Letter from Alexander Hamilton & Henry Knox to President George Washington (May 2, 1793), in 14 Papers of Alexander Hamilton, *supra* note 163, at 367-96.

182. *Id.*

183. Notes on Washington’s Questions on Neutrality and the Alliance with France, reprinted in Papers of Thomas Jefferson, *supra* note 163, at 666.



These events show that President Washington and his cabinet unanimously assumed that interpretation of the 1778 French treaty rested solely within presidential authority. Washington's April 22 Proclamation was not just a declaration that the United States would remain neutral in the European conflict. It was fundamentally a presidential determination that our treaty obligations, which included a defensive alliance, did not require the United States to enter the war on the side of the French. Only after Washington reached that interpretation could he declare the United States to be neutral in the conflict. Washington did not act pursuant to any congressional authorization to interpret the treaties. Indeed, the Cabinet unanimously agreed that the President should not call Congress into session to discuss their meaning.

More than a year later, Congress finally stepped in, providing legislation for federal prosecution of those who violated American neutrality.<sup>184</sup> This legislative act accepted Washington's interpretation of the 1778 treaties and implemented it at the domestic level.<sup>185</sup> Hence, the early American approach to the European war demonstrated a sensitivity to the distinction between treaty interpretation, which belonged to the Executive, and domestic implementation, which was the province of Congress.

A second lesson to emerge from these events comes from the manner in which Washington and his cabinet construed the Franco-American treaties. The Continental Congress conducted the negotiation and ratification of the 1778 Treaty.<sup>186</sup> Washington, however, never asked what understanding the Continental Congress held concerning American obligations under the agreement, nor did any of his cabinet members (including Jefferson, who strove mightily to interpret the treaty in the light most favorable to France). Rather, both Hamilton and Jefferson grounded their appeals in the national interest, international law, considerations of power politics, and reason and common sense. Neither Washington nor his cabinet ever mentioned consulting the Journals of the Continental Congress or the papers of the negotiating team in Paris. None of them expressed a belief that consultation with the existing Congress or Senate was necessary or advisable. Washington and the leading figures of his administration proceeded on the assumption that it was the exclusive province of the executive branch to interpret treaties on behalf of the United States.

Critics of this reading of the historical record might turn to the *Pacificus-Helvidius* debates for support of a greater congressional role in treaty interpretation. In those essays, which appeared during the summer of

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184. Neutrality Act, 1 Stat. 381 (June 5, 1794).

185. Indeed, efforts failed to prosecute those who violated neutrality before passage of the Neutrality Act. See McDonald, *supra* note 163, at 128.

186. See Jack Rakove, *The Beginnings of National Politics* 113-18 (1979) (describing Congress's involvement in 1778 treaty); Samuel F. Bemis, *The Diplomacy of the American Revolution* 58-69 (1957) (describing treaty).

1793, Hamilton, under the pseudonym of Pacificus, defended the President's constitutional authority to issue the Neutrality Proclamation.<sup>187</sup> He argued that Washington's authority to declare the nation's neutrality derived from the Constitution's Article II, Section 2 executive Vesting Clause; for him, the Senate's role in making treaties was only a narrow exception from the general grant of executive power to the President. When the Constitution sought to transfer traditionally executive powers away from the President, Hamilton argued, it did so specifically, as with the power to declare war. Writing as Helvidius, James Madison responded that Hamilton's reading exaggerated the President's authority.<sup>188</sup> He argued that Article II, Section 2 did not incorporate all of the British Crown's executive powers, and claimed rather unpersuasively that the Constitution placed strict limits on the President's foreign affairs powers.<sup>189</sup>

It is important to recognize, however, that Madison did not take issue with Hamilton's claim that the power to interpret treaties was fundamentally an executive power. Indeed, it was difficult for Madison to deny that the power emanated from Article II, Section 2. During the First Congress, after all, Madison had argued that the President enjoyed the power to unilaterally remove federal officers, despite the fact that the removal power was not explicitly allocated by the Constitution. Indeed, the Senate had a joint role in appointments similar to its participation in the making of treaties. Rather, Madison rested his constitutional claim on the far narrower point that the President could not interpret treaties in a manner that prevented Congress from exercising its own plenary constitutional powers.<sup>190</sup> Washington's Proclamation was defective, in Madison's eyes, not because the President interpreted a treaty without congressional participation, but because by declaring the nation's neutrality in the European war, Washington interpreted the treaty in a way that might preclude Congress from exercising its power to declare war. "The declaring of war," Madison argued, "is expressly made a legislative function."<sup>191</sup> Thus, the "judging of the obligations to make war, is admitted to be included as a legislative function."<sup>192</sup> Therefore, Madison concluded, "Whenever then a question occurs whether war shall be declared, or whether public stipulations require it, the question necessarily belongs to the department to which these functions belong."<sup>193</sup> Madison's criticism of the Neutrality Proclamation

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187. See *Pacificus Nos. 1-7* (1793), reprinted in 15 Papers of Alexander Hamilton, *supra* note 163, at 33-135.

188. See *Helvidius Nos. 1-5* (1793), reprinted in 15 Papers of James Madison 66-120 (Thomas A. Mann et al. eds., 1985).

189. See Elkins & McKittrick, *supra* note 163, at 362 (noting historians' judgment of Madison's weak performance).

190. *Helvidius No. 2*, *supra* note 188.

191. *Id.* at 82.

192. *Id.*

193. *Id.*

thus crucially turned upon the involvement of Congress's power to declare war. If the treaty had not involved a military alliance, Madison could not have maintained his argument against presidential treaty interpretation.<sup>194</sup>

If Madison's (and Jefferson's) constitutional opposition to the Neutrality Proclamation extended no further, it seems that the Framers' early practice assumed that the President enjoyed the plenary power to interpret treaties. Madison and Jefferson were only making the structural point that the Executive could not exercise its freedom to interpret treaties, or any of its other unenumerated executive powers, so as to supplant congressional powers. The President could not interpret a treaty to require the United States to remain at peace, just as he could not interpret a treaty to forbid Congress from lowering or raising tariffs as it wished. In either case, the Constitution's explicit grant of a specific power to Congress prevents the President from limiting that power's exercise through his treaty interpretation powers. Indeed, this is a logical corollary of the Constitution's separation of the treaty and legislative powers.<sup>195</sup> Thus, the Neutrality Proclamation episode not only demonstrates the President's freedom in treaty interpretation, but it also underscores the check on that power provided by Congress's Article I powers.

#### IV

#### History Repeating?: The Clinton Administration and National Missile Defense

Controversy over the proper application of the ABM Treaty to the SDI program may seem like another historical footnote to the Reagan era. A congressional advocate might even claim that presidents since have interpreted the ABM Treaty within the permissible range set by the Senate's understanding at the time of ratification, thereby avoiding any inter-branch conflicts over the power to interpret treaties. The Reagan administration's effort to reinterpret the ABM Treaty thus might be viewed as an aberration in a generally continuous pattern of harmonious cooperation between President and Senate. Not only would this settlement make political sense, but it would be consistent with many scholars' deeply-held views about the proper constitutional relationship between President and Senate, in which the Senate enjoys an equal role in determining the meaning of treaties.<sup>196</sup>

This rosy picture, however, did not prevail under the Clinton administration and is unlikely to characterize the Bush presidency. The Clinton

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194. Madison's point, it should be noted here, is not convincing. The Neutrality Proclamation did not prevent Congress from declaring war, if that were its wish. In fact, Washington's actions had the effect of preserving the states quo ante so that Congress could still choose war or peace at its discretion.

195. See, e.g., Yoo, *supra* note 96, at 2233-39.

196. See, e.g., Bestor, *supra* note 97, at 88, 108-09.

administration proved to be just as aggressive as the Reagan administration in its assertion of unilateral executive authority in foreign affairs. In the Kosovo war, for example, the Clinton administration defended the President's unilateral war-making authority with all of the vigor of bygone Republican administrations.<sup>197</sup> Similarly, in the treaty context, as will be seen below, the Clinton administration laid claim to plenary powers of treaty interpretation every bit as expansive as those articulated by President Reagan. It is more than merely coincidental that the primary treaty controversy of the 1990s should involve the very same treaty as that of the 1980s. While the substantive legal question in that decade was certainly different than the decade before, they both involved a contest between conflicting interpretations of the ABM Treaty. Those interpretations served as proxies for deeper disagreements concerning strategic nuclear weapons policy in the post-Cold War world. Part IV will draw on the conclusions reached about the earlier controversy over executive treaty reinterpretation to evaluate the current dispute that has arisen concerning the separation of powers and the ABM Treaty: whether the ABM Treaty remains in force after the collapse of the Soviet Union.

With the reduction in Cold War tensions during the 1990s, the strategic theories that had motivated the ABM Treaty came under stress. First, the Soviet Union was no longer the clear nuclear threat that it had once been. As the Soviet Union began to dismantle the communist system, the United States and the Soviet Union (and later its core successor state Russia) began the process of normalizing relations. In January 1993, President Bush and President Boris Yeltsin signed the START II agreements, which eliminated all multiple-warhead ICBMs and reduced the superpowers' strategic nuclear stockpiles by two-thirds.<sup>198</sup> Mutually assured destruction became less compelling as a system for preventing nuclear war, as the threat of a nuclear first strike by the Soviet Union receded.

Second, the nuclear threat from other nations dramatically increased. In the Persian Gulf War, Iraq not only used ballistic missiles to attack American and allied forces, but also turned out to have engaged in a secret, large-scale nuclear weapons development program.<sup>199</sup> A 1998 bipartisan commission headed by now-Defense Secretary Donald Rumsfeld concluded that the intelligence community had underestimated the ability of rogue nations to develop nuclear-armed missiles.<sup>200</sup> In 1999, the U.S. intel-

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197. See Yoo, *supra* note 76, at 1679-85.

198. Treaty on the Further Reduction and Limitation of Strategic Offensive Arms, July 31, 1991, U.S.-Russ., S. Treaty Doc. No. 20, 102d Cong. (1991); Treaty on Further Reduction and Limitation of Strategic Arms, Jan. 3, 1993, U.S.-USSR, S. Treaty Doc. No. 1, 103d Cong. (1993).

199. See, e.g., Michael A. Lysoy, *How Iraq Maintained Its Weapons of Mass Destruction*, 5 U.C.L.A. J. Int'l L. & Foreign Aff. 101 (2000).

200. Eric Schmitt, *Panel Says U.S. Faces Risk of a Surprise Missile Attack*, N.Y. Times, July 16, 1998, at A24.

ligence community concluded that North Korea could begin testing a ballistic missile capable of hitting the U.S.<sup>201</sup> In 1999, India and Pakistan both successfully tested nuclear warheads.<sup>202</sup> Nuclear proliferation and the rise of rogue nations eroded yet another piece of MAD, which had relied upon a single rational opponent who could understand the nuclear balance of terror.

In conjunction with these changes in the strategic environment, American missile defense goals shifted from countering a Soviet first strike to preventing limited ballistic missile attacks on the United States. In his January 29, 1991 State of the Union address, President Bush asked that the SDI program be refocused to provide protection from a strike of a few dozen warheads.<sup>203</sup> With the 1991 Missile Defense Act, Congress declared that the nation should deploy a National Missile Defense system “capable of providing a highly effective defense of the United States against limited attacks of ballistic missiles.”<sup>204</sup> The goal was not to alter the strategic balance with the Soviet Union, but to defend against “accidental or unauthorized launches or Third World attacks.”<sup>205</sup> As it had with the Reagan administration’s SDI program, Congress conditioned funding for the reoriented ABM program on continued compliance with the narrow reading of the ABM Treaty. To the extent a NMD system might become inconsistent with this understanding of the Treaty, Senate leaders urged the President to negotiate amendments with the Soviets that would allow deployment of a limited system.<sup>206</sup>

#### A. *The Demise of the Soviet Union*

The dissolution of the Soviet Union on December 25, 1991 dashed any hope of a clean, swift negotiated solution on NMD. Fifteen independent states emerged in place of the Soviet Union, and four of them (Russia, Belarus, Kazakhstan, and Ukraine) came into possession of portions of the Soviet nuclear arsenal. Replacing one nuclear adversary with four potential ones not only undermined the theory of mutually assured destruction between the two superpowers, it also destabilized the bargain struck in the ABM Treaty that the superpowers would limit themselves to a single ABM system each. Even if each republic of the former Soviet Union agreed to adhere to the Treaty, each could still build one ABM system around its

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201. See *Ballistic Missiles: Threat & Response*, *supra* note 1, at 409.

202. See *id.* at 421-22.

203. President George Bush, Address Before a Joint Session of the Congress on the State of the Union, 27 Weekly Congs Pres. Doc. 90 (Jan. 29, 1991).

204. Missile Defense Act of 1991, Pub. L. No. 102-190, § 232(a)(1), 105 Stat. 1321.

205. *Id.* at § 233(b)(2).

206. S. Rep. No. 102-352, at 138 (1992).

capital. In other words, the Soviet Union's breakup now meant that fifteen ABM systems could exist within its former territory.<sup>207</sup>

The Soviet Union's collapse also raises the possibility that the ABM Treaty is no longer in force because of the disappearance of one of the two state parties to the agreement. Under international law, a change in government alone generally does not alter a state's obligations to honor its treaty commitments. A different and more difficult question arises, however, when the state itself dissolves. Initially, the Bush administration decided to conduct a treaty-by-treaty review of the United States' agreements with the Soviet Union to determine which of them remained in force.<sup>208</sup> In 1997, the Clinton administration negotiated agreements, known as Memoranda of Understanding (MOUs), with the Russian Federation, Belarus, Kazakhstan, and Ukraine to expand the ABM Treaty to the four nuclear powers that emerged from the Soviet Union's collapse.<sup>209</sup> President Clinton, however, never submitted these agreements to the Senate, where they likely would have encountered stiff resistance from supporters of an NMD system. Nevertheless, President Clinton claimed that the "ABM Treaty itself would clearly remain in force" even if he never submitted the multilateralization agreements to the Senate, or even if the Senate had rejected them.<sup>210</sup> Some Republican Senators, on the other hand, claimed that the fall of the Soviet Union automatically terminated the ABM Treaty, and that a new treaty would have to be submitted to the Senate for any of its provisions to continue in force.<sup>211</sup> In an effort to prevent the administration from continuing the ABM Treaty in force without senatorial consent, both the Congress and the Senate approved provisions, one statutory and one a treaty condition, that declared that the United

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207. See George Bunn & John B. Rhinelander, *The Arms Control Obligations of the Former Soviet Union*, 33 Va. J. Int'l L. 323, 339 (1993).

208. See Edwin D. Williamson & John E. Osborn, *A U.S. Perspective on Treaty Succession and Related Issues in the Wake of the Breakup of the USSR and Yugoslavia*, 33 Va. J. Int'l L. 261, 267 (1993).

209. Memorandum of Understanding Relating to the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems of May 26, 1972, Sept. 26, 1997, available at [http://www.state.gov/www/global/arms/factsheets/missdef/abm\\_mou.html](http://www.state.gov/www/global/arms/factsheets/missdef/abm_mou.html).

210. Letter from President William J. Clinton to Benjamin A. Gilman, Chairman of the House Committee on International Relations (Nov. 21, 1997), in *Ballistic Missiles: Threat & Response*, supra note 1, at 477-79 ("If, however, the Senate were to fail to act or to disagree and disapprove the agreements, succession arrangements will simply remain unsettled. The ABM Treaty itself would clearly remain in force."); Letter from President William J. Clinton to Sen. Jesse Helms, Chairman of the Senate Committee on Foreign Relations (May 21, 1998), in *Ballistic Missiles: Threat & Response*, supra note 1, at 480-81 ("[T]here is no question that the ABM Treaty has continued in force and will continue in force even if the MOU is not ratified.").

211. See Letter from Senator Trent Lott et al. to President William J. Clinton (Oct. 5, 1998), in *Ballistic Missiles: Threat & Response*, supra note 1, at 482-83 ("[I]t is our position that the ABM Treaty has lapsed and is of no force and effect unless the Senate approves the MOU, or some similar agreement, to revive the treaty.").

States would not be bound by any substantial modification of the ABM Treaty that did not undergo the treaty process.<sup>212</sup> Despite this pressure, the Clinton administration continued to act as if the ABM Treaty remained in force between the United States and the Soviet Union's successor states.

The interpretive struggle over the effect of the Soviet Union's collapse turns on two interrelated constitutional and legal questions: first, whether the ABM Treaty still exists after the breakup of the Soviet Union, and, second, which branch of the federal government has the authority to make that determination. We will consider each question in turn. Under international law the breakup of an empire into smaller nations may release the successor states from former treaty obligations.<sup>213</sup> As treaties are contracts between nations, the disappearance of one of the parties to the agreement renders performance impossible. On the other hand, if the state maintains its sovereignty so that performance is possible, then the treaty might continue in existence. As the Supreme Court stated the principle in the 1902 case of *Terlinden v. Ames*: "Cessation of independent existence [of a treaty partner] rendered the execution of treaties impossible. But where sovereignty in that respect is not extinguished, and the power to execute remains unimpaired, outstanding treaties cannot be regarded as avoided because of impossibility of performance."<sup>214</sup> In *Terlinden*, a German citizen fought his extradition to the German empire on the ground that the U.S. only had extradition treaties with Prussia and other German principalities which had since been incorporated into the empire. The Supreme Court found the treaties to continue in force, because Prussia still existed within the German Empire, and because both governments had agreed to continue the agreements in force.<sup>215</sup>

Later expressions of the rule have avoided the earlier focus on a successor state's sovereign ability to maintain its international obligations. Instead, the emphasis has shifted toward freeing successors from their predecessor's international obligations. The *Restatement (Third) of the Foreign Relations Law of the United States* attempts to articulate the modern approach thus: "When part of a state becomes a new state, the new state does not succeed to the international agreements to which the predecessor state was party."<sup>216</sup> An exception to this rule exists if "expressly or by implication, [the successor state] accepts such agreements" and the other party consents as well.<sup>217</sup> Known as the "clean slate"

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212. See National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 232; Conventional Forces in Europe Flank Agreement, May 14, 1997, 36 I.L.M. 980, 984.

213. Restatement (Third) of Foreign Relations Law of the United States §210(3) (1990).

214. *Terlinden v. Ames*, 184 U.S. 270, 283 (1902).

215. *Id.* at 284-85.

216. Restatement (Third) of Foreign Relations Law of the United States §210 (1990).

217. *Id.*

theory, this rule allows a new state to start afresh without any of the obligations of the predecessor state.<sup>218</sup> The exception for voluntary continuation of agreements merely recognizes that the new nation can always re-enter into the previous treaties by mutual consent, which in essence creates another international agreement.

If one were to accept the *Restatement* as an authoritative expression of international law, the ABM Treaty might no longer be in force. The clean slate rule holds that none of the former republics of the Soviet Union remain bound by its international agreements, including its arms control treaties. Of course, the MOUs between the United States and Russia, Ukraine, Belarus, and Kazakhstan might fulfill the exception to the clean slate theory. These agreements, however, have not undergone the constitutional process of Senate advice and consent required for their approval in the United States. A comment to the *Restatement* suggests that acceptance by the United States of a successor state's agreement to extend its predecessor's treaties might not require Senate approval.<sup>219</sup> But while the *Restatement* declares that the Senate has apparently acquiesced in the practice of the executive branch in this matter, it does not cite any authorities or examples for this proposition.

Another possible source of international law in this area derives from the 1978 Vienna Convention on the Succession of States in Respect to Treaties.<sup>220</sup> The United States has neither signed nor ratified the Convention, but some might think it provides an indication of international legal opinion on the successor state question. Article 16 of the Vienna Convention, like the *Restatement*, establishes a clean slate rule: "[A] newly independent State is not bound to maintain in force, or to become a party to, any treaty" simply because it bound the predecessor state.<sup>221</sup> Article 24 creates an exception to this general rule if the parties, either expressly or by their conduct, agree to continue a bilateral treaty in force.<sup>222</sup> International law here, though unadopted by the United States, suggests again that the ABM Treaty is no longer in force.

A different part of the Vienna Convention, however, adopts a contradictory rule. Article 34 maintains that in the case of a separation of parts of a State, a treaty remains binding on the successor states, unless either the parties agree to release the successor state or a treaty's continued application "would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operations."<sup>223</sup> This

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218. *See id.* § 210 cmt. f.

219. *Id.* § 210 cmt. h.

220. Vienna Convention on Succession of States in Respect of Treaties, Aug. 22, 1978, 17 I.L.M. 1488.

221. *Id.* art. 16.

222. *Id.* art. 24.

223. *Id.* art. 34.



rule, which is generally known as the rule of “continuity,” suggests that the ABM Treaty would remain in force for the Soviet Union’s successor states, unless performance became impossible or the United States objected.

Closer examination, however, suggests that in regard to the ABM Treaty the continuity and clean slate rules are not truly in conflict. The main object of the Treaty was to limit the territory of the Soviet Union and the territory of the United States to one ABM system each. Even if the ABM Treaty were to continue to bind the Soviet successor states, it would still allow for at least fifteen ABM systems, one for each new successor state, within the territory of the former U.S.S.R. Such a possibility would provide the territory of the former Soviet Union with greatly increased ABM coverage, especially in those areas along its borders, which, because they provide a critical advantage in intercepting ballistic missiles in flight, are banned by the treaty as a location for ABM systems.<sup>224</sup> From this perspective, the MOUs between the United States and Russia, Belarus, Ukraine, and Kazakhstan only make matters worse. Rather than limiting the former territory of the Soviet Union to fifteen ABM systems, the new agreement binds only the four nuclear successor states, which potentially allows the other eleven states to build as many ABM systems as they wish. In any case, the fragmentation of the Soviet Union undermines the fundamental military and political bargain behind the Treaty limiting each side to a single ABM system. Under any interpretation of international law, it thus appears that the ABM Treaty no longer survives.

### B. *Constitutional Law and the ABM Treaty Today*

Even if international law were clear, however, the central question for American constitutional law remains which branch of the federal government has the primary authority to determine whether the ABM Treaty continues in force. Here, the earlier debate over President Reagan’s SDI reinterpretation bears important implications. This Book Review’s understanding of the President’s treaty powers suggests that the Clinton administration may have had the discretion to maintain our adherence to the ABM Treaty’s obligations. Likewise, earlier supporters of the Senate’s power to

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224. This logic is similar to that which would apply under the international law doctrine of changed circumstances. While perhaps the core principle of international law is *pacta servanda sunt* (treaties must be obeyed) one of the recognized exceptions to that rule is *rebus sic stantibus*, that circumstances have changed so completely as to allow one party to terminate, or withdraw from, the treaty. Article 62 of the Vienna Convention on the Law of Treaties, which the United States has not yet ratified, incorporates the idea of changed circumstances by allowing termination if the original circumstances were an “essential basis” for state consent to the agreement, or if the new circumstances “radically” transform the obligations of the treaty. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 62 (entered into force Jan. 27, 1980). One could view the split up of the Soviet Union into fifteen successor states, and the possibility that fifteen ABM systems could cover the U.S.S.R.’s former territory, as a sufficient change in circumstances to justify withdrawal from the ABM Treaty.

enforce a narrow interpretation must agree with the current Senate's efforts to declare the ABM Treaty null and void. At some point, of course, interpreters can stretch a treaty's text so far that they have essentially created a new treaty. If one believes that reinterpreting the ABM Treaty to allow exotic, Star Wars weapon systems went so far beyond the treaty text as to require an amendment, then it is difficult to see how the situation created by the end of the Soviet Union is any different. On the other hand, acceptance of the President's treaty powers during the SDI controversy may not necessarily entail a conclusion that the ABM Treaty continues in force. While difficult, a line might be drawn to distinguish between treaty interpretation and treaty amendment; the difference between the Star Wars reinterpretation and the multilateralization of the ABM Treaty may illuminate that line.

President Clinton's authority to command continued adherence to the ABM Treaty, despite the legal effects caused by the collapse of the Soviet Union, finds substantial support in the Constitution. First, the President enjoys plenary authority over the interpretation of international law on behalf of the United States. Treaty interpretation forms a subset of the President's executive power in foreign affairs.<sup>225</sup> If the President has the authority to interpret treaties, he certainly must have the power to interpret less concrete forms of international law. At the very least, executive interpretation of international law should receive substantial deference from the other branches,<sup>226</sup> just as the Court currently gives deference to the President's reading of treaties and statutes.<sup>227</sup> Presidential power thus allows the Executive to determine not only whether the ABM Treaty survives the collapse of the Soviet Union, but also the rules of international law concerning the obligations of successor states. President Clinton, on behalf of the United States, could have concluded that international law establishes a continuity rule. As the nation's chief interpreter of international law, the President could also read the exception for incompatibility with the object and purpose of a treaty as not applying in the ABM Treaty context.

Some in the international law community disagree with the notion that the President has such freedom to interpret international law. Several American legal scholars, for example, argue that the President has a con-

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225. See *supra* Part VI.B.

226. See Restatement (Third) of Foreign Relations Law of the United States §112 cmt. c (1990).

227. See, e.g., *United States v. Stuart*, 489 U.S. 353, 369 (1989) (requiring judicial deference to executive interpretation of treaties); *Sumitomo Shoji America v. Avagliano*, 457 U.S. 176, 184-85 (1982) (same); *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984) (statutes).

stitutional duty to enforce customary international law.<sup>228</sup> They believe that international law is part of the law of the land, on a par with treaties and statutes in Article VI's Supremacy Clause, and thus must be followed by the President as part of his Article II obligation to enforce the laws. As Professor Henkin has declared, "There can be little doubt that the President has the duty, as well as the authority, to take care that international law, as part of the law of the United States, is faithfully executed."<sup>229</sup> While the conclusion that international law forms part of federal law is open to significant question,<sup>230</sup> this approach does not restrict the President's power on the ABM Treaty issue. As the United States has yet to sign any agreement on state succession, the international law on this question, if there is any, lacks the binding legal force of a statute or treaty. At best, the rules on state succession form some type of proto-customary international law that cannot place any obligations on the executive branch. Indeed, the failure of the Vienna Convention on State Succession to garner widespread acceptance<sup>231</sup> evidences disagreement sufficient to deny either the clean slate or the continuity rule the status of customary international law. In the absence of any international consensus about the rules of state succession, the President's formal constitutional authority and his functional advantages in foreign affairs argue in favor of allowing him to determine the international rules that will constrain the nation.

Second, in addition to his other powers over international law, the President may interpret the ABM Treaty on behalf of the United States. The President's formal role as the maker of treaties and his function in conducting our international relations vest the Executive with the power to interpret treaties.<sup>232</sup> In combination with his authority to interpret international law, this authority allows the President to find that the ABM Treaty is still in force. President Clinton could have read, and President Bush may yet still choose to read, the Treaty to permit multilateralization without the

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228. See Michael J. Glennon, *Raising the Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 Nw. U. L. Rev. 321, 325 (1985); Louis Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555, 1567 (1984); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 Va. L. Rev. 1071, 1179 (1985). See generally Agora, *May the President Violate Customary International Law?*, 80 Am. J. Int'l L. 913 (1986).

229. Henkin, *supra* note 228, at 1567; see also Louis Henkin, *The President and International Law*, 80 Am. J. Int'l L. 930, 937 (1986).

230. See Curtis A. Bradley & Jack L. Goldsmith, *supra* note 78, at 817; see also Alfred Rubin, *Ethics and Authority in International Law* 185-206 (1997); Philip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. Rev. 665, 672-673 (1986); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 Vand. L. Rev. 1205, 1269 (1988). For some of the responses to Professors Bradley and Goldsmith, see Koh, *supra* note 78, at 1827; Neuman, *supra* note 78, at 371.

231. The Convention has been signed by only twenty or so nations; neither the United States, Russia, nor any of the major nuclear powers has ratified it.

232. See *supra* Part II.B.

need for amendment. Such a move would resemble the Reagan administration's broad interpretation of the ABM Treaty more than fifteen years ago. In that instance, the executive branch argued that ambiguity or silence in the treaty text allowed it to move forward with a new form of antiballistic defense, one unanticipated by the negotiators in 1972. Similarly, the ABM Treaty does not address multilateralization in the event of the collapse of the Soviet Union; the prospect of its disintegration was probably as remote in the negotiators' minds as the idea that the United States might someday devolve into fifty states. President Clinton could have claimed that in the absence of clear prohibitory language in the treaty, he had the power to fill the lacuna left by the treaty-makers of 1972. The executive branch merely would have been performing a gap-filling role similar to that played by the federal courts in creating federal common law. As the primary interpreter of federal law and policy in foreign affairs, this function would properly rest with the President when, in the domestic statutory context, it normally would fall to the federal courts.

Third, the President's other foreign affairs powers may provide independent justification for the continuation of the ABM treaty's obligations. In managing our foreign affairs, the President often makes executive agreements with other nations without the consent of the Senate or of Congress. These agreements can be made pursuant to pre-existing authorization by treaty or statute, or they can be made within the President's commander-in-chief or other executive authority.<sup>233</sup> Indeed, a great deal of the nation's foreign relations must be conducted by agreements, of varying levels of formality, between the executive and the representatives of other nations. The executive branch can enter into an informal agreement whereby it promises to refrain from a particular action in exchange for similar restraint on the part of the other party. Although SALT II never underwent Senate advice and consent, the United States acted consistently with its terms as a matter of executive branch policy, so long as the Soviet Union did the same (pp.334-36). Even less formally, the executive branch has entered into voluntary restraint agreements whereby foreign exporters limit their imports into the United States in exchange for executive refusal to pursue trade sanctions.<sup>234</sup> At even lower levels, the executive branch enters into memoranda of understandings that express our agreement to cooperate with other nations, but do not even rise to the level of an executive agreement.<sup>235</sup> Indeed, as arms control agreements and other interna-

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233. See Restatement (Third) of the For Rel Law of the US § 303 (2)-(4) (1989).

234. See, e.g., *Consumers Union v. Kissinger*, 506 F.2d 136 (D.C. Cir. 1974).

235. See Loch K. Johnson, *The Making of International Agreements: Congress Confronts the Executive* 127-29 (1984); David J. Kuchenbecker, *Agency-Level Executive Agreements: A New Era in U.S. Treaty Practice*, 18 *Colum. J. Transnat'l L.* 1, 64-69 (1979); cf. Andrew T. Guzman, *International Law Rules: A Compliance Based Theory* (preliminary draft 2000)

tional regulatory regimes grow more specific and complex, it is almost inevitable that the executive branch will need to rely upon less formal methods of agreement to fill in gaps in international agreements and to reach more flexible methods of cooperation.<sup>236</sup>

We can view the multilateralization of the ABM Treaty as one of these forms of international cooperation. The MOU with Russia, Belarus, Ukraine, and Kazakhstan could be seen as a sole executive agreement, taken pursuant to the ABM Treaty itself, which extends the treaty's terms to unforeseen circumstances. We also could consider the MOU to be a sole executive agreement, one formally distinct from the ABM Treaty, which independently enforces the ban on anti-missile systems among the United States, Russia, Belarus, Ukraine, and Kazakhstan. President Clinton could have claimed that his power to enter such an agreement derived from his status as Commander-in-Chief and his general executive authority to manage the nation's foreign affairs. Finally, the MOU might be considered an informal agreement between the United States and the successor nations. In exchange for continued restraint on the part of Russia, Ukraine, Belarus, and Kazakhstan, the United States has agreed to voluntarily refrain from deploying a national ABM system. There is no agreement in the sense recognized by the Treaty Clause or even international law, only the President's unilateral promise that he will conduct our nation's foreign relations in a certain manner, so long as certain conditions do not change.

A claim that the President could extend the restrictions of the ABM Treaty beyond the collapse of the Soviet Union might even stand on firmer ground than the Reagan administration's reinterpretation effort. In the latter circumstance, the executive branch adopted a foreign policy that arguably was at odds with an existing treaty commitment (although it is the thesis of this Book Review that the Reagan administration had a more plausible case than was assumed at the time). While the President had the constitutional authority to terminate the Treaty, it still would have been necessary for the President to disavow the ABM Treaty on behalf of the United States in order to pursue the SDI program. Until and unless President Reagan did so, it could be claimed that our foreign policy contradicted a treaty obligation that the President had the constitutional duty to uphold. President Clinton, by contrast, could unilaterally accept the burdens of the ABM Treaty without contradicting any existing international agreements. This provided the Clinton administration with greater room to maneuver in coordinating a continued ABM policy among the nuclear powers.

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(arguing that formal categories of international agreements do not express the wide range of forms of international cooperation).

236. See, e.g., David A. Koplow, *When is an Amendment Not an Amendment?: Modification of Arms Control Agreements Without the Senate*, 59 U. Chi. L. Rev. 981 (1992).

While the ability to see the multilateralization of the ABM Treaty as a valid exercise of unilateral executive power may allay concerns that the ABM Treaty has ceased to exist in any form, this perspective also allows the Senate and the Congress to become more greatly involved in the NMD question. Even when an international agreement is formally embodied in a treaty, the legislature has the constitutional discretion to frustrate or even countermand its obligations. For example, the Framers understood the legislative power, in particular Congress's monopoly over funding and the domestic implementation of international obligations, to impose a check on the Executive's control over treaty making. Thus, Congress could use its power over the purse to require the President to deploy a NMD system by a certain date. Indeed, Congress came close to this very outcome by declaring in the 1999 Missile Defense Act that the United States ought to develop such a system as soon as technologically feasible.<sup>237</sup> Congress could go even further by ordering the deployment of a primitive ABM system, even if it represented a poor risk at huge cost, solely to provide some defense against an accidental launch or an attack by a rogue state.

Congress could further declare, as it in fact has, that any agreement made by the Executive concerning the ABM Treaty would not bind the United States unless it underwent the treaty process. Section 232 of the 1995 National Defense Authorization Act states that, "The United States shall not be bound by any international agreement entered into by the President that would substantially modify the ABM Treaty unless the agreement is entered pursuant to the treaty making power of the President under the Constitution."<sup>238</sup> Since, under the last-in-time rule, Congress has the power to terminate treaties, it could certainly deny any non-treaty international agreements the status of a binding national obligation. While such a law could not constrain the Executive's discretion to conduct foreign policy as it saw fit, it could release the nation or any of its branches from either international or domestic obligations to uphold the ABM Treaty's successor agreements.

The lack of a formal treaty also might invite Senate intervention into ABM policy. At present, it does not appear that the Senate, acting alone, has the authority to terminate treaties. In a situation where the executive pursues international agreements without the treaty form, however, the Senate can use its role in the treaty process to promote its own wishes. During its 1997 consideration of the Conventional Forces in Europe (CFE) Flank Document, which adjusted the CFE agreement in the wake of the

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237. See National Missile Defense Act of 1999, Pub. L. No. 106-138, 113 Stat. 205, 52 ("It is the policy of the United States to deploy as soon as technologically possible an effective National Missile Defense against limited ballistic missile attack").

238. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 232, 108 Stat. 2700.

Soviet Union's collapse, the Senate conditioned its approval of the Treaty on the submission of any ABM multilateralization agreement for Senate advice and consent.<sup>239</sup> While not legally enforceable, the Senate's condition implicitly threatens that the Senate will refuse to approve subsequent arms control agreements until it receives the ABM successor agreements. The Senate would be fully within its constitutional rights to exercise its discretion in this fashion to protect its own role in the treaty process. As with Congress's power vis-à-vis the Executive's treaty-making authority, the Senate can use its constitutional powers to achieve the political end of ensuring that it can participate in any decision involving the ABM Treaty.

With President George W. Bush assuming office in January 2001, these arguments provide the new administration with substantial flexibility in developing and deploying an NMD system. At the outset, we must recognize that the ABM Treaty itself acknowledges the United States's *unilateral* right to pull out of the agreement. Article XV gives each party the right, "in exercising its national sovereignty," to withdraw from the treaty with six months notice "if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests."<sup>240</sup> Surely, the possibility that rogue nations like North Korea will have the capability to field a nuclear missile against the United States within a few years (a conclusion reached in 1998 by the Rumsefeld commission) could meet the standard for withdrawal from the treaty. Even if this were open to doubt, the phrase "if it decides" means that the treaty authorizes either the United States or the Soviet Union to decide for itself whether national security concerns warrant withdrawal. Even if the ABM treaty were currently in force, President Bush need only notify Russia of the reasons for our withdrawal six months before we began to deploy an NMD system.

Further, President Bush might have substantial flexibility in deploying an NMD system while still maintaining much of the ABM Treaty structure. He might argue that the Treaty contains a significant lacuna. Its main focus is on ABM systems that provide a continental defense against the nuclear arsenal of the Soviet Union; its text does not specifically address systems that create a more limited security against only a few missiles launched by others or by accident. This is where the President's powers of treaty interpretation, developed in this Review, could come into play. Consistent with the Constitution, the President could interpret the ABM Treaty to maintain its ban on an NMD system that could defeat the large Russian nuclear deterrent, but that still allows the deployment of a limited system aimed at accidental launches or rogue states. This does not stretch presidential powers any further than did President Washington in interpreting the 1778 French treaties as allowing American neutrality in 1793, than did

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239. See Conventional Forces in Europe Flank Agreement, May 14, 1997, 36 I.L.M. 980, 984.

240. See ABM Treaty, *supra* note 3, art. XV.

President Reagan in the 1980's in interpreting the ABM Treaty to allow SDI research, or than did President Clinton in the 1990's in claiming that the ABM Treaty continued to exist despite the disappearance of the Soviet Union. While no doubt some would argue that this is inconsistent with the ABM Treaty's blanket prohibition on ABM systems, the President enjoys the final constitutional authority on the interpretation of treaties such as this; opposition to his interpretation would have to work its way through the spending and legislative powers of Congress.

Finally, President Bush could use a combination of his formal powers in foreign affairs to arrive at the same result as a reinterpretation of the ABM Treaty. President Bush could decide to unilaterally terminate only those portions of the ABM Treaty that might be read to bar a limited NMD system. This might maintain in force the rest of the ABM Treaty in terms of its application to comprehensive NMD systems that might counter a nuclear force of the size deployed by Russia. Or, if it is thought that the President could not sever a portion of the treaty in that manner, President Bush could terminate the entire treaty. He then could declare it the policy of the United States to adhere to the rest of the Treaty's terms in regard to comprehensive ABM defenses, so long as the Russians do so as well. The Bush administration could express this policy through a sole executive agreement, or even through an informal understanding with the Russians, rather than through a new treaty. Of course, as I have argued above, the more informal the arrangement, the more significant become the powers of Congress and the Senate, which could influence NMD policy through spending and legislation, or by leveraging its power over the approval other international agreements.

### Conclusion

Perhaps the most useful way to view the disputes over the ABM Treaty, both the fight over the broad versus the narrow reinterpretation fifteen years ago, and the more recent debate over the continued existence of the Treaty after the Soviet Union's collapse, is to see them as political struggles over the course of American nuclear weapons policy. It is a mistake to think of these disputes as governed by law in the same way that a federal statute governs a dispute between private parties. Instead, a large number of treaties, especially arms control and politico-military agreements, do not create any legally-enforceable rights for individuals, but rather regulate the international relations between two or more nation-states. As such, they represent political arrangements, not domestic law. While the Supremacy Clause makes treaties, like the Constitution and federal statutes, supreme over inconsistent state law, it does not make treaties an equivalent form of federal law on a par with the other two. Rather, as Alexander Hamilton put it, the object of treaties more often than not are



“contracts with foreign nations” which constitute “not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign.”<sup>241</sup> As such, they more properly rest in the realm of politics, rather than law.

Approaching treaties in this manner goes farther toward explaining the unusual constitutional rules that apply in the treaty field. Treaty-specific doctrines, such as unilateral presidential termination, unilateral presidential interpretation, judicial deference to executive interpretation, the possibility of different international and domestic meanings, the non-self-execution doctrine, and the last-in-time rule set treaties apart from other species of federal law. These anomalies in the treatment of treaties represent an accommodation our system has made to their essentially political, rather than legal, nature. This Book Review shows that we can usefully understand the struggle over the interpretation of the ABM Treaty in this manner. Both the President and Congress have a voice in setting nuclear and arms control strategy; interpreting the ABM Treaty to allow SDI or to extend to the Soviet Union’s successor states was only part of a larger contest between the branches over defense policy. Thus, the tools each branch could use to shape treaty interpretation were essentially political: the President’s formal and functional control over foreign relations, balanced by the Congress’s power over the purse and military authorization, versus the Senate’s blocking power over other treaties. Resolution of the ABM Treaty controversies did not depend so much on any correct legal answer, as it did on the interaction of the branches, using their constitutional powers, within the arena of politics. Given the manner in which the Framers allocated the foreign affairs power among the different branches, this ongoing conflict over treaties seems to be a fulfillment of the constitutional design.

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241. See *The Federalist* No. 75 (Alexander Hamilton) at 380.

