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TREATIES IN A CONSTITUTIONAL DEMOCRACY*

*Louis Henkin***

During these years of the Bicentennial of the Constitution, recurrent constitutional controversy has caused many to wonder whether the Framers' dispositions for the governance of our foreign affairs were worthy of celebration. Some have been moved to ask whether, as regards foreign affairs at least, the Constitution was adequate for our third century.

Much recent controversy, and much academic debate, has involved "War Powers" and other powers of Congress and of the President that may fall within a constitutional "twilight zone," where their respective authority is uncertain or their powers may be concurrent.¹ In these pages I lay those issues aside² and revisit the treaty power, recently a focus of controversy arising out of major arms control agreements with the Soviet Union. I inquire whether the provisions governing treaties, ordained in 1789 for an "aristocratic republic,"³ are appropriate to the constitutional democracy we have become.

The constitutional issues of treaty-making are different from those of the twilight zone. The twilight zone is the field of tension between Congress as legislature and the President as executive and as Commander in Chief; issues in treaty-making are between the President and one chamber of Congress, the Senate, with the Senate here acting in an executive capacity and exercising jointly with the President a function which the Framers assumed to be an executive function.⁴

* This essay is an adaptation of one of the Cooley Lectures delivered at the University of Michigan Law School, Nov. 14-16, 1988, on the theme "Constitutionalism, Democracy and Foreign Affairs," due to be published by Columbia University Press in 1990. I am pleased to dedicate this essay to the memory of Professor William Bishop. Professor Bishop made important contributions to our understanding of the Treaty Power in the U.S. constitutional system, notably during the campaign to defeat Senator Bricker's 1950-55 efforts to have the Constitution amended so as to emasculate the Treaty Power.

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1. The "twilight zone" is Justice Jackson's characterization in his famous concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952).

2. The tensions in the twilight zone and the relevance of political ideology to their resolution were the subject of the first Cooley Lecture, noted above. See also Henkin, *Foreign Affairs and the Constitution*, 66 FOREIGN AFF. 284 (1987-88).

3. See *infra* pages 410, 422.

4. In the division implied in "separation of powers," the Europeans saw treaty making as

The twilight zone is an arena of competition for unexpressed, uncertain constitutional authority; the issues of treaty-making provide principally a study of friction in the exercise of an explicit constitutional mandate to share power. But the two sets of issues, sharing a common history, reflect the same political transformations: as regards treaty-making — as for the twilight zone — history has reshaped what the Framers probably intended. Here, too, there is some unhappiness with the original dispositions and some pressure for reallocating them. Here too, I will suggest, principles of constitutionalism and democracy are relevant, both to the issues that have arisen under the existing constitutional mandate and to recurrent proposals for change.

I address principally relations between “the Treaty-Makers,” the President and Senate, under article II, section 2, where constitutional controversy has recurrently — and again recently — swirled. I consider also, briefly, the relevance of constitutionalism and democracy to our jurisprudence on treaties under the Supremacy Clause.⁵

CONSTITUTIONAL CONTROVERSIES ABOUT THE TREATY POWER

Constitutional controversies under the Treaty Power erupted early in our history, and during 200 years the infinite variety of international relations and of constitutional politics have continued to generate issues. Some of the controversies reflect differences as to the meaning or implications of the constitutional text; some reflect dissatisfaction with what the text has come to mean, or with how it has worked.

It is unnecessary to revisit the storms generated by the Jay Treaty of 1796, or even the Treaty of Versailles, now 70 years ago. We find uncertainties and controversies in our daily papers. In 1988, the Senate denied President Reagan’s power to interpret the Anti-Ballistic Missile (ABM) Treaty other than as the Senate had interpreted it when the Senate consented to making that treaty. Later the Senate in effect declared its constitutional views on that issue as a condition of its consent to the Intermediate Nuclear Force (INF) Treaty. A few years ago the Senate challenged President Carter’s authority to terminate the Defense Treaty with the Republic of China (Taiwan) without the consent of Congress or at least of the Senate. Members of Con-

part of the executive power. In the Constitution, too, the power to make treaties is in Article II, which is devoted to the executive power.

5. Treaties appear in the Constitution in article II, section 2, the power to make treaties, and in Article VI, declaring treaties to be law of the land and supreme to state law. See *infra* page 424. Article I, section 10, provides that no State (of the United States) shall enter into any treaty. Article III provides that the judicial power of the United States shall extend also to cases arising under United States treaties.

gress went to court in an attempt to enjoin carrying out the Panama Canal Treaty, claiming that it was beyond the powers of the President and Senate under the Constitution.⁶

Other issues are older, but recur, and might yet trouble us again in the next century.⁷ Above all, repeatedly during 200 years, Senate and President have exchanged recriminations, the Senate accusing the President of frustrating the Senate's constitutional role, the President charging the Senate with abusing that role and embarrassing the United States in its relations with other countries. Again and again, during 200 years, Senators have challenged the President's authority to conclude international agreements as executive agreements without Senate consent.⁸ Every year during 200 years members of the House of Representatives have expressed resentment at their exclusion from treaty-making, and there have been innumerable proposals for amending the Constitution to undo that "error" of the Framers.

As for many other constitutional issues in foreign affairs, the courts have provided few answers. As a result, issues remain unresolved, constitutional processes suffer, Senate and President resort to political weapons, and constitutional relations in the United States as well as foreign relations with other governments are roiled.

For present purposes, I ask: What does the constitutional text mean and how was it intended to work? Has history reinterpreted text or otherwise resolved issues? How has the process projected by the Framers worked, and has it worked well enough? Do constitutional theory and democratic ideology offer guidelines, or commend — or command — constitutional change, whether by formal constitutional amendment or by reinterpretation?

TEXT AND FRAMERS' INTENT

The constitutional provision conferring power to make treaties is brief:

[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. . . .⁹

6. *Edwards v. Carter*, 580 F.2d 1055 (D.C. Cir. 1978), *cert. denied*, 436 U.S. 907 (1978); see also *infra* note 39.

7. One controversy, I hope, will not be resurrected: the campaign led by Senator Bricker to have the Constitution amended so as — they thought — to limit sharply the uses of the treaty power, and make it impossible for the United States to adhere to international human rights covenants.

8. Senator Robert Dole went to court to try to prevent President Carter from returning the crown of St. Stephen to Hungary without a treaty approved by the Senate. See *Dole v. Carter*, 569 F.2d 1109 (10th Cir. 1977).

9. U.S. CONST. art. II, § 2, cl. 2.

The text seems simple and clear, but even clear constitutional text is not wholly clear. Notably, we have “advice and consent,” a historic phrase that has entered our daily language; but what is “advice,” when and by whom is it to be given, and must it be heeded? Consent has proved clear enough, but not crystal clear: may consent be conditional, and what kinds of conditions may the Senate impose? And what is a treaty? May the President make other agreements without Senate consent?

As elsewhere in constitutional discussions of foreign affairs, here, too, we hear little of “original intent.” But surely “original intent” has its claims, and there is some evidence as to what the Framers intended. The treaty clause is an original and unique arrangement, a compromise determined by the Framers. Here the Framers turned their backs on Locke and Montesquieu, on British and European practice. European practice and “separation” theory saw treaty-making as an executive power, but, perhaps with George III on their minds, the Framers were not disposed to entrust the new executive office they were creating with that much independent power by leaving treaty-making to the President.

We now think of the treaty power as the President’s, subject to Senate consent, but that may not have been what the Framers intended. In large measure, at Philadelphia the treaty power developed separately, independently of the delegates’ general conception of the new Presidency-to-be.¹⁰ For their treaty power, the Framers began with the Articles of Confederation, under which Congress — the Continental Congress, which had executive as well as legislative power — made treaties. But under the Articles, Congress needed the consent of nine states in order to make a treaty. At Philadelphia, even after it was clear that there would be an Executive, the Framers seemed disposed to leave treaty-making to Congress, or rather to one chamber of the new Congress, the Senate. Then, perhaps recalling the difficulties of negotiation and diplomacy by Congress under the Articles, the Framers thought to give some role in the process to the new Executive, and to provide for treaty-making by the Senate with the Executive as its agent for negotiation. As it emerged, we know, the treaty power is listed under Article II, which begins: “The Executive power shall be vested in a President,” and the power “to make treaties” is given to the President subject to Senate advice and consent. But it is not obvious that in the end the Framers had decided to establish a process significantly different from what they had contemplated ear-

10. See Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties*, 55 WASH. L. REV. 1 (1979); THE FEDERALIST No. 64 (J. Jay).

lier, *i.e.*, treaty-making by the Senate with the President as the Senate's agent, or perhaps as a joint responsibility, with the task of negotiation left to the President alone.¹¹ In any event, what the Framers intended, it appears, is Presidential negotiation, upon advice of the Senate before negotiation, with continuing Senate advice during the process of negotiation, and, in the end, the President making the treaty to which the Senate had consented.

Note: the Framers did not provide for "advice and consent" by Congress, but by the Senate alone. The Senate would not be acting as part of the legislature but in a special, executive capacity. For this role the Framers selected the body that was to be the smaller, less representative, less accountable, chamber of Congress. And, it appears, the Framers selected the Senate for this special treaty-making role, *because* it was to have those undemocratic characteristics. The Senate was also to be the special representative and guardian of state interests. Consent of two-thirds of the Senate, I note, was probably seen as not too different in effect from the consent of nine States required under the Articles.

EXPERIENCE UNDER THE TREATY POWER

History reshaped the treaty power as it reshaped other powers allocated to Congress and the President in foreign affairs. Change in the treaty process came early, and continued, due to larger changes that had not been — and could not have been — anticipated. There was change in the character of the Presidency, and change in the character of the Senate. Political parties emerged, with their consequences for relations between Executive and Senate. The United States grew, and so did its place in a changing world system. The character of United States foreign affairs changed. The role of treaties in international relations and in the foreign relations of the United States changed.

The Framers had probably intended that the President and a small Senate would deliberate together, prior to and during negotiations, leading to treaties acceptable to both. The intended "advice" function atrophied, and died early; in fact, advice before and during treaty negotiations hardly took off. President Washington came to the Senate with a treaty already negotiated, wanting consent, not advice; the Senate offered him advice and Washington swore never to go there again.¹²

11. See *supra* sources cited at note 10.

12. This story is widely told; see, e.g., E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957*, at 209-10 (4th rev. ed. 1957).

If the President had sought advice along the way, presumably there would have been an agreed U.S. position early, subject to modification during negotiation with the foreign country. Then Senate consent would ordinarily come easily. With the demise of advice prior to and during negotiation, the Senate considered the treaty for the first time after it was negotiated, and Senate advice appeared at the time of, and as a condition of, consent.¹³ The Senate used the consent requirement to “advise” the President as to the kind of treaty the Senate wanted and the kind of changes that would make the President’s treaty acceptable. Often the Senate cluttered the treaty with reservations, amendments, understandings, and other conditions. Many treaties required renegotiation.

The result was a sharp bifurcation of the treaty process between the Presidential stage and the Senate stage, which frustrated Presidents, annoyed foreign governments, and troubled United States foreign relations. The Senate sometimes rejected a treaty that had been carefully and painstakingly negotiated, to the embarrassment of the President and the dismay of the other government. Early in the nineteenth century foreign governments decried the U.S. treaty process as making it impossible to do diplomatic business with the United States. Early in our century a Secretary of State expressed doubt that an important treaty would ever again receive Senate consent. The Senate was described as the “graveyard of treaties.” In time, the Senate became more “sophisticated”: instead of rejecting a treaty, it simply shelved it (becoming not a graveyard but a place for cold storage). For a notorious contemporary example, the Genocide Convention was on the Senate shelf for 37 years. The United States finally ratified the Genocide Convention in 1988, although the United States had been a leading exponent of the treaty 40 years earlier.

The world has grown accustomed to — but not much happier with — our treaty process. Its inefficiency has been alleviated somewhat by some revival of the advice function. The Executive now anticipates and seeks to determine the terms to which the Senate will consent. The Executive Branch will now consult with (*i.e.*, seek “advice” of) Senators and Senate staff, though not formally with the whole Senate. Sometimes the President appoints a member of the Senate to the delegation negotiating an important treaty, thus providing some “advice” as to what some Senators think and what the Senate is likely to do. But — contrary to the original intent — treaty making remains essentially a Presidential power subject to Senate modification or veto. The

13. See *infra* page 415.

treaty-making process continues to leave all concerned — the President, the Senate, foreign governments, as well as the House of Representatives, which remains excluded from the process, and many aware citizens — less than content.

CONSTITUTIONAL ISSUES UNDER THE TREATY POWER

The relationship between the President and Senate in treaty making became, and generally remains, adversary instead of collaborative. At best, it is often an “arms-length” relationship; sometimes it is exacerbated by antagonism and distrust. That is the notorious history of President Wilson’s experience with the Versailles Treaty. In our day, SALT I and SALT II, the ABM and INF treaties, the Panama Canal Treaty and others have not escaped friction between President and Senate.

Over 200 years, there has been much tension between the President and Senate over treaties, but there have been few constitutional, jurisprudential issues at the heart of these tensions; rather, we have had the friction that is perhaps inevitable in the exercise of shared power by two proud, independent, separated constitutional bodies.¹⁴ Sometimes these tensions have been aggravated by partisan, ideological, and institutional differences. Presidents have charged the Senate with abusing its constitutional role, by delaying consent, by forcing renegotiation, by imposing improper conditions on its consent. The Senate has charged the Executive with abuse of process by excluding the Senate from early planning and negotiation (“advice”), with lack of candor, concealment, even deception. Not infrequently, Senators have declared that the President denied them access to the negotiating data and have suspected uncommunicated discussions or even secret understandings with the foreign state.

These recriminations are perhaps inevitable, systemic, built into Article II as it has developed. They may not be readily curable or easily palliated. At bottom, I stress, they are not issues of constitutional law, and do not turn on constitutional construction. But in the context of a relationship susceptible to such friction, when a small constitutional issue occasionally arises it may blow up into a small crisis, as in 1987-88 in regard to the ABM and INF treaties. In that instance, the Executive and the Senate differed sharply over minor constitutional implications of the treaty-making power.

14. See the famous statement by Justice Brandeis, *infra* page 427.

Implications of the Consent Requirement

Some implications of the procedure prescribed by the Constitution are not disputed. The President can negotiate or not, can heed or disregard Senate advice if, whenever, and however given. The Senate can offer any advice, and can refuse consent for any reason or no reason; it can consent on conditions.¹⁵ The President can make (bind the United States to) the treaty if the Senate has consented to it; he cannot make the treaty without Senate consent.

One implication of the constitutional requirement of Senate consent seems obvious but it surfaced — and was confirmed — only recently in the tempest surrounding the ABM treaty. At stake was a politically important difference between a “narrow” and a “broad” interpretation of that treaty, between a construction that would permit and one that would forbid steps towards a Strategic Defense Initiative (“Star Wars”) program. But the underlying constitutional issue, though novel, was small, and the area of disagreement, though generating much heat, was comparatively narrow.

All were agreed that the President can make a treaty only if the Senate has consented to it. Therefore, the President can make only the treaty to which the Senate consents. Generally, the Senate consents to what the text of the treaty provides, as reasonably interpreted. But if there is any ambiguity, the treaty to which the Senate consents is, inevitably, the treaty as the Senate understands it. However, all were not agreed upon what would constitute binding evidence of the Senate’s understanding.

The Senate has often explicitly declared its understanding of the meaning of a possibly-ambiguous treaty provision by an express “understanding” in its resolution of consent. If the Senate declares its understanding, the President must honor it: the treaty as so understood is the treaty to which the Senate consents. The President communicates to the other party (or parties) the Senate’s understanding of the treaty as constituting the United States’ understanding of it, and, unless the other parties reject it, that becomes the meaning of the treaty.

In the case of the ABM Treaty, the Senate’s understanding of the provision later in issue was not formally declared. But it was in fact clear (and I think not seriously disputed) that the Senate had under-

15. Contrary to common parlance, the Senate cannot enter reservations to or amend a treaty; in effect, it refuses consent to the text as it is, while declaring that it will consent if the text is changed as indicated. This may be done ordinarily by amendment by the parties (in the case of a bilateral treaty) or by reservation by the United States (in adhering to a multilateral treaty). See *infra* page 415.

stood the treaty to be more rather than less restrictive, less rather than more permissive. For a time, the Executive Branch appeared to take the position that if the Senate's understanding of a treaty was not formally declared it was of no effect and need not govern the meaning of the treaty for the United States later.¹⁶ That view, I think, is mistaken: whether or not the Senate expressed an understanding, what the Senate in fact thought the treaty meant is the treaty to which the Senate consented.¹⁷ The Executive Branch challenge to that view was untenable, and the Executive may itself have abandoned it, but not without leaving severe political bruises.

The ABM confrontation was unprecedented, but perhaps an inevitable consequence of our unique, complex treaty process involving independent, powerful, constitutionally-based institutions. The controversy involved a major security treaty, concluded after long negotiations that were heavily shrouded; the subject of the treaty — arms control generally, and the particular treaty under negotiation — was esoteric and one as to which the Executive and the Senate were both ambivalent, and both internally divided. Both President and Senate had been uneasy over making a commitment; both were distrustful of the USSR; and the Senate and the Executive did not trust each other fully. As to the particular treaty, a later President, less-than-wholly sympathetic to the treaty and eager to relax its restraints, was tempted to revise an earlier President's undertakings to which the Senate had consented. But the present majority of the Senate continued to favor the treaty and resisted a new interpretation which it disfavored. Above all, the Senate was determined to vindicate its earlier consent and to preserve the integrity of its consent power.¹⁸

16. There appears to have been also an issue as to the Senate's reliance on informal Executive communications. The Executive Branch insisted, in effect, that the Senate must accept what the President formally communicates and not form any understandings on the basis of informal communications from individuals in the Executive Branch. There is something to be said for the view that ordinarily the Senate should not rely on views or communications of individual officials. But the Senate gave its consent to the treaty as it understood it, no matter how or from whom it obtained that understanding.

17. See *United States v. Stuart*, 109 S. Ct. 1183, 1192 n.7 (1989), in which the Supreme Court invoked the RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 314, comment *d* & § 325, reporters' note 5 (1987), and looked to the record of Senate preratification materials as a guide to interpreting the treaty in question.

18. The President does not have to make a treaty even after the Senate gives its consent and the President can terminate a treaty that has been made. See *infra* note 39. But if a treaty has been made and has not been terminated, the Senate is entitled to resist a Presidential interpretation of a treaty that renders it effectively a treaty other than the one to which the Senate had consented.

The Senate was not asserting a power to interpret a treaty at a later time. Once a treaty is made, the Senate has no special authority in relation to it. The President later interprets the treaty for purposes of executing it. Congress — both Houses — interpret the treaty for legislative purposes. Courts may interpret it for their purposes. The Supreme Court's interpretation of

The controversy surrounding the interpretation of the ABM Treaty highlights larger consequences of our treaty process and of the separation of powers. In the United States, all branches of the government are bound by the text of a treaty made by the United States as the Senate understood it. Presumably, the United States must pursue that interpretation also for international purposes. But the international system — including international courts and arbitral tribunals — is not bound by the subtleties of United States treaty procedure, and by internal interpretations that are not expressed, adopted, and communicated to the other parties to the treaty. The international system, then, may come to an interpretation of a treaty different from the one the Senate tacitly assumed. If that happens and is established, the international interpretation of the treaty may later become the meaning within the United States as well, a consequence of the “slip-page” between internal and international law in our modified dualist system.¹⁹

Senate Conditions

As a consequence of the ABM controversy, there was constitutional confrontation in 1988 between President and Senate in the case of the INF treaty, brought on by the Senate's power to impose conditions on its consent to a treaty. The Constitution says nothing about Senate conditions to its consent, but the development of the Senate's practice of giving consent on condition was the perhaps inevitable consequence of the demise of the Senate's advice function and the bifurcation of the treaty process between the Presidential stage and the Senate stage.

Senate consent on condition developed early. Usually, the Senate has consented on condition of a change in the treaty or, in the case of a multilateral treaty, on condition that the United States adhere to the treaty subject to one or more reservations. But the Senate has learned to add other kinds of conditions which are not modifications of any international obligation under the treaty and are therefore not of importance to the other state (or states) party to the treaty. These condi-

a treaty made in deciding a case or controversy is authoritative for purposes of U.S. law and is binding on all courts as well as on the political branches.

19. Monists see national and international law as parts of a common legal system, with international law supreme. Dualists see national and international law as discrete legal systems, and national law determines whether to incorporate international law into national law in some ways and the place of international law in the hierarchy of the national legal system. On monist and dualist approaches to the relation of international law to national law, see, e.g., L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *INTERNATIONAL LAW, CASES AND MATERIALS* 140-62 (2d ed. 1987).

tions, too, are usually treaty-related, usually benign, and usually not unduly troublesome. For example, as a condition of its consent the Senate may insist that the treaty shall not be self-executing but shall require implementing legislation, sometimes even that the United States shall not ratify the treaty until implementing legislation is adopted.²⁰

Important, controversial treaties in particular — in our time, notably, arms control treaties — have often evoked other “non-amending” kinds of conditions. In SALT II, for example, three kinds of “conditions” were declared, some addressed to the President, some to the U.S.S.R. (the other party to the treaty), some to the world. Various conditions were imposed by the Senate in its consent to the controversial Panama Canal Treaty.²¹

Some Senate conditions are designed to enhance the power of the Senate, or to constrain Presidential power. For example, the Senate might decide to reserve a voice in the termination of the particular treaty, to preclude Presidential termination of the treaty on his own authority as the President did in the case of the Taiwan Defense Treaty.²² Sometimes the Senate uses conditions to score in battles with the President. In consenting to the INF Treaty — following the ABM controversy — the Senate declared a principle of treaty interpretation as a constitutional principle, in the guise of a condition. The Senate resolution provides:

That the Senate advise and consent to ratification of the Treaty . . .
subject to the following:
Condition:

20. See, e.g., the Senate conditions in two well-known instances, the 1950 Niagara Power Treaty with Canada, and the Genocide Convention to which the Senate consented in 1986. On the former, see L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 134-35 (1972).

21. In addition to interpretive understandings discussed above, and conditions to consent, the Senate has taken to attaching various “declarations” to its resolutions of consent. The Senate does not intend such declarations to condition its consent but that seems to free the Senate to be promiscuous with its declarations and some of them are of dubious “propriety.” For example, in consenting to the INF treaty the Senate resolution appended an array of declarations of varying character. The Senate declared that because the incentive for Soviet non-compliance and the difficulties of monitoring will be great, the United States should rely primarily on its own technical means of verification. The Senate took the occasion to advise the President as to the kinds of further agreements he should negotiate. It declared its strong belief that respect for human rights and fundamental freedoms is essential to the development of friendly relations, and called upon the U.S.S.R. to live up to its international human rights agreements (some of which the United States itself had not ratified). For the full text of the Senate resolution, see 82 AM. J. INT’L L. 10-15 (1988).

Hypothetically, the Senate might impose conditions unrelated to the treaty; e.g., that the President fire his Secretary of State or that he move the United States embassy in a certain country to a different location. Such conditions are rare and probably “improper.” But could the President disregard them if the Senate declares that they are conditions on its consent to the treaty? Can the President treat the condition as null, and the consent as unconditional?

22. See *infra* note 39.

(1) Provided, that the Senate's advice and consent to ratification of the INF Treaty is subject to the condition, based on the treaty Clauses of the Constitution, that—

(A) the United States shall interpret the Treaty in accordance with the common understanding of the Treaty shared by the President and the Senate at the time the Senate gave its advice and consent to ratification. . . .²³

In my view the constitutional principle declared by the Senate is sound and its implications for treaty interpretation unexceptionable. But its title as a condition is dubious. The President, eager to make the treaty, accepted the Senate's consent subject to the Senate's "condition," but issued a statement declaring the condition to be "improper." Proper or not, such conditions are not very significant except as a salvo in President-Senate warfare in the conduct of their shared treaty power. Attaching a constitutional principle as a "condition" of consent to a treaty does not bind future Presidents to that principle. A future President might not agree that there is such a constitutional principle. The principle may not bind even the President who ratified that particular treaty. The principle is not really a condition of consent but only an expression of the Senate's view of the Constitution. The Senate's view may be disputed by the President and must stand or fall on its merits.

Non-amending conditions sometimes reflect distrust between the United States and the other party to the treaty, or Senate mistrust of the Executive (or of later Executives). Sometimes such conditions are blows in larger battles with the President. They reflect and inevitably aggravate friction in the treaty process and beyond, another consequence of our bifurcated treaty procedure.

CIRCUMVENTING THE TREATY POWER: EXECUTIVE AGREEMENTS

A recurrent issue between President and Senate arises from the President's assertion of constitutional power to make some international agreements on his own authority, without consent of the Senate. The Senate sees such agreements — sole executive agreements — as, in principle, unconstitutional attempts to circumvent the Treaty Power by excluding Senate "advice" and avoiding Senate consent, veto, or modification. There have been no recent recriminations over the issue but it is always in the wings, as perhaps another, inevitable result of the divided Treaty Power.

Presidential agreements other than treaties are not mentioned in the Constitution. But the Framers clearly understood that nations

23. Congressional Record, *reprinted in* 82 AM. J. INT'L L. 10-15 (1988).

make some agreements that are not treaties,²⁴ and they could not help but anticipate tacit, informal understandings by the President with representatives of foreign states. Early in our history, Presidents began to make written, formal agreements on their own authority, and there have been many thousands since, made without first obtaining the consent of the Senate or of Congress.

It is now established that the President can make some agreements on his own authority. On the other hand, it is indisputable that there are some agreements he cannot make without Senate consent. But which agreements are in which category? The courts have not helped with any general, principled, guidance. They have given effect to agreements incidental to some admittedly Presidential function, *e.g.*, Franklin Roosevelt's agreement incidental to his recognition of the USSR, and claims settlements, such as the Iranian Hostages Agreement.²⁵ Military armistices, such as the agreements that effectively terminated World War I and the Korean and Vietnam Wars, have been commonly accepted as within the President's authority as Commander in Chief.

Congressional attempts to regulate executive agreements have stumbled over the difficulty of distinguishing agreements which the President may, should, perhaps must, do alone, from those that should require Senate consent.²⁶ In 1969, the Senate adopted the non-binding Commitments Resolution declaring that the President could not commit the armed forces or financial resources of the United States without Senate consent or Congressional approval,²⁷ but no President has openly accepted even that limitation. The Senate considered but did not adopt the Clark Resolution,²⁸ which sought to compel the Executive Branch to consult the Senate as to the method of concluding a particular agreement. For now, Congress has contented itself with requiring the Executive Branch to report every executive agreement made.²⁹ It is not clear that there is serious scrutiny of these agreements

24. Article I, section 10, distinguishes between treaties which States are forbidden to make, and compacts or agreements which States may make with the consent of Congress.

25. *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Pink*, 315 U.S. 203 (1942); *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

26. The Bricker Amendment included a provision that would have limited executive agreements, and that provision might have been adopted had there been agreement as to which agreements were to be regulated.

27. See 115 CONG. REC. 17,245 (1969).

28. S. Res. 536, 95th Cong., 2d Sess. (1978). See T. FRANCK & M. GLENNON, *FOREIGN RELATIONS AND NATIONAL SECURITY LAW, CASES AND MATERIALS* 396-99 (1987).

29. 1 U.S.C. § 112(b) (1982). The original Case Act was amended to require that oral agreements be reduced to writing and transmitted, apparently to ensure that there is no attempt to circumvent the requirement to inform Congress by making oral agreements.

but perhaps the need to report helps deter the Executive from making agreements that would arouse Senate ire and invite its, adverse reaction.

For the rest, we have another intractable constitutional problem. Periodically, the Senate bristles at an executive agreement, and sometimes threatens to use its political weapons, both treaty and not-treaty related, *e.g.*, its power to hold up confirmation of the President's appointments. The Senate also has weapons as part of the legislature, to "punish" the Executive by adopting or not adopting laws or withholding appropriations.

TREATY-MAKING IN A CONSTITUTIONAL DEMOCRACY

That is the treaty power today; how does it look for the years ahead?

Unlike issues between Congress and the President in the "twilight zone,"³⁰ contemporary issues of treaty-making do not depend on differences of interpretation of constitutional text or of original intent. What we have is chronic unhappiness with the prescribed bifurcation of the treaty-power and with its implications and consequences. There appears to be an amazing acquiescence in keeping the Treaty Power as it is, perhaps a reflection of a general reluctance to tamper with our constitutional institutions.

If raised at all, questions about the Treaty Power ask how to make the existing process work better. I venture to ask first whether the constitutional procedure is consistent with our political ideology — whether the original decision of the Framers to share the treaty power continues to maintain their concerns for constitutionalism, and whether it responds to our commitment to democracy today. And would greater democratization of the process make it easier or more difficult for the United States to cooperate with other nations in the 21st century?

It is relevant to recall the Framers' political ideology.³¹ They were committed to social contract, to constitutionalism, to republicanism. The Constitution was a social contract among the people to institute a government, as well as a contract between the people and the government-to-be — the people consenting to be governed, the officers of government committing themselves to respect the constitutional blueprint and its limitations. For the Framers, the Constitution im-

30. See *supra* note 2.

31. I address the Framers' ideology in the first of the Cooley Lectures. See also Henkin, *The United States Constitution as a Social Compact*, in *A More Perfect Union: Essays on the Constitution*, 131 *PROC. AM. PHIL. SOC'Y*, September 1987.

plied a commitment to constitutionalism — to government according to and limited by a written constitution, to government with agreed powers for agreed purposes, subject to the rule of law. For them, constitutionalism implied fractionalized authority to prevent concentration of power and the danger of tyranny. Constitutionalism implied also the reservation of a large private domain and retained rights for every individual.

The Framers were republicans. For them that implied government by the people through chosen representatives. But, as is evident from the Constitution they drafted, representatives could be chosen either directly by popular vote — the House of Representatives — or indirectly — the Senate to be chosen by the State legislatures, the President by electors appointed as the State legislatures direct. Government by the people, moreover, did not mean by all the people. Slaves and even free blacks, women, and persons without sufficient property, were not eligible to vote. It has been estimated that only five percent of the inhabitants of the United States voted for the delegates to the state conventions that ratified the Constitution. Not many more were eligible to vote in 1789 for members of the House of Representatives, or for the popularly elected branch of the state legislatures which determined how the President and Senators were chosen.

Much has changed in the country and in our institutions of government. In particular, we have become a democracy, a representative constitutional democracy. Senators are still elected by state, not according to population, but they are elected directly.³² The indirect election of the President is the barest formality: we have rarely — and now, not for a hundred years — elected a President who did not receive a majority of the votes cast, and we decry and fear that possibility because it would be undemocratic. Above all, we have achieved universal suffrage. Constitutional amendments eliminated voting barriers for Blacks, women, the poor (by poll and other taxes), persons of ages 18 to 21. The Supreme Court has ruled that the equal protection of the laws requires an equal vote for all.³³

Our transformation to a representative democracy has not brought any constitutional change in our governance. The United States has been transformed, the federal government has been transformed, Congress and the Presidency have been transformed, but except for the move to direct election of senators — now 75 years ago — the Constitution has not been amended to modify the framework of government,

32. U.S. CONST. amend. XVII.

33. U.S. CONST. amends. XV, XIX, XXIV, XXVI; *Reynolds v. Sims*, 377 U.S. 533 (1964); see also *Wesberry v. Sanders*, 376 U.S. 1 (1964).

the distribution of governmental authority among the Branches, or the powers and functions of any Branch. It is difficult to believe that, assuming continued commitment to our Congressional-Presidential system, we would decide today to distribute governmental authority in the way the Framers did. Surely, a contemporary blueprint of government would reflect better that we are now a constitutional democracy rather than only a republic.

The Framers' commitment to constitutionalism, and our commitment to democracy, I have suggested,³⁴ should shape our constitutional jurisprudence in the "twilight zone" where the distribution of authority between Congress and the President is concurrent or uncertain, and where constitutional confrontation is our daily lot. Here I address the significance of that political ideology in considering the adequacy for the next century of our constitutional jurisprudence on treaties.

In fact, the treaty power — as it was conceived, and as it is — may be an authentic expression of constitutionalism; surely it provides checks and balances. Giving the power to make treaties to the President, but only with Senate advice-and-consent, was designed, and serves, to limit and diffuse the treaty power and to prevent its ready and easy use. For the Framers, the dominant motive of that particular form of checks and balances may have been to protect the interests of some of the States, but the result was to prevent concentration of the treaty power in the Executive, as was then the practice in Europe. At the same time, the Framers decided not to leave treaty-making to the Senate alone; giving the President the power to negotiate and later to make the treaty created a counter-weight to the Senate and made the negotiating process less inefficient.

Constitutionalism demands limitation and diffused power but it does not require a particular form or locus of diffusion. The loci of allocated power, however, are relevant to democracy. Now that suffrage is universal and the United States has thus become a democracy, democratic precepts should permeate our constitutional dispositions. Is the treaty power, as we have it, appropriate for a democracy? Is that all the democracy that the needs of international treaty-making can accommodate?

The Framers gave the President a role in the Treaty Power when he was not to be democratically chosen and not authentically representative of or responsive and accountable to the people. Now the Presidency is part of our dual democracy; the President is elected vir-

34. See *supra* note 2.

tually directly (though by a process weighted along state lines), and is accountable quadrennially. For the Framers, the Senate's role in treaty-making was not designed to serve some democratic purpose; as Anti-Federalists noted at the time, the Senate was to be an aristocratic body, and it was doubtless chosen for its role in treaty-making in part because of its non-democratic character. Much later, the representative character of the Senate improved with direct election (Amendment XVII), and quite recently with universal suffrage. But the Senate is still only one house of Congress, still the less representative, less accountable house, still the "aristocratic," "States' rights" branch.

One way of rendering treaty-making more democratic without constitutional amendment might be to have agreements made by the President if authorized or approved by both Houses of Congress, a procedure that has been called the Congressional-Executive agreement. It now is accepted that the Congressional-Executive agreement is a constitutionally acceptable alternative to the treaty method for United States adherence to any international agreement — an example of constitutional construction that developed for other reasons but could serve also the cause of greater democracy. The House has sought some such procedure for 200 years, and the Congressional-Executive agreement has in fact been used regularly for some kinds of agreements — e.g., trade agreements generally³⁵ — but not from any concession to democratic doctrine and without any principle to guide choice between this method and the treaty method.

There is much — in addition to the more democratic character of that procedure for making agreements — to commend the Congressional-Executive agreement. Especially since treaties are automatically law or require Congress to enact implementing legislation,³⁶ treaty-makers are law-makers, and the Congressional-Executive agreement avoids law-making by less than a full, democratic legislature. Implementation, if necessary, could be accomplished at the time Congress (both Houses) consented to the agreement.³⁷

35. Beginning early in our history, Congress decided that some agreements do not require Senate consent, for example, when it authorized the Postmaster General to conclude international postal agreements.

36. See *infra* page 425. The Congressional-Executive agreement gives both Houses equal authority to advise and consent, therefore to veto or modify the agreement. In the case of a treaty to which the Senate has consented, it is established that both Houses are constitutionally obligated to enact any necessary implementing legislation or appropriate any necessary funds.

37. Congress has developed procedures for expediting implementation of international agreements, notably by fast-track procedures. See, e.g., J. JACKSON, V. LOUIS & M. MATSUSHITA, IMPLEMENTING THE TOKYO ROUND: NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES 162-68 (1984); J. JACKSON & W. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT 151 (2d ed. 1986).

Presidents might have reason to resist the Congressional-Executive agreement if it became the sole method of making international agreements. That method might make the process even less efficient, would double the obstacles to United States adherence (requiring consent of two Houses instead of one), increase the number of committees, members of Congress, and members of staff whose advice the Executive would have to seek in order later to obtain Congressional consent.³⁸

On the other hand, Presidents sometimes are pleased to have a choice between the two procedures, if only in order to appease the House of Representatives and because the Congressional-Executive agreement does not require the concurrence of two-thirds of the Senators present. For its part, the Senate would doubtless resist a change that would eliminate its privileged status, and Senate consent would be necessary for a constitutional amendment to that end since the Senate is part of the ordinary amending process. Without constitutional amendment, Senate consent would be necessary for establishing the Congressional-Executive agreement by law, and Senate consent is in effect necessary every time the President seeks approval of an international agreement by joint resolutions. The Senate can refuse to consider a joint resolution to approve an agreement and insist on the treaty procedure. But considerations of democracy (and of comity between the two Houses) might be urged upon the Senate. The Senate has accepted the joint resolution procedure for some subjects, notably trade, and it may be time for the two Houses to seek — at least — to develop a general principle for identifying international agreements that might be sent to both Houses for approval rather than to the Senate alone.

The treaty power as we have it is not as democratic as it might be, and without constitutional amendment it could be replaced, in whole or in part, by the Congressional-Executive agreement, giving the more representative House of Representatives a role equal to that of the Senate. But that change would make the process more cumbersome. Do the claims of democracy demand that greater inefficiency?³⁹

38. For that reason, foreign countries — our potential treaty partners — might also not favor such a modification; they would generally prefer freer use of sole executive agreements.

39. Apart from the issues arising out of treaty-making, another issue arose as to treaty-*terminating* when President Carter acted to terminate the defense treaty with the Republic of China (Taiwan) and to establish full relations with the People's Republic of China (Beijing). Senators claimed that the President needed the consent of the Senate (or of Congress), and some Senators took the issue to court, but the Supreme Court did not resolve it. See *Goldwater v. Carter*, 444 U.S. 996 (1979). The Restatement has concluded that the President may terminate a treaty on his own authority, both when the treaty permits termination and when termination by the United States would violate its obligations under international law. Termination by the President alone might be suspect under the aspects of both constitutionalism and of democracy, but under the

TREATIES AS LAW

Constitutionalism and democracy are relevant to other treaty issues, involving not the President and Senate and checks and balances but the place of treaties in our constitutional jurisprudence.

The status of treaties in the constitutional system of the United States is shaped by their international character. Treaties are a principal source of international law and the most important principle of international law is *pacta sunt servanda*; that treaties are binding and must be observed. There is, then, a binding obligation on the parties to a treaty to carry out their obligations, but how a state does so is ordinarily not a concern of international law: the status of treaties in the domestic law of any country is a constitutional, not an international, question. All states have incorporated international law into their legal system to some extent in some ways, but states differ both as to extent and as to ways. States differ also as to what — if anything — is necessary to make a treaty part of national law, and with what consequences.⁴⁰

United States jurisprudence on treaties is a hybrid of different ways and conceptions. The Constitution, Article VI, declares that treaties are law, and are supreme to State law. Article VI has been interpreted as also declaring that treaties are equal to statutes in the constitutional hierarchy, and therefore as mandating that in case of conflict between a statute and a treaty the later in time prevails.

That principle applies to only some treaties. Thanks to John Mar-

prevailing view termination is seen as an aspect of the conduct of foreign relations which has been and remains Presidential even in a constitutional democracy.

Issues as to the scope and uses of the Treaty Power — issues not between the President and Senate but between the treaty-makers and Congress or the States — do not significantly implicate considerations of democracy. They have virtually disappeared. It is no longer claimed that a treaty will be given effect if it violates constitutional rights, but it is not seriously argued that either principles of federalism or of separation of powers imply or warrant any limitation on the subject matter of treaties. The power to make treaties was delegated to the Federal government and neither the principle of enumerated powers, nor the Tenth Amendment which encapsulates it, nor any "invisible radiation" from that Amendment, warrants limiting the Treaty Power. No one now claims that the power to make treaties is limited by the legislative powers of Congress, though it is commonly accepted that some matters can not be achieved by self-executing treaty but require implementation by Congress. See *infra* note 41. The notion that some subjects, such as a state's violation of the human rights of its inhabitants, are inherently not of international concern and therefore not within the Treaty Power, died long ago.

See RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 (1987); Reid v. Covert, 354 U.S. 1 (1957) (opinion of Black, J.); Missouri v. Holland, 252 U.S. 416 (1920); Edwards v. Carter, 580 F.2d 1055 (D.C. Cir. 1978), *cert. denied*, 436 U.S. 907 (1978).

It is argued with increasing frequency that a treaty settling or otherwise affecting private claims takes individual property for a public use and requires just compensation under the Fifth Amendment. See, e.g., Dames & Moore v. Regan, 453 U.S. 654 (1981). If those arguments prevail, it may reflect enhanced concern for individual property rights and reduced concern for the public fisc and the taxpayer, in foreign affairs as elsewhere.

40. See *supra* note 19.

shall, we distinguish for this purpose between self-executing treaties and non-self-executing treaties.⁴¹ A treaty that is self-executing is to be applied by the Executive and the courts automatically, immediately upon its entry into force for the United States. Treaties that are non-self-executing ordinarily require some implementing act, usually by Congress. As a result, the Executive has to decide, as to every treaty, whether it is necessary to seek implementing legislation. Courts have to decide, when a case before them demands it, whether to give a treaty or a treaty provision effect as law or to await implementation.

Increasingly, the mood in the Senate — and in the courts — is to render, or interpret, treaties as non-self-executing and requiring implementation by Congress. This may please the House of Representatives by giving it some voice in the treaty process, and even Senators sometimes wish to have another look at a treaty in the Senate's other capacity, as a house of Congress enacting legislation. So long as we adhere to the present procedure for making treaties, however, this trend to render treaties not self-executing, I believe, is misguided. The international obligation of the United States under a treaty is immediate, whether a treaty is self-executing or not. Declaring a treaty to be non-self-executing and requiring implementing legislation delays and creates obstacles to our carrying out our international obligations, encourages members of Congress to delay or frustrate legislation to give effect to the treaty, especially Senators who did not favor the treaty and, even more, members of the House of Representatives who had not previously considered it. Little is gained, not even a second thought, since the United States has an obligation to enact necessary legislation promptly so as to enable it to carry out its obligations under the treaty.⁴²

So long as we have self-executing treaties, we must face the possibility of inconsistency between treaty and statute. Our jurisprudence giving treaty and statute equal status so that the later in time will prevail was developed a hundred years ago by constitutional construction based, I believe, on misconstruction of Article VI. By that article, the Framers clearly intended treaties to be binding on the States and on State courts and supreme over State law, hence the appellation of Arti-

41. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829). It is commonly accepted that some treaties cannot be self-executing but require implementation by statute; e.g., to enact criminal law, to appropriate funds, to declare war. See *RESTATEMENT, supra* note 39, § 111, comment *i* and reporters' note 6.

42. The argument that we should not have self-executing treaties, since some other states do not, misses the point. We render treaties self-executing not for the convenience of other states but to facilitate our living up to our obligations. Rendering a treaty non-self-executing in no way reduces or significantly postpones our legal obligations. See *RESTATEMENT, supra* note 39, at § 302, reporters' note 5.

cle VI as "the supremacy clause." There is no evidence that, in that article, the Framers also addressed the equality of treaties and United States statutes. On the other hand, there is evidence elsewhere that, in general, the Framers assumed that the United States — all the Branches — would respect the Law of Nations, including treaty obligations. Certainly, there is an argument for the supremacy of international law and treaties in our jurisprudence, subject to the Constitution.

The equality of statutes and treaties, then, is not, in my view, what the Framers intended, and seems not to satisfy either democratic principle or international need. If both the legislative process and the treaty power are themselves democratic, democracy does not require the supremacy of either laws or treaties, nor does it require their equality. If the Supreme Court could be persuaded to reconsider 100 years of jurisprudence, we ought to look hard at European constitutions, some of which provide for the supremacy of international law and of treaties.

CONCLUSION

Under the Constitution, treaties are made by a process unique to the United States, a special case of a larger, unique constitutional arrangement for the conduct of foreign relations, itself part of a unique Congressional-Presidential system. The treaty power was not designed pursuant to an ideal principle or even a working model, but is yet another of the Framers' second choices. It has not worked as intended, Constitutional experience having denied the Senate a full, continuing participation and relegated it to a second stage of scrutiny and modification or veto.

In two hundred years of history under the Treaty Power there have been few issues of constitutional dimension. The ABM and INF controversies of 1987-88 masqueraded as issues of constitutional construction but were essentially, I think, reflections of political differences between independent constitutional bodies in the exercise of a shared role, which neither is happy to share.

Neither the President nor the Senate is happy with the Treaty Power. The President resents Senate disposition to reject, or shelve, or "butcher" what has been negotiated "in the national interest." The Senate resents its being excluded from the negotiating process, being presented with a *fait accompli*, and being told it must take it "in the national interest." The House of Representatives is the least happy, sitting by, feeling like a second-class chamber. And our partners in treaties—foreign governments—have long found the United States

procedure incomprehensible and vexing, when agreements apparently concluded are frequently rejected or reopened for renegotiation.

The unhappiness of both President and Senate is particularly acute when addressing important treaties as to which both are sensitive and ambivalent. Senate unhappiness is aggravated by recognition that its role in treaty-making generally terminates with consent, whereas the President, and later Presidents, continue to live with the treaty, interpreting and applying it. Senate unhappiness is exacerbated by fear that — as in the case of the ABM Treaty — the President, or his successor, may be tempted to reshape a treaty to which the Senate remains better disposed. Senate resentment and resistance are strong when it senses a threat to its constitutional treaty role, and they will be stronger still when it believes that the Executive was not — is not — wholly forthcoming and had been — is — less than candid.

Sole executive agreements — inevitable and having their place — are not the answer to the tensions of the Treaty Power. The Framers clearly contemplated a line between treaties and executive agreements, but the line which the Framers would have drawn is unknown. Sole executive agreements, moreover, raise storm signals for constitutionalism, since such agreements entail no checks. They are also insufficiently democratic. The Presidency is today a more democratic institution than the one the Framers contemplated, but sole executive agreements are not authentically democratic even today. They are often secret or unknown, do not engage Executive responsibility, responsiveness, accountability, and have little relevance for the quadrennial Presidential plebiscite. Principles of constitutionalism and democracy suggest a limited role for sole executive agreements, especially — but not only — if an agreement entails law-making and affects individual rights.

The frictions of treaty-making are inherent in the shared function. Recall Justice Brandeis's famous justification:

The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.⁴³

I know no reason to assume that Justice Brandeis would except the treaty power from that judgment. The Framers did not want autocracy by treaty any more than by other Executive activity. History, I think, has not proved them wrong, and transformations in the Presidency, in the Senate, in the United States, in the international system,

43. *Myers v. United States*, 272 U.S. 52, 293 (1926).

do not suggest that we should unshackle the President to make treaties without Senate consent, as, for example, by narrow construction of what is a treaty and large construction of the unwritten power to make sole executive agreements.

The treaty process needs to be thought about, but no one seems seriously to demand or contemplate change. This may come from a sense that "if it ain't broke. . . ." Or perhaps treaties do not appear important enough to warrant the trouble to try to change the process of making them; perhaps unhappiness with the process is not great enough to overcome inertia; perhaps the claims of democracy are not heard; perhaps the claims of efficiency, the needs of the international system and of diplomacy, prevent our moving to a more democratic system; perhaps no better procedure seems available.

Dissatisfaction with the Treaty Power apart, perhaps constitutional democracy now requires that restraints on the President should be lodged not in the Senate but in the House — the more representative body — or in both Houses. Without formal amendment, I have suggested, we can democratize the process by increased and orderly resort to the Congressional-Executive agreement as an alternative to the treaty procedure. But that "solution" would please only the House and increase the unhappiness of the others concerned. That change if applied to all agreements might entail too great a sacrifice of the needs of the United States in the international system. Does democracy — our dual democracy — demand it? Or is what we have, the President combined with the Senate as they are now elected, democratic enough?

There are advantages to the Congressional-Executive agreement but perhaps it is too cumbersome for general use. Perhaps we need a streamlined intermediate version. Tentatively, I venture, Congress could create a new, small, informal sub-constitutional body representing both Houses to deliberate together with the Executive. That body would offer advice on international agreements early; consider what agreements the President could make alone in principle, and whether he or she could make a particular agreement on his or her own authority; develop guidelines for deciding between the treaty method and the Congressional-Executive agreement and apply them in particular cases; decide whether an agreement should be self-executing or should require legislative implementation.⁴⁴

Together, the House and the Senate, as the legislature, might also regulate and scrutinize sole executive agreements. The Executive now

44. Compare the Clark Resolution, *supra* note 28.

reports the executive agreements he has made;⁴⁵ does any one look at them? Better scrutiny of what the Executive has done might lead to greater caution by the Executive in deciding not to seek the approval of the Senate or of Congress. In turn, it might well lead also to more orderly delegation to the President by Congress of authority to conclude agreements, thereby effectively converting all agreements into Congressional-Executive agreements as a matter of constitutional authority but without the cumbersomeness of that process.

Subject to such tinkering or tuning, in the complex governmental system we have, we may be "stuck with" the treaty-making procedure we have. As the Framers recognized, Congress cannot negotiate. As history has demonstrated, we cannot return to formal advice by the Senate as a whole. Although it developed from other considerations, the treaty-making process the Framers gave us, even as it has been modified by experience, does not in principle clearly offend constitutionalism or democracy. But we will continue to have crises unless both President and Senate take care to make the present procedure, or a Congressional-Executive alternative, work. We need to move towards greater cooperation and less adversariness between the Branches, but that is easy to recommend and difficult to achieve in a system of independent branches. The advice function ought to be reintroduced, not formally but regularly, and should include some advice on important sole executive agreements. Later Presidents must not attempt to shave treaty obligations by reinterpretation (or mis-interpretation). The ABM controversy should not tempt the Senate to load its consent with express understandings, to clutter treaties with conditions, to jam the treaty process. In relations between them concerning treaties, the President must be candid, the Senate must be restrained.

This is not a cheerful or ringing conclusion, but it is — I think — the message of the still, small voice of the Constitution we have inherited and are devoted to, in our kind of constitutional democracy in a world of states.

45. See *supra* page 418.