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THE MEANING OF "ADVICE AND CONSENT": THE SENATE'S CONSTITUTIONAL ROLE IN TREATYMAKING

Howard R. Sklamberg*

The President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."

—Treaty Clause of the United States Constitution

The "advice and consent of the Senate" are . . . coextensive with the "power" conferred on the President, which is "to make treaties," and apply to the entire process of treatymaking.

—Henry Cabot Lodge

The President . . . may guide every step of diplomacy, and to guide diplomacy is to determine what treaties must be made, if the faith and prestige of the government are to be maintained. He need disclose no step of negotiation until it is complete, and when in any critical matter it is completed the government is virtually committed. Whatever its disinclination, the Senate may feel itself committed also.

—Woodrow Wilson

INTRODUCTION

In Wilson v. Girard, the Supreme Court stated that a "Security Treaty between Japan and the United States, signed September 8, 1951,

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1. U.S. CONST. art II, § 2, cl. 2.
3. WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 77-78 (1905).
Michigan Journal of International Law

was ratified by the Senate on March 20, 1952 and proclaimed by the President effective on April 28, 1952. This sentence seems to be a pedestrian comment on the Senate’s role in the treaty-making process—except for one small detail. The Treaty Clause of the United States Constitution does not give the Senate the power merely to “ratify” treaties. Rather, the Constitution requires that treaties receive the “Advice and Consent of the Senate.”

Nevertheless, the Supreme Court’s use of the word “ratified” is an accurate description of the Senate’s present role in treatymaking. Generally, the President negotiates a treaty without receiving any formal “advice” from the Senate. Only after completing a negotiation does the President submit a treaty to the Senate for its approval. “Advice and consent” has come to mean “ratification.” But is “advice and consent” really a constitutional synonym for “ratification?” Or, does the Treaty Clause empower, or perhaps even require, the Senate to play a more active part in the negotiation of treaties?

This article analyzes the role that the Constitution assigns to the Senate in treatymaking and the implications of this role on the relationship between the President and the Senate. Part I examines the meaning of “advice and consent” in the Treaty Clause. It discusses the origins of the phrase “advice and consent,” the history of the drafting of the Treaty Clause, and the implications of the Framers’ decision to include the Treaty Clause in Article II of the Constitution.

Drawing on these sources, Part I considers three possible interpretations of the Treaty Clause. The first interpretation, which has been forcefully advanced by Professor Arthur Bestor, and which I refer to as the Senatorial Dominance Model, would give the Senate the power of “deciding upon the policy to be pursued in a treaty negotiation and of formally approving the diplomatic instructions embodying this policy.”

The second approach, which I term the Ratification Model, gives the

5. Id. at 526 (footnote omitted).
7. Staff of Senate Comm. on Foreign Relations, 98th Cong., 2d Sess., Treaties and Other International Agreements: The Role of the United States Senate 104 (Comm. Print 1984) [hereinafter Treaties and Other International Agreements] (“[W]hat Presidents generally seek from Senators is not advice in advance, but consent after the fact—after negotiations are completed. Most treaties, therefore, engage the Senate only after their formal transmission by the President for approval.”). See also Louis Henkin, Foreign Affairs and the Constitution 130–32 (1972); Peter M. Shane & Harold H. Bruff, The Law of Presidential Power 520–21 (1988).
Senate no role other than the power to vote to approve or reject a treaty which the President has already negotiated. Finally, the Recommendation Model provides the Senate with the constitutional power to suggest diplomatic instructions or broad negotiating goals to the President, while allowing the President the option of ignoring the Senate's suggestions. Part I concludes that the Recommendation Model is the correct interpretation of the Treaty Clause.

Part II explores the implications of the Recommendation Model on the relationship between the Executive and the Senate. It discusses an immense practical problem that the Senate would face if it wished to exercise its Treaty Clause power to offer nonbinding advice to the Executive. Unlike the Executive, the Senate does not control a huge foreign-policy apparatus that can supply it with diplomatic information. In order to exercise its advice power, the Senate must, therefore, depend on the Executive for this information. Part II considers whether the President can refuse to provide the Senate with information relevant to treatymaking. It discusses the doctrine of executive privilege and concludes that the Recommendation Model sharply restricts the President's constitutional authority to refuse to give the Senate access to information that it would need in order to perform its advice function.

PART I: INTERPRETING "ADVICE AND CONSENT":
WHAT TREATY-MAKING ROLE DOES THE CONSTITUTION ASSIGN TO THE SENATE?

A. "Advice and Consent" as an Eighteenth Century Term of Art

Treaty Clause interpreters might be tempted simply to look up the words "advice" and "consent" in a dictionary and combine their definitions. Professor Glenn Harlan Reynolds employed this method to interpret the meaning of "advice and consent" in the Appointments Clause.9

The meaning of "consent" is pretty obvious. So what does "advice" mean? Well, advice is normally conceived of as something not binding—we may give advice freely, but it is a gift that the recipient is not obliged to take. This is what makes advice different from, say, a command. . . . Thus, the text provides that the Senate

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9. The Appointments Clause provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint." U.S. Const. art II, § 2, cl. 2.
may advise the President on who should be nominated, but the President should be held under no constitutional duty to follow that advice—though there is perhaps a duty to listen to the advice before nominating anyone.\textsuperscript{10}

But Reynold’s approach fails to account for the fact that “advice and consent” was a term of art that appeared in Eighteenth Century English statutes and in many of the constitutions of the original thirteen American states. At the time of the framing of the Constitution, “advice and consent” had a meaning quite different from what Professor Reynolds has suggested.

Beginning in the Seventeenth Century, English statutes contained the following enacting clause:\textsuperscript{11} “[B]e it enacted by the King’s most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same. . . .”\textsuperscript{12} The “advice and consent” that Parliament gave the Monarch in the legislative process was no mere “advice,” as that word is used today. By the time of the framing of the American Constitution, Parliament dominated the legislative process. The Monarch’s role was reduced to withholding his royal assent from parliamentary laws with which he disagreed. Even this formal power had atrophied by the late Eighteenth Century: Queen Anne was the last Monarch to use the royal veto, in 1707.\textsuperscript{13}


\textsuperscript{12} E.g., An Act to empower his Majesty to secure and detain persons charged with, or suspected of, the crime of high treason, committed in any of his Majesty’s colonies or plantations in America, or on the high seas, or the crime of piracy, 17 Geo. 3, ch. 9 (1777) (Eng.). An Act against the Importation of Gunpowder, Arms, and other Ammunition, and Utensils of War, 1 Jam. 2, c. 8 (1685), quoted in Bestor, supra note 11 at 541–42. Prior to the late 1600s, enacting clauses contained slight variations on this phrasing. See RAOUl BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 122 n.23 (1974) (describing “[a]n early version, 3 Hen. V, 1 Stat. at Large 466 (1415), [which] states: ‘Our Lord the King, at his Parliament . . . by the Advice and Assent of the Lords Spiritual and Temporal, and at the Request of the Commons . . . hath ordained and established divers Statutes and Ordinances.’ ”).

\textsuperscript{13} See 1 WILLIAM ANSON, THE LAW AND CUSTOM OF THE CONSTITUTION 300 (5th ed. 1922). For a description of the Monarchy’s legislative power in the Eighteenth Century, see 1 WILLIAM BLACKSTONE, COMMENTARIES 49–51, 156. See generally WALTER BAGEHOT, THE ENGLISH CONSTITUTION 34–89 (Little, Brown, & Co. 1873) (1872). The last monarch to attempt to have any significant role in shaping legislation was King George III. Frustrated by the Monarchy’s loss of its law-making power during the Seventeenth and Eighteenth Centuries, George III attempted to seize back some role in the legislative process by appointing ministers that would do his bidding in Parliament. He was successful from 1770 to 1782, during the prime ministership of Lord North, who pushed George III’s agenda through
The term "advice and consent" was not confined to English statutes. At the time of the Constitutional Convention, every written state constitution created a council that advised the chief executive. Six of these state constitutions used the term "advice and consent" to describe powers to be shared between the chief executive and the council. The level of control exercised by these councils varied considerably from state to state. However, the councils shared two common characteristics. First, the "advice" that they dispensed was not informal; most states required that records be kept of council proceedings, that conciliar advice be given in writing, and that the votes of the individual councilors be recorded. Second, they were part of state constitutions that "included almost every conceivable provision for reducing the executive to a position of complete subordination." Indeed, councils played such an active part in exercising executive power that, in the words of Virginia Governor Edmund Randolph, the governor was only "a member of the executive."

Parliament. This reemergence of some semblance of monarchical power was short-lived, however. Throughout the 1770's, opposition to George III and Lord North grew in Parliament. Finally, in 1782, five years before the American Constitution was drafted, Parliament reasserted itself and forced George III to accept a Whig government which he despised. From that point on, there have been no further attempts by British monarchs to play any significant part in lawmaking. See George Burton Adams, Constitutional History of England 401-09 (6th ed. 1935).

14. See Bestor, supra note 11, at 643-44. The names given to these councils ("Privy Council," "Council of State," "Executive Council," and "Council") varied somewhat but their duties were essentially similar. See id.

15. See id. at 644-45. The six states were South Carolina, Delaware, Maryland, New York, Massachusetts, and New Hampshire. For example, Article 35 of the South Carolina Constitution provided that "the governor and commander-in-chief ... by and with the advice and consent of the privy council, may lay embargoes ... for any time not exceeding thirty days, in the recess of the general assembly." 6 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 3255 (Francis Newton Thorpe ed., 1909) quoted in Bestor, supra note 11, at 646 n.435.

16. Charles Thach summarized the relationship between colonial governors and councils:

The first South Carolina constitution provided that the council's advice need be asked only where the constitution expressly required it, but in the second the matter was left entirely to legislative determination. The latter method was adopted in Maryland, where also it was provided that the council should constitute a board "for the transacting of business," in which the governor had only a single vote. The Delaware constitution provided that the governor might convene the council when he deemed it advisable, a provision made applicable in New Jersey to the whole upper chamber, which was intended, it would seem to have special advisory functions as a whole ... Both these documents are very vague, however ....

Charles C. Thach, Jr., The Creation of the Presidency 28 n.7 (1969).

17. See Bestor, supra note 11, at 646.

18. Thach, supra note 16, at 28; see generally id. at 25-54 (describing the dominance of the legislature and lack of a unitary executive in the state governments that existed between 1776 and 1787).

19. Letter from Edmund Randolph to George Washington (Nov. 24, 1786), quoted in Thach, supra note 16, at 29. This comment is particularly revealing considering that the
Thus, at the time of the Constitutional Convention, the term “advice and consent” denoted a Parliament that exercised nearly plenary law-making power and state councils that played a substantial role in the exercise of executive power. This historical context suggests that the Constitution assigns the Senate some active function in treatymaking and does not limit it to the role of a ratifier.

It would be a mistake, however, to interpret the Treaty Clause simply by referring to how Parliament and American state constitutions used the phrase “advice and consent.” The form of government created by the American Constitution was different from that of England or of American state governments. The Treaty Clause must be interpreted as part of Article II of the American Constitution, rather than part of an English statute or of the constitution of Eighteenth Century South Carolina. Unfortunately, the history of the drafting of the Treaty Clause—of how and why the words “advice and consent” were made part of Article II of the Constitution—is not very illuminating.

B. The Enigmatic History of the Treaty Clause—The Rise and Fall of the Senatorial Dominance Model

Drawing partly on the Eighteenth Century definition of “advice and consent,” Arthur Bestor, the author of two comprehensive analyses of the history of the Treaty Clause,20 argues that the Senate should have a dominant role in treatymaking. According to Bestor:

[t]he word “advice,” if given any defensible meaning, signifies with great precision the task of deciding upon the policy to be pursued in a treaty negotiation and of formally approving the diplomatic instructions embodying this policy. It goes without saying that concessions have to be made in the course of any complicated negotiation. Instructions cannot be mandatory, except, perhaps, on a small number of extremely critical points. “Advice” in this context derives its force from the obligation it imposes on the executive to explain why various departures from the instructions were necessary in order to achieve some more fundamental aim of the agreed-upon policy.21

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constitution of Virginia did not use the phrase “advice and consent,” but merely required the Governor to act “with the advice of” the Council of State. See Bestor, supra note 11, at 645 n.431.

20. Comprehensive is probably an understatement; Bestor’s two principal articles total some 273 pages. See supra notes 8 and 11.

Bestor bases this Senatorial Dominance Model on the treaty-making procedure that operated from 1781 to 1787 under the Articles of Confederation. Because the Articles of Confederation did not create any executive branch, Congress exercised complete control over treatymaking. To facilitate the negotiation of treaties, Congress created the office of Secretary of Foreign Affairs. However, Congress retained control over policy decisions relevant to treatymaking, allowing the Secretary discretion over only minor matters. On more than one occasion, Congress appointed a committee to investigate the Department of Foreign Affairs.

This model of treatymaking, in which the legislature makes all the policy decisions and approves diplomatic instructions, prevailed throughout most of the Constitutional Convention. From the beginning of the Convention on May 25, 1787, until September 4, thirteen days before the Convention finished its work, no formal motion or committee report suggested that the President should play any role whatsoever in treatymaking. Alexander Hamilton did offer a plan on June 18 proposing that the President “have with the advice and approbation of the Senate the power of making all treaties.” But Hamilton’s plan had few supporters and it was not brought to a vote.

22 Congress also had the power to authorize states to enter into treaties with foreign countries. See ARTICLES OF CONFEDERATION AND PERPETUAL UNION, art. VI ("No states" without the consent of the United States in Congress assembled, shall . . . enter into any conference, agreement, or alliance or treaty with any King, prince or state. . . .").

23 See Bestor, supra note 8, at 56. Robert Livingston served as Secretary of Foreign Affairs from 1781–83. John Jay replaced Livingston in 1784 and served for the duration of the Articles of Confederation period. Id. at 56–73.

24 See id. at 57. For example, in February 1782, Congress passed a resolution describing the duties of the Secretary of Foreign Affairs, which stated:

[P]rovided always, that letters to the ministers of the United States, or ministers of foreign powers, which have a direct reference to treaties or conventions proposed to be entered into, or instructions relative thereto, or other great national subjects, shall be submitted to the inspection and receive the approbation of Congress before they shall be transmitted.


26 See Berger, supra note 12, at 126.

27 See Arthur Bestor, “Advice” From the Beginning, “Consent” When the End is Achieved, 83 AM. J. INT’L L. 718, 719 (1989). This exclusion of the President from treatymaking was consistent with the narrow view of executive power that prevailed throughout most of the Constitutional Convention. On June 1, the Convention voted to grant the Executive only the “power to carry into execution the national laws” and “to appoint to offices in cases not otherwise provided for.” 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 63 (Max Farrand ed., 1911) [hereinafter Farrand]. In this June 1 debate, James Wilson, a vigorous advocate of a strong executive, stated: “Making peace and war are generally determined by Writers on the Laws of Nations to be legislative powers.” Id. at 73–74.

28 See Bestor, supra note 11, at 590.
The Convention's Committee on Detail submitted the first specific draft of a treaty clause on August 6. It stated that the Senate alone would have the power "to make treaties, and to appoint Ambassadors, and Judges of the Supreme Court." Over the next two weeks, delegates levelled two principal lines of criticism against the Committee on Detail's draft. Delegates from large states faulted the draft for excluding the House of Representatives. Some delegates also criticized the draft for not requiring a two-thirds vote. With one insignificant exception, there was not a single statement advocating a presidential role in treatymaking. If the Committee on Detail had stopped here, Professor Bestor would be right. As of August 6, 1787, the Senate, like the Articles of Confederation Congress, possessed the sole power to make treaties.

However, on August 23, the Senatorial Dominance Model began to unravel when James Madison commented that since "the Senate represented the States alone . . . for this as well as other obvious reasons it was proper that the President should be an agent in treatymaking." Bestor denies significance to Madison's statement:

Madison's choice of the word "agent" . . . indicates clearly enough that he was not proposing a wholesale transfer of foreign-policy making from legislative to executive hands . . . . Madison, in short, was not proposing an innovation. He merely wished to write into the new Constitution the relationship that already existed between the old Congress and its Secretary for Foreign Affairs, substituting for the former the about-to-be-created Senate, and for the latter the head of the about-to-be-created executive branch, the President. Had he been proposing something more far-reaching, some comment—some outcry, more probably would have followed his speech. There was

29. 2 Farrand, supra note 26, at 183.

30. See Bestor, supra note 8, at 93–96.

31. See id. at 97–100.

32. The exception was an August 15 speech by John Francis Mercer of Maryland, who argued that "the Senate ought not to have the power of treaties. This power belonged to the Executive department . . . ." 2 Farrand, supra note 26, at 297. However, none of Mercer's colleagues responded to or showed any other sign of interest in Mercer's suggestion, perhaps because a number of the delegates thought of Mercer as an opportunist. See Bestor, supra note 8, at 105 (quoting a letter from Jefferson to Madison in which Jefferson described Mercer as "a candidate for the secretariaship of foreign affairs and tho' he will not get the vote of one state, I beleive [sic] he expects the appointment. . . . Vanity and ambition seem to be the ruling passions of this young man, and as his objects are impure, so also are his means."). Bestor also notes that "Mercer is virtually the last delegate whose opinion can be credited as evidence of his colleague's feelings." Jack N. Rakove, Solving a Constitutional Puzzle: The Treatymaking Clause as a Case Study, 1 Persp. in Am. Hist. (n.s.) 233, 240 n.12 (citing Bestor, supra note 8, at 103–06).

33. 2 Farrand, supra note 26, at 392.
none whatever. Madison had made an observation, not a motion, and the Convention immediately directed its attention elsewhere. In this day’s discussion of treatymaking, the President was mentioned by no one but Madison.34

On August 31, without any further statements on the President’s role in treatymaking, the Convention voted to refer the issue of treatymaking to a Committee that was created to deal with “such parts of the Constitution as have been postponed, and such parts of reports as have not been acted on.”35 On September 4, this Committee on Postponed Parts reported to the Convention a draft treaty clause that read: “The President by and with the advice and Consent of the Senate, shall have power to make Treaties . . . . But no Treaty shall be made without the consent of two thirds of the members present.”36

The Committee on Postponed Parts’s proposed treaty clause differed dramatically from the version submitted by the Committee on Detail on August 6. Not only did the Senate lose its exclusive treaty-making role, but in its September 4 draft, the Committee on Postponed Parts placed the treaty clause in Article X of its draft constitution, the article that dealt with executive power.37 A five-person Committee on Style then made some cosmetic changes to the Committee on Postponed Parts’s draft, which resulted in the final version of the Treaty Clause.

Despite these substantial changes, there was very little debate on the President’s role in treatymaking.38 Bestor emphasizes this lack of debate. He interprets the silence of the delegates as evidence that they did not wish to change the Senatorial Dominance Model that had prevailed during the early stages of the Constitutional Convention.39

But an examination of the statements of a number of prominent Framers shows that there certainly was not a consensus behind the Senatorial Dominance Model. In fact, the Framers interpreted the Treaty Clause in varying ways; some argued that the Constitution gave the Senate a substantial role in treatymaking while others contended that the President would have the primary responsibility.

34. Bestor, supra note 8, at 109.
35. 2 Farrand, supra note 26, at 473.
36. Id. at 498–99.
37. See id.
38. See Bestor, supra note 11, at 652–60. There was, however, considerable debate on the exclusion of the House of Representatives and on the requirement of a two-thirds Senate vote. See Bestor, supra note 8, at 123–31.
39. See Bestor, supra note 8, at 101 (discussing “[t]he absence of controversy on the matter is almost conclusive proof that no radical change from previously established practices was contemplated.”).
For example, at the North Carolina ratifying convention, William Davie, a Framer, asserted that "it would seem that the whole power of making treaties ought to be left to the President, who, being elected by the people of the United States at large, will have their general interest at heart[,]" but since the small states demanded "an absolute equality in making treaties[,]" it had been found "indispensable to give to the senators, as representatives of the states, the power of making, or rather ratifying treaties." Davie's interpretation of the Treaty Clause is diametrically opposed to the Senatorial Dominance Model. Not only did Davie reduce the Senate to the role of a ratifier, but he viewed the President as the articulator of the national interest.

James Wilson, who has been characterized as the creator of the American presidency, held similar views. In December 1787, Wilson argued that "[t]he Senate can make no treaties; they can approve of none unless the President lay it before them." He went on that "[w]ith regard to their power in forming treaties, [the Senate] can make none; they are only auxiliaries to the President.

A number of prominent figures did interpret the Treaty Clause as giving the Senate a more significant role. In Federalist 64, John Jay, who was then Secretary of Foreign Affairs, wrote that "[i]t seldom happens in the negotiation of treaties, of whatever nature, but that perfect secrecy and immediate dispatch are sometimes requisite." Secrecy and dispatch, Jay argued, were attributes of the President, not the Senate. But Jay then provided a narrow definition of presidential power:

Those matters which in negotiations usually require the most secrecy and the most dispatch are those preparatory and auxiliary measures which are not otherwise important in a national view, than as they tend to facilitate the attainment of the objects of the negotiation. For these the President will find no difficulty to provide; and should any circumstance occur which requires the advice and consent of the Senate, he may at any time convene them. Thus we see that the Constitution provides that the negotiations for treaties shall have every advantage which can be derived from talents, information,

41. Davie's view of the President was shared by Gouverneur Morris who characterized the President as "the general Guardian of the National interests." 2 Farrand, supra note 26, at 540-41.
42. See THACH, supra note 16, at 176-77.
44. Id. at 491.
integrity, and deliberate investigations, on the one hand, and from secrecy and dispatch on the other.\textsuperscript{46}

Thus, Jay saw the Senate as having some role in setting the treaty-making policy and only being excluded from "preparatory and auxiliary measures."\textsuperscript{47}

Alexander Hamilton, usually an advocate of an energetic executive, characterized the treaty-making power as neither purely legislative nor executive: "The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive."\textsuperscript{48} The qualities needed for effective management of foreign negotiations made the President "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 portion of the legislative body in the office of making them."\textsuperscript{49} Hamilton's use of the word "agent" suggests a limited presidential role. However, Hamilton points out that the President is not "the ministerial servant of the Senate" and that the President and the Senate share "joint possession" of the treaty power.\textsuperscript{50}

In sum, prominent political figures of the 1780s disagreed over the original meaning of the Treaty Clause. This lack of consensus is not particularly surprising considering the schizophrenic nature of the Treaty Clause.\textsuperscript{51} On the one hand, the phrase "advice and consent" suggests some active senatorial role beyond mere ratification. On the other hand, the Framers placed the Treaty Clause in Article II, the constitutional source of presidential power.

C. Treatymaking as an Article II Power

In \textit{Goldwater v. Carter},\textsuperscript{52} the Court of Appeals for the District of Columbia Circuit held that the President has the constitutional power to

\begin{itemize}
  \item \textsuperscript{46} \textit{Id.} at 393.
  \item \textsuperscript{47} \textit{Id. Federalist} 64 is unclear about whether the President would be free to disregard the Senate's advice.
  \item \textsuperscript{48} \textit{The Federalist} No. 75, at 451 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
  \item \textsuperscript{49} \textit{Id.}
  \item \textsuperscript{50} \textit{Id.} at 452.
  \item \textsuperscript{51} Nor is this lack of agreement unique to the Treaty Clause. As a general matter, there was no consensus on the scope of presidential power. \textit{See Shane & Bruff, supra} note 7, at 11. \textit{See generally Thach, supra} note 16, at 140-65.
  \item \textsuperscript{52} 617 F.2d 697 (D.C. Cir. 1979) (en banc) (per curiam). The Supreme Court vacated the Court of Appeals's decision on the grounds that the case presented a nonjusticiable political question, \textit{Goldwater v. Carter}, 444 U.S. 996, 1003 (Rehnquist, J., concurring in the judgment), and was not ripe, \textit{id.} at 997 (Powell, J., concurring in the judgment).
\end{itemize}
terminate a treaty unilaterally. The court noted that "[i]t is significant that the treaty power appears in Article II of the Constitution, relating to the executive branch, and not in Article I, setting forth the powers of the legislative branch."\(^5\) Thus, the Senatorial Dominance Model, which relegates the President to a subordinate role in treaty-making, is incompatible with the Treaty Clause's location in Article II.

A comparison of the authority that would be granted to the President under the Senatorial Dominance Model to his power to execute the law explains this incompatibility. The Take Care Clause of the Constitution provides that the President "shall take Care that the Laws be faithfully executed."\(^5\) The amount of discretion enjoyed by the President in executing a law varies. Sometimes, Congress passes a statute which leaves "a gap for [the Executive] to fill,"\(^5\) thus delegating to the Executive the power to "elucidate a specific provision of the statute by regulation."\(^5\) However, Congress also passes very detailed statutes which give the President much less discretion.\(^5\) The Senatorial Dominance Model would operate in a similar fashion—the Senate would either give the President a great deal of flexibility by issuing very broad diplomatic instructions, or it would limit presidential discretion by issuing detailed instructions.

But, if the President enjoys only limited discretion in exercising his Article II power to execute the law, then it should not seem anomalous for him to enjoy limited discretion in exercising his Article II power to make treaties. A comparison of the sources of the constraints on these presidential powers shows that such an anomaly exists. In order for the President to have any discretion in taking care that a given statute is enforced, Congress must first pass that statute. And passing statutes is a power given to Congress in Article I, that section of the Constitution which describes the powers of the House and Senate. The limited room for discretion that the President may have when executing a law is not caused by any provision in Article II. Rather, it results from the interplay between two grants of power—that assigned to Congress in Article I and that assigned to the President in Article II.\(^5\) By contrast, with respect to

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53. Goldwater, 617 F.2d at 705.
54. U.S. Const. art. II, § 3.
56. Id. at 844. See also Lincoln v. Vigil, 508 U.S. 182, 192 (1993) ("A lump-sum appropriation leaves it to the recipient agency (as a matter of law, at least) to distribute the funds among some or all of the permissible objects as it sees fit.") (citations omitted).
58. This relationship between an Article I power and the Executive's discretion in exercising an Article II power is not limited to the context of the Take Care Clause. One other example concerns the President's role as Commander-in-Chief. In Article II, the Constitution provides that the "President shall be Commander in Chief of the Army and Navy of the United
treaties, the Senate has no Article I power. The textual basis for its role in treatymaking is derived solely from Article II.\(^6^9\)

Of course, it is not the case that just because a grant of power to Congress or to the Senate is located in Article II or Article III, or a grant of power to the President is located in Article I means that the power is trivial. An obvious example of this caveat is the veto power, which is located in Article I, yet gives significant power to the President.\(^6^0\) Nevertheless, considering how far the Senatorial Dominance Model would tip the balance of power towards the Senate and the fact that Article I is silent on the subject of treatymaking, the Senatorial Dominance Model is at odds with the Treaty Clause’s location in Article II.

D. Reconciling the Treaty Clause with Interpretations of Other Foreign-Affairs Powers

The Treaty Clause is not only a part of Article II, but is also one of only a few constitutional provisions that regulate the conduct of foreign affairs.\(^6^1\) These few provisions are broadly written and, like the Treaty Clause, are susceptible to a number of interpretations.\(^6^2\) Furthermore, the Constitution is silent on a number of foreign-affairs questions,\(^6^3\) leaving many of what Professor Henkin refers to as “lacunae.”\(^6^4\)

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\(^6^9\) U.S. CONST. art. II, § 2, cl. 2. However, in Article I, the Constitution gives Congress the power “[t]o declare War,” “[t]o raise and support Armies,” “[t]o provide and maintain a Navy,” and “[t]o make Rules for the Government and Regulation of the land and naval Forces.” U.S. CONST. art I, § 8, cl. 11–14. There is, of course, great disagreement about the relative scope of congressional and presidential power in this area. See generally Henkin, supra note 7, at 50–54. At least one thing is certain—a determined Congress that uses its Article I power to refuse to appropriate funds for a war can sharply limit how the President uses his Article II Commander-in-Chief power.

\(^6^0\) Although most of the powers granted in Article I are to Congress, Article I, Section 3, Clause 6, does give the Senate the sole power to try impeachments. Thus, the fact that the President’s partner in treatymaking is the Senate, and not Congress, does not justify the Treaty Clause’s presence in Article II or explain the omission of the Senate’s treaty-making power from Article I.

\(^6^1\) See U.S. CONST. art. I, § 7, cl. 2. But note that the Senate would enjoy far more treatymaking power under the Senatorial Dominance Model than the President does with respect to his veto power. Unlike a refusal by the Senate to authorize a treaty negotiation, a veto can be overridden. More fundamentally, the veto power is a purely negative power; it does not give the President any authority to direct Congress to legislate. In this sense, it resembles the comparatively weak power of the Senate under the Ratification Model. The Senatorial Dominance Model would give the Senate the much greater power of directing the President to enter into treaty negotiations.


\(^6^3\) For a list of some of these questions, see Henkin, supra note 7, at 16–17.

\(^6^4\) Henkin, supra note 61, at 10.
Over the years, the Supreme Court has interpreted these provisions and filled in these gaps in a manner that has given the President a significant role in formulating American foreign policy. Although the Supreme Court has never issued a holding on what "advice" means in the Treaty Clause, where it has resolved ambiguities in the Constitution’s foreign-affairs provisions, it has not relegated the President to the status of an agent with the power only to execute a foreign policy set by the Senate or some other governmental body. Yet, that is precisely what the Senatorial Dominance Model would accomplish. Although the Supreme Court has never directly contradicted this Model, its other foreign-affairs decisions indicate that the Senatorial Dominance Model is an incorrect interpretation of the Treaty Clause.

In *United States v. Curtiss-Wright Corp.*, the Supreme Court acknowledged "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." The origin of the phrase "sole organ" is a 1799 statement by then-Congressman John Marshall that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." As Professor Corwin has observed, "[c]learly, what Marshall had foremost in mind was simply the President's role as *instrument of communication* with other governments." Still, since the Washington Administration, this seemingly narrow power of communication, in fact, has given the President a broad role in formulating American foreign policy. As our sole organ of communication:

> [t]he President had charge of daily relations with other nations. Continuous intercourse generated innumerable issues, and someone had to formulate United States policy about them. . . . The President began to make that policy. Small decisions in daily intercourse inevitably were made "on the spot" by those engaged in the process. . . . The President had the facts, and the advice of expert subordinates. He could act quickly, decisively; only he could act when Congress was not in session and decision was urgent. George Washington—scrupulous, responsible, non-self-aggrandizing—proclaimed neutrality, asked for the recall of the misbehaving French Minister, fought Indians, launched the Jay Treaty. He, or his cabinet,

65. 299 U.S. 304 (1936).
66. Id. at 320.
67. 10 *Annals of Cong.* 613 (1800).
or his ambassadors, made a myriad of smaller decisions—"formulated national policy"—in conducting relations with countries every day.69

The significant role the President plays in formulating American foreign policy does not derive solely from his control over day-to-day interactions with foreign governments. The Supreme Court’s interpretations of the Constitution’s ambiguous foreign-affairs provisions have also added depth to this role.

One powerful example is the President’s possession of the power of diplomatic recognition. The Constitution provides that the President “shall receive Ambassadors and other public Ministers.”70 As is true of the Treaty Clause, there is more than one plausible interpretation of this power to “receive Ambassadors.” In Federalist 69, Hamilton downplayed its importance and described this presidential power as merely symbolic.71 However, the Washington Administration and all others since have interpreted this provision as giving the President the unilateral power to determine which governments the United States recognizes. The Supreme Court has endorsed this presidential power unequivocally.72

69. Henkin, supra note 61, at 11. Congress recognized this presidential role in formulating American foreign policy as early as 1789. When it created the departments of the executive branch, the First Congress differentiated between foreign and domestic affairs. In domestic departments, such as the Treasury Department, Congress carefully defined the duties of the Secretary. By contrast, it authorized the Secretary of State:

[to] perform and execute such duties as shall from time to time be enjoined on or entrusted to him by the President of the United States, agreeable to the Constitution, relative to correspondences, commissions or instructions to or with public ministers or consuls, from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs as the President . . . shall assign to the said department . . .

1 Stat. 28 (1789).

70. U.S. CONST. art. II, § 3.

71. Hamilton wrote:

The President is also to be authorized to receive ambassadors and other public ministers. This, though it has been a rich theme of declamation, is more a matter of dignity than authority. It is a circumstance which will be without consequence in the administration of the government; and it was far more convenient that it should be arranged in this manner than that there should be a necessity of convening the legislature, or one of its branches, upon every arrival of a foreign minister, though it were merely to take the place of a departed predecessor.


72. See Goldwater v. Carter, 444 U.S. 996, 1007 (1979) (Brennan, J., dissenting) ("Our cases firmly establish that the Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign nations."); United States v. Pink, 315 U.S. 203, 229 (1942) (The President has "the power to determine the policy which is to govern the question of recognition.").
In fact, the President's power is not even limited to unilateral declarations of American recognition but also includes the "modest implied power" to remove such obstacles to full recognition as "settlement of all outstanding problems including the claims of our nationals."73 And the President has "some measure of power" to remove these obstacles by "enter[ing] into executive agreements without obtaining the advice and consent of the Senate."74 Although this presidential authority to conclude executive agreements outside of the Treaty Clause is limited in scope,75 and not without its critics,76 its existence is a powerful example of the way in which the President's Article II foreign-affairs powers have been broadly construed.

The Supreme Court's interpretation of the Receipt of Ambassadors Clause and its endorsement of the President's power to conclude executive agreements that remove obstacles to recognition are by no means anomalies.77 The President, in short, has assumed a commanding role in formulating American foreign policy.78 Gaps and ambiguities in the original meaning of the Constitution's foreign-affairs provisions have not been resolved in the manner in which the Senatorial Dominance Model would interpret the ambiguous Treaty Clause. The President is not a mere agent in conducting American foreign policy.

73. Pink, 315 U.S. at 229–30.
75. See, e.g., Restatement (Third) of Foreign Relations Law § 303(4) (1986) ("The President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution.") (emphasis added); Tribe, supra note 62, at 1267 ("Whatever the details, the impact of an agreement on state or national sovereignty must ultimately determine whether the agreement" must be in the form of a treaty rather than an executive agreement.).
77. For a discussion of the breadth of the President's foreign-affairs powers, see Corwin, supra note 68, at 200–56; Henkin, supra note 7, at 44–65; Henry P. Monaghan, The Protective Power of the Presidency, 93 Colum. L. Rev. 1, 47–56 (1993). The following dicta from Department of the Navy v. Egan, 484 U.S. 518 (1988), provides another example of the broad way in which the President's foreign-affairs powers have been interpreted:

The President, after all, is the "Commander in Chief of the Army and Navy of the United States." U. S. Const., Art. II, § 2. His authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant.

Id. at 527.
78. See Henkin, supra note 61, at 11–12. Congressman Lee Hamilton, former Chairman of the House Foreign Affairs Committee, summarized the President's foreign-affairs powers succinctly: "We can modify, we can alter. But the fundamental policy remains the president's policy." Michael Barone & Grant Ujifusa, The Almanac of American Politics 1994, at 462 (1993).
E. Returning to the Text—The Triumph of the Recommendation Model

Before rejecting the Senatorial Dominance Model, we must confront one stubborn fact. No matter how many times one cites Curtiss-Wright, describes the breadth of the President’s foreign-affairs powers, and points out that the Treaty Clause is located in Article II, the words “by and with the Advice and Consent of the Senate” remain in the text of the Constitution. As Part I.B showed, at the time of the drafting of the Constitution, “advice and consent” did not just mean ratification. However, the Eighteenth Century definition of “advice and consent” is not sufficient support for the radical departure which the Senatorial Dominance Model would take from the interpretation of the Constitution’s other foreign-affairs provisions. This definition does not overcome the arguments in favor of a significant presidential role in treatymaking that were advanced in Parts I.C and I.D.

Even in the Eighteenth Century, the meaning of “advice and consent” varied depending on the context in which it was used. In Eighteenth Century England, when Parliament gave the Monarch its “advice and consent” to a law, Parliament actually wrote the law and the Monarch fulfilled her limited role by granting her symbolic royal assent. The parliamentary power to give “advice and consent” was equivalent to the power to draft and pass legislation. In the American state governments of the 1780s, the chief executive’s power did not consist of rubber-stamping the Privy Council’s votes. Rather, the governor generally shared power with the Privy Council, together forming a type of plural executive. The British Monarch’s lawmaking power relative to Parliament was not identical to the power of American state governors relative to their Privy Councils. Therefore, despite the usage of “advice and consent” on both sides of the Atlantic, its meaning depended on its context.

As shown in Parts I.C and I.D the presence of the Treaty Clause in Article II and its place in a government structured to give the President

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79. 299 U.S. 304 (1936). See Koh, supra note 68, at 94 (“Among government attorneys, Justice Sutherland’s lavish description of the president’s powers is so often quoted that it has come to be known as the ‘Curtiss-Wright, so I’m right’ cite.”).
80. See, e.g., Charles J. Cooper, What the Constitution Means by Executive Power, 43 U. MIAMI L. REV. 165, 177 (1988) (“[T]he conduct of foreign relations is an aspect of the executive power entrusted to the President, subject only to narrowly defined exceptions.”).
81. See supra text accompanying notes 11–13.
82. See Thach, supra note 16, at 29–34; supra text accompanying notes 14–19. The exception was New York, which had a strong executive. See Thach, supra note 16, at 34–38.
a strong role in foreign policymaking gives the Clause a dramatically different context from that of the Eighteenth Century governments of England and of the American states. It is so different that the Eighteenth Century wording of the grant of power to the Senate through the term "advice and consent" loses relevance. The word choice is not enough to sustain the radical Senatorial Dominance Model. To conclude otherwise would amount to what Professors Tribe and Dorf call "a dis-integrated reading" of the Constitution, that is, an attempt "to lift one provision out, hold it up to the light, and give it its broadest possible interpretation, while ignoring the fact that it is immersed in a larger whole." The Senatorial Dominance Model suffers from the symptoms of such a dis-integrated reading.

Having rejected the Senatorial Dominance Model, we are left with two alternatives. The first alternative, the Ratification Model, gives the Senate no constitutional role other than to approve treaties that the President has negotiated. The other possibility is the Recommendation Model, under which the Senate would have the constitutional power to give the President advice before and during a treaty negotiation.

Choosing between these two models is a much easier task than disposing of the Senatorial Dominance Model proved to be. The Constitution contains a number of provisions that give one government entity the power merely to ratify some action of another. Article I, section 10 contains a list of actions that states may not undertake without "the Consent of Congress." After two-thirds of the House and Senate propose

84. Id.
85. The Senate has, on rare occasion, chosen to give the President advice before he began treaty negotiations. One modern example is the Vandenberg Resolution, which the Senate approved on June 11, 1948. This resolution expressed the sense of the Senate:

that this Government, by Constitutional processes, should particularly pursue . . . objectives [including] . . . [P]rogressive development of regional and other collective arrangements for individual and collective self-defense in accordance with the purposes, principles, and provisions of the [United Nations] Charter [and] . . . Association of the United States, by constitutional processes, with such regional and other collective arrangements as are based on continuous and effective self-help and mutual aid, and as affect its national security.

S. Res. 239, 80th Cong. (1948) (enacted) (also found in Treaties and Other International Agreements, supra note 7, at 91-92). See Restatement (Third) of Foreign Relations Law § 303 reporters’ note 3 (1986) (discussing the infrequency with which the Senate has offered formal treaty-making advice).
86. U.S. Const. art. I, § 10, cl. 2-3 (emphasis added).
a constitutional amendment, that amendment becomes valid "when Ratified by the Legislatures of three fourths of the several States." The Constitution took effect after "[t]he Ratification of the Conventions of nine States." Finally, the Constitution defines the President's veto power in the following manner: "If he approve he shall sign it, but if not he shall return it." "Advice and consent" is noticeably different from the terms "consent," "ratified," "ratification," and "approve," which indicates that the Framers intended to convey a much different power through this formulation. The Ratification Model would be consistent with these other constitutional provisions if the Treaty Clause read "by and with the Consent of the Senate." But that is not what the Treaty Clause says. The Ratification Model is, therefore, plainly inconsistent with the text of the Constitution.

The only interpretation of the Treaty Clause that avoids the pitfalls that doomed the Senatorial Dominance and Ratification Models is the Recommendation Model. By giving the Senate the power to offer non-binding recommendations before and during a treaty negotiation, it neither relegates the President to the status of an "agent," nor seeks to delete the words "advice and" from the Constitution. It is the only interpretation that is faithful to the text and structure of the Constitution.

87. Id. art. V (emphasis added).
88. Id. art. VII (emphasis added).
89. Id. art. I, § 7, cl. 2 (emphasis added).
90. Indeed, the term "ratification" properly refers not to any act of the Senate, but rather to the President's decision, made after the Senate has consented, to accede to a treaty. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 reporters' note 3 (1986).
91. This article takes no position on the meaning of "advice and consent" in the Appointments Clause. As Senator Henry Cabot Lodge pointed out, the text of the Appointments Clause may suggest that the Constitution gives the Senate less of a role in appointments than it does in treaties:

[T]he carefully phrased section gives the President absolute and unrestricted right to nominate, and the Senate can only advise and consent to the appointment of, a given person. All right to interfere in the remotest degree with the power of nomination and the consequent power of selection is wholly taken from the Senate. Very different is the wording of the treaty clause. There the words "by and with the advice and consent of" come in after the words "shall have power" and before the power referred to is defined. The "advice and consent of the Senate" are therefore coextensive with the "power" conferred on the President, which is "to make treaties," and apply to the entire process of treaty-making.

Lodge, supra note 2, at 231–32. But see David A. Strauss & Cass R. Sunstein, The Senate, the Constitution, and the Confirmation Process, 101 Yale L.J. 1491, 1495 (1992) ("These words assign two distinct roles to the Senate—an advisory function before the nomination has occurred and a reviewing function after the fact. . . . The clause thus envisages a genuinely consultative relationship between the Senate and the President.").
F. Defining the Breadth of the Senate's Advice Power under the Recommendation Model

Choosing the Recommendation Model does not end our inquiry into the meaning of "advice." Though the Senate has the constitutional power to offer its opinion, the nature of the subjects on which it may exercise this power is nebulous. The Treaty Clause may broadly empower the Senate to give advice on any matter related to the making of a treaty, including details such as the day-to-day strategy the executive should employ when negotiating with a foreign country. Conversely, it may grant a more narrow advice power limited to offering recommendations on the broad policy goals to be pursued in a treaty negotiation.

The Supreme Court's decision in *Curtiss-Wright* helps to resolve this issue. The Court explained that as our sole organ of communication with foreign governments, the President "alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude . . . ." 92

*Curtiss-Wright*’s exclusion of the Senate from the day-to-day conduct of treaty negotiations is consistent with John Jay’s position in *Federalist* 64. Recall that John Jay warned that “[i]t seldom happens in the negotiation of treaties, of whatever nature, but that perfect secrecy and immediate dispatch are sometimes requisite.” 93 Jay argued that secrecy and dispatch were presidential attributes. He further noted that the President need not consult with the Senate in all circumstances but only in circumstances where the President required the Senate’s “advice and consent.” 94

History also supports the idea that the Senate’s advice power does not cover day-to-day negotiating strategy. At the time of the framing and

93. *The Federalist* No. 64, *supra* note 45, at 392. Then-Secretary of Foreign Affairs Jay expressed similar sentiments to the Articles of Confederation Congress in 1785:

> It is proper and common to instruct Ministers on the great Points to be agitated, and to inform them how far they are to insist on some, and how far they may yield on others. But I am inclined to think it is very seldom thought necessary to leave nothing at all to their Discretion; for where that ought to be the Case, the Man ought not to be employed. . . . Should [a Spanish envoy] discover (and discover it he will) that every thing he may say to me, which may be denominated a Proposition, is to be reduced to Writing and laid before Congress, I think it probable that he would observe more Caution and Reserve, than he might otherwise deem necessary and it does not strike me as expedient thus to urge him to be circumspect.

94. See *The Federalist* No. 64, *supra* note 45, at 393.
The Meaning of "Advice and Consent"

ratification of the Constitution, transatlantic travel and communications were so slow and inefficient that it would have been physically impossible for the Senate to give advice on the daily conduct of treaty negotiations. Indeed, even the Articles of Confederation, Congress insisted on controlling only basic policy decisions and gave its Secretary of Foreign Affairs control over the day-to-day conduct of treaty negotiations.95

Thus, although the Senate has the power to offer nonbinding policy recommendations regarding the goals of a treaty negotiation, it has no constitutional power to offer advice on the day-to-day conduct of a treaty negotiation. The President and his foreign-policy apparatus enjoy plenary power over day-to-day matters such as when to make concessions, when to tell the truth, when to bluff, and when to lie.

However, the Senatorial power to offer nonbinding policy advice may prove insignificant. Suppose, for example, that the Senate offered the President its opinion regarding what negotiating strategy the President should employ in a treaty negotiation. Constitutionally, such advice would be beyond the Senate's Treaty Clause power, but no one could prevent the Senate from doing so.

The power to grant nonbinding advice implies the conveyance of other Senatorial powers. In order for the Senate to perform its advice function, it must have access to foreign-policy information which is compiled by the executive and which is often top secret. As Part II explains, the Senate's possession of a constitutional power to give nonbinding advice provides it with a constitutional sword to obtain the required information from the Executive.

PART II: USING THE "ADVICE" FUNCTION AS A SWORD:
THE SENATE'S RIGHT TO RECEIVE
INFORMATION FROM THE EXECUTIVE

A. Giving Knowledgeable Advice—The Need for Information

If the Senate chooses to exercise its right under the Recommendation Model to give nonbinding advice to the President, it runs into an immense practical obstacle—its lack of access to foreign-policy information. As Part I.D discussed, the President is our sole organ of communication with foreign governments. He controls a huge foreign-policy apparatus

95. See Bestor, supra note 8, at 60-62 (discussing Congress's decision to approve Secretary Jay's suggestion that he not be required to share with Congress every proposal that he would receive or make in his 1785-86 treaty negotiation with Spain).
that receives and analyzes information from abroad. By contrast, the Senate has a limited foreign-policy staff and does not have any routine contact with representatives of foreign states.

This asymmetry gives the President the opportunity to deny the Senate the ability to give advice before or during a treaty negotiation. Because the President controls the foreign-policy apparatus, he could order his diplomats to commence negotiations on a treaty and not inform the Senate of the negotiations until the treaty is signed. The Senate, of course, could defend itself by refusing to give its consent to a secretly negotiated treaty. But that is easier said than done. By the time that the President has signed a treaty, negotiating positions have crystallized and international commitments have been made. If the Senate were to refuse to consent to the treaty, it would risk possible loss of American credibility abroad.

Presidential administrations are, of course, aware that informing the Senate of a treaty only after it has been signed can short-circuit the Senate’s advice function. At times, the Executive has expressed a desire not to undermine the Senate’s advice power. For instance, Secretary of State John Foster Dulles explained to the Senate:

It will be our effort to see that the Senate gets its opportunity to “advise and consent” in time so that it does not have to choose between adopting treaties it does not like or embarrassing our international position by rejecting what has already been negotiated out with foreign governments.

Unfortunately, Secretary Dulles’s high-sounding words are the exception, not the rule. Presidential administrations have often not given the Senate adequate information on treaty negotiations and have left the Senate with the dilemma described by Secretary Dulles.


97. See Henkin, supra note 61, at 15–16.

98. See id.


100. See Henkin, supra note 61, at 15–16. Although he does not directly address the Senate’s right to information regarding treaty negotiations, George Kennan, a leading American diplomat during the Cold War, expresses the distaste that some in the executive have for sharing foreign-policy information:

I pointed out [to a Washington reporter] that personally[,] I had entered a profession which I thought had to do with the representation of United States interests vis-a-vis foreign governments; that this was what I had been trained for and what I was prepared to do to the best of my ability; and that I had never understood that part of my profession was to represent the US government vis-a-vis the Congress; that my specialty was the defense of US interests against others, not against our own
The doctrine of executive privilege gives the President the constitutionally based right to withhold certain types of information from Congress or the courts. But, the doctrine may not give the President license to undermine the Senate's advice function by withholding information about an ongoing or future treaty negotiation.

B. Executive Privilege—General Principles

The first assertion of executive privilege to withhold treaty-making information occurred during the Washington Administration. In 1796, the House of Representatives requested that President Washington provide it with papers relating to the negotiation of the Jay Treaty. Washington refused the request and, in a statement to the House quoted approvingly by the Supreme Court in *Curtiss-Wright*, Washington explained his decision:

> The nature of foreign negotiations requires caution and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers.

Washington based his denial of the House's request partly on the fact that the Constitution vested treaty-making power in the President and the Senate, but excluded the House. He concluded that the House should have no “right... to demand... all the papers respecting a negotiation with a foreign power.”

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representatives; that I resented the State Department being put in the position of lobbyists before Congress in favor of the US people;... that we were not their keepers or their mentors; that it was up to them to inform themselves just as it is up to us to inform ourselves; that 98 percent of the information needed as background for judgments on questions of foreign policy can be found in the *New York Times* and that I had no sympathy with the allegations that Congress cannot act intelligently in these questions because “it has not been given the facts.”


101. For a brief discussion of the President's power to withhold treaty-making information from the Senate, see TRIBE, *supra* note 96, § 4-16, at 285-86.

102. See CORWIN, *supra* note 68, at 212.

103. 299 U.S. 304, 320-21 (1936).

104. *Id.* at 321.

105. *Id.* For a discussion of this confrontation between President Washington and the House of Representatives, see BERGER, *supra* note 12, at 132.
Unlike the House, the Senate does have a share in the treaty-making power. So Washington's refusal to honor the House's request is of limited applicability to presidential denials of Senate information requests. But Washington did have a point. Diplomatic negotiations demand secrecy. A President who turns down a Senate request for information might do so not out of some malevolent desire to undermine the Senate's ability to perform its advice function, but out of a fear that the Senate would leak confidential information and thus harm America's position in a treaty negotiation. Unfortunately, legal precedents do not clearly indicate whether the President may rely on executive privilege to withhold treaty-making information from the Senate for reasons of secrecy.

In *United States v. Nixon*, the Supreme Court's leading decision on executive privilege, the Court held that, under certain circumstances, the President has a constitutional privilege to refuse to disclose information to a criminal court. The privilege is based on "the supremacy of each branch within its own assigned area of constitutional duties" and on "the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties." However, the Court found that "[a] President's acknowledged need for confidentiality in the communications of his office is general in nature" and was outweighed by the "constitutional need for production of relevant evidence" in a specific criminal proceeding.

In dicta, the Court did acknowledge the importance of secrecy in foreign affairs. But the Court stressed that its holding applied only to

108. Id. at 705.
109. Id.
110. Id. at 712–13.
111. Id. at 713.
112. The Court used strong language:

> It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.

*Id.* at 711 (quoting *United States v. Reynolds*, 345 U.S. 1, 10 (1953)). But see Tribe, supra note 96, § 4-15, at 284–85 (arguing that this dicta should not be read as prohibiting in camera inspections of material when there is no extrinsic evidence that the material contains state secrets).
"the conflict between the President's assertion of a generalized privilege of confidentiality and the constitutional need for relevant evidence in criminal trials" and not to "congressional demands for information" (or Senate requests for treaty-making information). The Supreme Court has never ruled on an executive-privilege dispute between the President and the House or Senate.

In United States v. American Telephone & Telegraph Co., the Court of Appeals for the District of Columbia Circuit did consider an executive-privilege controversy between the Executive and Congress. AT&T involved an effort by a House Subcommittee to obtain from the Justice Department, AT&T records pertaining to certain warrantless wiretaps. The Justice Department refused to turn over the records, citing national security concerns. The court reasoned that if it were to decide the case on the merits, it would have to employ a Nixon-like balancing test:

[W]e would be called on to balance the constitutional interests raised by the parties, including such factors as the strength of Congress's need for the information in the request letters, the likelihood of a leak of the information in the Subcommittee's hands, and the seriousness of the harm to national security from such a release.

It declined to apply the balancing test, declaring that "[a] court seeking to balance the legislative and executive interests asserted here would face severe problems in formulating and applying standards." These problems would be particularly great when it came to estimating the danger to national security. Accordingly, the court ordered the Department of Justice and the Subcommittee to return to the bargaining table and try to reach a settlement.

115. 551 F.2d 384 (D.C. Cir. 1976).
116. Id. at 391.
117. Id. at 394.
118. Id. The court also found that making such an estimate would prove to be difficult and unbecoming:

As to the danger to national security, a court would have to consider the Subcommittee's track record for security [and] the likelihood of a leak if other members of the House sought access to the material. In addition to this delicate and possibly unseemly determination, the court would have to weight the effect of a leak on intelligence activities and diplomatic relations. Finally, the court would have to consider the reasonableness of the alternatives offered by the parties and decide which would better reconcile the competing constitutional interests.

Id.
A year later, the parties were still unable to reach an agreement, and they returned to the court of appeals.\footnote{United States v. American Telephone & Telegraph Co., 567 F.2d 121 (D.C. Cir. 1977).} Using strong language, the court rejected the Executive’s claim that “the Constitution confers on the executive absolute discretion in the area of national security.”\footnote{Id. at 128.} But, discouraged by the difficulty of balancing the Subcommittee’s need for the information with the Executive’s national security claim, the court flinched. It noted that “the Constitution is largely silent on the question of [the] allocation of powers associated with foreign affairs and national security. These powers [fall] . . . within a ‘zone of twilight’ in which the President and Congress share authority or in which its distribution is uncertain.”\footnote{Id.} The court found that the dispute between the House Subcommittee and the Department of Justice fell within this “zone of twilight.”\footnote{Id. at 131–33. For a criticism of the court’s solution, see Bruce E. Fein, \textit{Access to Classified Information: Constitutional and Statutory Dimension}, 26 WM. & MARY L. REV. 805, 840 (1985) (characterizing \textit{AT&T} as “wooly and temporizing”).} It declined to rule in favor of either party and instead devised a detailed plan that the court hoped would break the impasse.\footnote{Id.}

The court of appeals’s performance in \textit{AT&T} seems to show that resolving an executive-privilege dispute over treaty-making information would be an extremely difficult task. Applying a Nixon-like balancing approach, as in \textit{AT&T}, would raise problems similar to those that so confounded the court of appeals. For instance, when considering the possible threat to national security, the courts would have to devise a means of determining the likelihood that the Senate would leak the information. Furthermore, they would have to estimate whether these leaks would damage the President’s capacity to negotiate.

In \textit{AT&T}, the court of appeals found issues like these difficult to decide because the Constitution is silent on whether a House Subcommittee can be trusted to keep national-security secrets.\footnote{The Constitution’s requirement that “[e]ach House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy[,]” U.S. CONST. art. I, § 5, cl. 3 (emphasis added), would provide some textual evidence refuting a blanket assertion by the President that he can always withhold information from Congress on the grounds that Congress can \textit{never} be trusted not to disclose \textit{any} secret information. However, this constitutional provision is too general to be of much use in assessing the more nuanced argument that the court faced in \textit{AT&T}—that under the circumstances of the case, a congressional subcommittee could not be trusted with certain specific information that would be particularly harmful to national security. United States v. American Telephone & Telegraph Co., 551 F.2d 384, 394 (D.C. Cir. 1976).} Without much constitutional context, these issues would have required a seat-of-the-pants judgment from the court of appeals. Fortunately, when it comes to
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disputes over information relevant to treaty-making, the fact that the Constitution grants the Senate the power to offer advice answers the question of when the Senate is to be trusted with sensitive information.

C. The Link Between the Breadth of the Senate’s Advice Power and its Right to Information

To see what impact the Senate’s advice power has on its right to demand information, we shall discuss two different types of information requests—one for information not linked to the Senate’s advice power and the other for information needed by the Senate to exercise its advice power.

Let us begin with the following information request: “Please describe the negotiating strategy the administration plans to use in next week’s negotiations with the Russians.” Recall that, as Part I.F explained, although the Senate has the constitutional power to offer nonbinding policy recommendations regarding the goals of a treaty negotiation, it has no power to offer advice on the day-to-day strategy and conduct of a treaty negotiation. The Senate would, therefore, have a very weak claim to this information. In fact, it would have a weaker claim than the House Subcommittee had on the wiretap records that were the subject of AT&T.

In AT&T, the Subcommittee was “inquiring into a suitable area of federal legislation—interception of interstate telephone communication.” By contrast, it is hard to see any tangible connection between the Senate’s information request and a suitable area of federal legislation or to any Senate power.

As for the President’s interest in withholding information, recall that, as Jay explained, one of the reasons that the Executive was given the sole

125. 551 F.2d, at 393. See also Eastland v. United States Servicemen’s Fund, 421 U.S. 491, 504 n.15 (1975) (“The subject of any inquiry always must be one ‘on which legislation could be had.’ ” (quoting McGrain v. Daugherty, 273 U.S. 135, 177 (1927))); Watkins v. United States, 354 U.S. 178, 187 (1957) (Congress’s investigative power “encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. . . . It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.”).

126. One could concoct an attenuated link to Congress’s appropriations power. Congress does have an interest in seeing that the diplomatic corps, for which it appropriates money, operates effectively. But this link is very tenuous when compared to the President’s need for secrecy.

If the Senatorial Dominance Model applied, then there would be a strong connection between the Senate’s information request and a Senate power. Under the Senatorial Dominance Model, the Senate would have the power to decide upon the policy to be pursued in a treaty negotiation. The Senate’s information request would then be linked to an oversight interest in ensuring that its negotiating instructions were being followed by the treaty negotiators. However, under the Recommendation Model, the Senate has no authority to see that its advice is followed and that link does not exist.
power over the day-to-day conduct of treaty negotiations was that it alone was thought capable of maintaining the "perfect secrecy [that is] sometimes requisite." The President, therefore, would have a firm constitutional basis for asserting that he needed to withhold the information to preserve secrecy. When we balance the constitutional interests of the President and Senate, as called for by Nixon and AT&T, it becomes clear that a Senate request for information on the day-to-day conduct of a treaty negotiation would not withstand a claim of executive privilege.

Now consider a very different request: "Before next week's arms-control negotiations begin, please send to the Senate a description of how dismantling one hundred long-range missiles would affect our nuclear deterrent." In order for the Senate to exercise its constitutional power to give intelligent advice on how many missiles we should agree to dismantle, it would need this information. In assigning to the Senate the power to offer nonbinding advice on the policy goals to be pursued in a treaty negotiation, the Framers implicitly made a decision about the Senate's ability to keep secrets. The Framers were well aware that secrecy is crucial to the success of a treaty negotiation. Indeed, as Hamilton explained in Federalist 75, one of the principal reasons why the House of Representatives—but not the Senate—was excluded from treatymaking was out of a fear that the House would leak diplomatic information. Despite the acknowledgment by Hamilton, Jay, and others of this need for secrecy, the Constitution empowers the Senate to play an active role in treatymaking. It excludes the Senate only from the day-to-day conduct of treaty negotiations and declines to confine the Senate's role to that of a post-negotiation ratifier. Any presidential attempt to withhold information that the Senate needs to perform its advice function would, therefore, amount to an assertion that the Framers misjudged the Senate's competence to preserve diplomatic secrets. Whether or not the Framers were right is, perhaps, debatable. What is not debatable is that, absent a

127. The Federalist No. 64, supra note 45, at 392. See supra text accompanying notes 45–46.

128. See The Federalist No. 75, supra note 48, at 452 (indicating that the House could not "share in the formation of treaties" because, among other things, "decision, secrecy and dispatch are incompatible with the genius of a body so variable and numerous").

129. It is by no means clear that the Senate would leak sensitive diplomatic information. Indeed, there are many measures that the Senate may take to minimize the risk of disclosure:

Hearings involving classified information can be held in closed executive sessions; classified documents can be made available for examination by members of Congress or their staffs only in executive branch offices; disclosure of classified documents can be made only to select committees or select members; classified documents can be held in secure rooms and safes in congressional offices for perusal there without notetaking; debates on the floor of the House or Senate concerning national security
constitutional amendment, we are not free to second-guess the Framers' judgment and to strip the Senate of power granted to it by the Constitution.

When we place these principles on the *Nixon* and *AT&T* balancing scale, we find that the Senate's constitutional interest in the information is strong while, in light of the power granted to the Senate by the Treaty Clause, the President has no legitimate interest in keeping the information from the Senate. Thus, although the President has the authority to deny Senate requests for information regarding the day-to-day conduct of treaty negotiations, he must turn over information needed by the Senate to exercise its constitutional power to give advice on the policy goals to be pursued in a treaty negotiation.

**D. The Line-Drawing Problem**

In practice, distinguishing between the day-to-day conduct of a treaty negotiation and the policy goals to be pursued in a negotiation may not always be easy. A Senate demand to know whether the administration will bluff next Thursday clearly falls on one side of the line, and an inquiry regarding how many missiles the United States could agree to dismantle while maintaining nuclear superiority would clearly fall on the other. But negotiating tactics and policy objectives sometimes cannot be separated so easily. For instance, consider the following Senate information request: "Will we walk out of the negotiations on May 5?" A decision to suspend negotiations can be seen as a mere tactical move calculated to pressure the other party to make concessions. But, if one of the paramount negotiating goals was to sign a treaty at all costs by May 6, suspending talks on May 5 could be considered a substantive decision.

The analysis advanced in this article does, however, provide some much-needed structure to the *AT&T* balancing test. Recall that the *AT&T* court faced the "delicate and possibly unseemly" task of weighing the Subcommittee’s need for information against the Subcommittee’s propensity to leak and the President’s need for secrecy. Deciding an executive-privilege dispute over treaty-making information involves the far more concrete task of drawing a line between information related to the

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Fein, *supra* note 123, at 816. Since the Senate would be politically accountable for leaks, it would have an incentive to take these or other measures to ensure that secret information is not disclosed.

130. 551 F.2d at 394.
day-to-day conduct of negotiations and information related to policy goals. This task is not only more manageable, but would also spare a court from having to make a delicate judgment about whether the Senate can be trusted to keep secrets.

CONCLUSION

In Wilson v. Girard, the Supreme Court was, in a sense, right. Nowadays, the Senate plays no part in treatymaking other than to consider agreements that the President has already signed. It does, to paraphrase the Court, "ratify" treaties. But, the Constitution gives the Senate the power not just to consent to treaties, but also to offer the President "advice." Although the Treaty Clause does not empower the Senate to set the policy to be pursued in treaty negotiations, it does give the Senate the constitutional authority to demand diplomatic information from the Executive and to offer policy recommendations that would help to shape our nation's treaties.

Were the Senate to use its advice power aggressively, the Executive would surely claim that the Senate's meddling would be harmful and that the Senate cannot be trusted with sensitive diplomatic information. Whether the Executive's arguments are correct as a policy matter is difficult to say. But, in giving the Senate the power to offer advice, the Constitution has rejected these arguments, and the Senate has just as much constitutional authority to use its advice power as the President does to use his power to negotiate treaties.

131. See supra text accompanying notes 4-5.