ESSAY

Interpreting "Interpretation": The President, the Senate, and When Treaty Interpretation Becomes Treaty Making

*Michael J. Glennon**

Can the President, by relying upon a secret negotiating record not transmitted to the Senate when it approved a given treaty, "interpret" the treaty in a manner at odds with what the Senate then understood to be the treaty's meaning?

Traditionally, the President has been seen as having broad authority to construe the words of a treaty.[1] The Senate has been said to have no role in the interpretive process.[2] The role of the Senate has been seen as confined to the advice-and-consent function conferred by the Constitution.[3]

However, the President's interpretive power is not unlimited. He cannot make an altogether new treaty and dispense with the requirement of Senate advice and consent by calling that treaty an "interpretation" of an earlier one. Nor can he amend an earlier treaty and escape the requirement of Senate approval (to what is in reality a new treaty) by calling the amendment an "interpretation." The President's own se-

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* Professor of Law, University of California, Davis. The author serves as a consultant to the Foreign Relations and Judiciary Committees, United States Senate, on the matters discussed in this essay.

[1] RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW § 326 (1) (A.L.I. TENT. DRAFT No. 6, Vol. 2, Apr. 12, 1985) [hereafter REVISED RESTATEMENT] provides that the President "has authority to determine the interpretation of an international agreement to be asserted by the United States in its relations with other states."

[2] *Id.*, Reporters' Note 1.

[3] U.S. CONST. art. II, § 2, cl. 2 provides that 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."

mantic denomination of his act cannot of itself control what procedure is required constitutionally. At some point his authority ends and the Senate's begins; at some point an interpretation becomes a new treaty or an amendment to the old one. But when does this occur?

At the outset, one should recall that the United States' *domestic* obligations under a given international agreement need not necessarily correspond to its *international* obligations. This principle is clear under customary international law, and is of course true with respect to every nation. Perhaps the best example of an agreement giving rise to disparate obligations within the two different legal systems is an agreement entered into in violation of a nation's domestic law. Under international law, such an agreement can be binding internationally notwithstanding the domestic violation. Indeed, such an agreement *is* binding internationally unless the agreement violates a "fundamental rule" of domestic law and that violation is "manifest."[4] At the same time, the domestic rule is, *ex hypothesi*, contravened. Domestically, such an agreement is thus void; internationally, it is binding.

This consideration is important to bear in mind because, during the dispute concerning interpretation of the ABM Treaty, the State Department Legal Adviser, Abraham Sofaer, repeatedly cautioned the Senate against endorsing a principle that would "[deprive] our nation of the benefits of mutuality of obligation in its treaty relations."[5] "The United States," the Legal Adviser testified, "would be put at a significant disadvantage if the President is subject to stricter constraints, as a result of internal understandings of the Senate, than those which apply to other parties."[6] It is important, he appeared to suggest, that the Senate not endorse a principle that could result in one obligation for the United States and another for a treaty partner.

Surely all nations have a tidiness interest; it ill behooves a nation that takes law seriously to skirt juridical schizophrenia by readily permitting itself to undertake dissonant domestic and international obligations. Yet the Legal Adviser seemed to assume wrongly that the possibility of disparity was some novel idea propounded by a few Senators, rather than a contingency inherent in the nature of the relationship

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[4] *See* VIENNA CONVENTION ON THE LAW OF TREATIES, art. 46, UN DOC. A/CONF. 39/29 (1969) [hereafter VIENNA CONVENTION].

[5] A. Sofaer, State Department Legal Adviser, testimony before a joint hearing of the Senate Committee on Foreign Relations and the Senate Committee on the Judiciary, at 28 (Mar. 26, 1987) (unpublished Committee transcript, on file with the *U.C. Davis Law Review*) [hereafter Sofaer Testimony].

[6] *Id.*

between the two legal systems. Moreover, he seemed to assume wrongly that the interest in harmony between the two legal regimes is the *only* interest at stake. Surely a far greater interest is involved: surely the interest of every state — and the United States in particular — in preserving the integrity of the domestic legal order must prevail over concerns about mere orderliness. The United States Constitution places limits on the President's power. Whatever international law may say about the *international* nature of an obligation undertaken by the United States, those limits apply domestically and must be respected.

In the ABM Treaty dispute, curiously, the Administration was not truly concerned about a lack of mutuality of *international* obligation. Its whole point to the Senate was that United States and Soviet negotiators did indeed have a meeting of the minds in 1972, and that the meaning of the treaty in force in 1987 was the meaning on which the negotiators had secretly agreed — not the meaning described to the Senate in 1972 by Administration spokesmen, not the meaning identified in 1972 by the two Senate opponents of the treaty as a reason for voting against it. That meaning, which would have prohibited testing and development of the exotic, space-based laser technologies comprising the Strategic Defense Initiative, or "Star Wars," may have been *inferred* by the Senate, but the Senate was wrong — or more precisely, misled. "[E]rrors sometimes occur," the Legal Adviser testified, "people sometime [sic] exaggerate, and misunderstandings take place."[7] His fundamental argument, therefore, was that however clear the ratification record of the treaty, however clear subsequent practice of the parties, the secret negotiating record was dispositive of the treaty's meaning.[8]

But dispositive in which legal system — international law or domestic, constitutional law? *TIME* magazine reasonably drew the conclusion that the Legal Adviser's reference was to both systems; he was, after all, giving testimony concerning the propriety of a measure that undertook to describe principles of treaty interpretation "[u]nder the United States Constitution."[9] Yet, in a letter to the editor of *TIME*, the Legal Adviser disclaimed any intent to address the domestic issues:

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[7] *Id.* at 29.

[8] Administration supporters of the "broad" interpretation and Senate proponents of the "narrow" interpretation both contended that the text of the treaty supported their interpretation, and allowed that, in the event of ambiguities, reference to extrinsic sources was permissible. Certain Senators opposing the Administration, however, disputed the propriety of reference to an untransmitted, secret negotiating record to resolve textual ambiguities.

[9] S. Res. 167, 100th Cong., 1st Sess. § 2(2)(A) (1987).

> You say that I "claimed that nothing the Administration tells the Senate during the ratification process is binding." My testimony, however, was addressed to the effect of the Senate's ratification record on international *obligations* toward the other party to a treaty, not the obligations of the President toward the Senate under the U.S. constitutional structure."[10]

With all due respect to Mr. Sofaer, this simply is not true. His testimony is replete with commentary concerning the "obligations of the President toward the Senate under the U.S. constitutional structure."[11] In any event, analysis is advanced by distinguishing between the different effects under the different systems, and the distinction serves to highlight three central issues arising within the domestic legal system.

First, is it within the President's *constitutional* power to enter into a treaty different than the one approved by the Senate? In effect, that different treaty is not a treaty but an executive agreement; the issue is whether that executive agreement falls within the scope of his sole power under the Constitution. The President's very act of transmitting the *treaty* for Senate advice and consent would seem to imply his own answer; constitutionally, if the treaty can be entered into as an executive agreement, why seek Senate approval? Senate Resolution 167 leaves little room for quarrel: "[I]f, following Senate advice and consent, the President proceeds to ratify a treaty, the President may ratify only the treaty to which the Senate advised and consented."[12]

Second, what weight is to be accorded the negotiating record in interpreting the President's constitutional obligations? Before addressing the substantive issue, looking closely at exactly what the term "negotiating record" means is worthwhile. In reality, no genuine "negotiating record" was compiled at the time the ABM Treaty was ratified. Rather,

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[10] TIME, Apr. 27, 1987, at 10.

[11] Mr. Sofaer comments on the Framers' intent with respect to the Treaty Clause. *See* Sofaer Test. *supra* note 5, at 46. He proceeds to address Professor Henkin's remarks on the role of the President and the Senate. *See id.* at 47. He raises a core constitutional question: "what is the treaty that is the law that the President must faithfully execute?" *Id.* He then talks about constitutional requirements concerning the inclusion of Senate-added conditions in the resolution of ratification and constitutional requirements concerning their inclusion by the President in the instrument of ratification. *See id.* at 53-54. He describes certain elements of the ratification record as "purely domestic documents." *Id.* at 55-56. He talks about the President's "responsibilities to enforce the laws and to conduct the foreign affairs of the United States. . . ." *Id.* at 58. He addresses the "allocation of powers" that "the nation has developed." *Id.* at 59. Finally, Mr. Sofaer asserts explicitly that "when [the Senate] gives its advice and consent to a treaty, it is to the treaty that was made, irrespective of the explanations it is provided." *Id.* at 62.

[12] S. Res. 167, 100th Cong., 1st Sess. § 2(2)(A) (1987).

the "record" assembled was put together only recently — through an office-to-office survey conducted by personnel of the Legal Adviser. Normally, "negotiating record" is a term of art used to describe an *agreed* negotiating record, since it is only the joint intent of the parties that has significance under international law. Notes unilaterally compiled by one party cannot control a treaty's meaning.

In addition, there is no guarantee that Mr. Sofaer's staff was able to compile a complete and accurate record of the ABM Treaty negotiations. Mr. Sofaer candidly described this process in testimony before the House Foreign Affairs Committee in 1985. He said that he and his staff "obtained from various sources *everything that we could find* that might be relevant to the issue of future systems and components." Yet all must realize that the collage may represent far less than a complete, accurate picture of what actually transpired during the ABM Treaty negotiations.

Finally, even if — as seems unlikely — every piece of that disjointed record was recovered, what reason is there to believe that the American negotiators chose to reduce to writing all relevant materials bearing upon this question? Evidently the members of the American negotiating team themselves never believed that their instructions, responses, and various and sundry musings would someday be viewed as dispositive concerning the treaty's meaning; otherwise, would they not have taken more care in assembling a single, complete, and cohesive record? For these reasons, therefore, reference to the "negotiating record" of the ABM Treaty presented threshold, fact-related difficulties. Even if those difficulties could be overcome, substantive constitutional hurdles concerning its relevance remained. Senate Resolution 167 addressed those issues directly: "[T]he Senate's understanding of a treaty cannot be informed by matters of which it is not aware, such as private statements made during the negotiations that were not communicated to the Senate."

This formulation is eminently reasonable. Although Senate Resolution 167 does not expressly address the issue, it would permit a secret negotiating record, not transmitted to the Senate when it approved a treaty, to be taken into account when that record is not inconsistent with the Senate's understanding of a treaty's meaning. However, that would be disallowed when the Senate understood otherwise, as reflected in the treaty's legislative history. Then, the Senate's understanding would control, as indeed it should. Legislative intent is reflected by legislative history, and an untransmitted negotiating record by definition is not part of the legislative history.

Third, how is the Senate's understanding to be assessed? The ques-

tion, again, is asked for *constitutional* purposes. To say, as the Legal Adviser did,[13] that formal communication to the other party is required is to say what need be done to firm up an *international* obligation. At issue here is the President's obligation vis-à-vis the Senate. In this domestic context, there is no reason to insist that the Senate make formal its understanding of the treaty's meaning. As Senate Resolution 167 put it:

> [T]he understanding of the Senate is manifested by any formal expression of understanding by the Senate, as well as by other evidence of what the Senate understood the treaty to mean, including Senate approval or acceptance of, or Senate acquiescence in, interpretations of the treaty by the executive branch communicated to the Senate. . . .[14]

As Senate Resolution 167 indicates, if the Senate proceeds to approve a treaty based on a certain understanding, that understanding controls. This is the rule of section 314 of the *Revised Restatement*, which imposes no requirement that the Senate's understanding be reduced to a formal condition. This rule is reiterated in comment *d* of the *Revised Restatement*.[15] A contrary rule would be illogical: the reason that the understanding in question is not reduced to a formal condition is that the Senate considers the meaning of the treaty obvious; formal conditions are appropriate where the meaning is not obvious. The Administration's position would require that the Senate clarify — indeed, clarify formally, through an explicit condition to its consent — precisely what the Senate views as being *beyond* reasonable disagreement. Normally, of course, the Senate conditions its consent to a treaty for the purpose of making some change in the treaty. Thus the Senate has no reason to condition its consent to a treaty when it believes that the treaty's meaning is clear. Yet the Administration views those matters about which a genuine consensus exists as necessitating formal clarification! The argument is difficult to take seriously, for on analysis it is seen to assume the very point in controversy. It assumes that the ABM Treaty in 1972 was properly accorded a "broad" interpretation, and that the Senate could change that interpretation if it so wished.

Constitutionally, one can reasonably conclude that the President can-

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[13] Sofaer testimony, *supra* note 5, at 20.

[14] *Id.*

[15] Although the Senate's resolution of consent may contain no statement of understanding, there may be such statements in the report of the Senate Foreign Relations Committee or in the Senate debates. In such case, the President must decide whether they represent a general understanding by the Senate and if he finds that they do, must respect them in good faith. REVISED RESTATEMENT, *supra* note 1, § 314 comment d.

not, by relying upon a secret negotiating record not transmitted to the Senate when it approved a given treaty, "interpret" the treaty in a manner at odds with the Senate's earlier understanding. The President is bound by the Constitution to take care that the laws be faithfully executed, and to act on the basis of such an interpretation would breach that requirement.

Such an act is thus not truly an "interpretation" at all — it is a violation of the Treaty Clause. When the President acts beyond the scope of his constitutional authority to interpret a treaty, he is in effect either amending that treaty or making a new one. The President cannot *call* a new treaty an "interpretation" of an old one and thereby dispense with the constitutional requirement of Senate advice and consent. Similarly, the President cannot *call* an amendment to a treaty an "interpretation" of that treaty and thus dispense with that requirement. The President's power of treaty interpretation is limited — limited by the Treaty Clause. The Constitution permits the President, acting alone, only to interpret existing treaties — not to make new ones. To remain within the scope of his constitutional power, the President must genuinely be engaged in the act of treaty *interpretation*. He cannot engage — by himself — in the act of treaty *creation*.

Where is the line drawn? Senate Resolution 167 drew the line in the same place as the Vienna Convention on the Law of Treaties and the *Restatement (Revised) of Foreign Relations Law*, which indicate that a treaty is to be construed in good faith in accordance with the ordinary meaning to be given its terms in light of its context and its object and purpose. When the President does this, he acts within the scope of his constitutional power. When the President's construction of a treaty cannot be so described, his endeavor represents not construction or interpretation at all, but the making of a new treaty. This he can do only with the advice and consent of the Senate.

Sound policy concerns support this conclusion. If the negotiating record were deemed controlling, the damage to the institution of the Presidency — and the conduct of American diplomacy — would be immeasurable. Hereafter the Senate would feel compelled to demand the negotiating record to every treaty to satisfy itself that nothing therein contradicted the public assurances of the Administration. Or, the Senate would feel compelled to incorporate into its approval of every treaty a reservation for every jot and tittle in the Administration's public statements as to what the treaty means, lest those statements later be disavowed in favor of a secret negotiating record. The impact on American diplomacy would be devastating. "Treaties so laden," as Senator Nunn put it, "would sink under their own weight. It would be extremely

difficult to achieve bilateral agreements and virtually impossible for the United States to participate in multilateral treaties."[16] It could also mean the end of confidential treaty negotiations — a tradition that traces to the earliest days of the Republic and one widely thought to be essential to the candid exchange of views by negotiators.

Like all rules of interpretation, those set forth in the Vienna Convention, the *Revised Restatement*, and Senate Resolution 167 grey at the margins. Room exists for reasonable disagreement whether close fact cases fall on one side of the line or the other. But ambiguity on the fringe does not preclude clarity at the center. Some facts *do* fall clearly on one side or the other. That the President can interpret treaties alone does not mean that he can make or amend them alone. To "interpret" a treaty in a manner at odds with the original interpretation of the President and Senate that made the treaty is not to interpret it. To do so is to amend it, or to make another.

For this the President needs the Senate's consent.

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[16] Sen. S. Nunn, testimony before a joint hearing of the Senate Committee on Foreign Relations and the Senate Committee on the Judiciary, at 22 (Mar. 11, 1987) (unpublished Committee transcript on file with the *U.C. Davis Law Review*).