Comments

Necessary and Proper: Executive Competence to Interpret Treaties

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I. Introductory Remarks

From Europe, where I have been for the last months, it seems quintessentially "anglo-saxon," in that slightly pejorative sense in which Europeans use the term, to have selected a debate format to explore the question of whether the Executive should continue to perform treaties and, as a necessary part of that function, have the autonomous competence to interpret the instrument in light of changing circumstances and needs or whether the Executive should henceforth constantly check back with the Senate or Congress for authorizations for each new interpretation. The format creates a certain drama but it also polarizes inquiry, presses participants and audience into a disjunctive, either-or mode and deflects attention from the search for integrative solutions. Given my own views on the matter, I find it particularly constraining. Though I think Bricker Amendments,¹ however they try to weasel in, are misguided and could not imagine myself sitting on the other side of this table on this issue, some assertions made successively on behalf of the Carter, Reagan and Bush administrations are equally unpersuasive.

For many citizens, the "real" issue is not the distribution of powers between the President and the Senate with regard to treaty performance or even the international legal interpretation of the Anti-Ballistic Missile (ABM) Treaty. It's the Strategic Defense Initiative (SDI). However, this debate is not about whether a particular construction of the ABM Treaty would enhance security or would lead the nation and its adversa-

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1. See M. McDougal & W.M. Reisman, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 1174 (1981) for text of one Bricker Amendment formulation and citations to additional commentary.
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ries into an infinite and expensive regress without real security increments. Here we address the constitutional issue. But precisely because so many have come to suspect that arguments for executive competence are all designed to justify SDI, you may wish to know that I am not a Star Warrior and do not support the program. But don’t expect fireworks from me on that issue. Because the alternative left to me, Mutual Assured Destruction (MAD), is, I recognize, an irrational defensive strategy, I have never been able to rise to the level of withering scorn and ridicule attained by some SDI opponents.

Embedded, as it is, in a current controversy, the debate can get sidetracked into snide or indignant comments and then arguments about the wisdom or bona fides of tactics of this President’s man or that Senator in various phases. I believe that mistakes were made on all sides and extreme and infelicitous language was sometimes chosen. But this debate is not about that. It is about how we will govern ourselves and, in particular, conduct our foreign activities in the future.

Nor is this a confrontation between democracy and autocracy. That’s been a red herring in the national debate. Democratic theory in our system does not equal or require legislative supremacy. In a parliamentary system, in which the chief executive is elected by a majority of parliament and serves at its pleasure, a claim by that chief executive of autonomous power would be problematic. In a constitutional system in which the chief executive alone is independently elected by all the people, autonomous executive powers don’t present that sort of problem, a fortiori when they are specifically assigned by the constitutive process as part of a design to limit the powers of the other branches, including the legislature. The question in this debate is not King George v. Parliament or democracy v. autocracy, but, within a constitutional system, the explication of the proper roles of the different branches in the performance of treaties.

I have used the word “branches” advisedly. The title of our debate is conceived too narrowly both nationally and internationally. The President and the Senate and the House and the courts must, in the discharge of certain of their assigned duties, make independent and sometimes continuous interpretations of treaties. Because of checks and balances and separation of powers, each branch, in performing its functions, must often consider, take account of, appraise and sometimes reach its own conclusion as to, in the light of the case or context, the proper interpretation of agreements.

The title of the debate also misleads in implying that some part of the federal government has the final say on what a treaty means at a particu-
lar moment. The United States is part of an international legal system, with its own policies and hermeneutics for treaty interpretation, and they prevail. Whether legal jingoists like it or not, a purported interpretation which one of the branches adopts and tries to render the national position — for example, Congress' Anti-Terrorism Act of 1987 — which is inconsistent with the international construction of a treaty obligation and/or with international law will be internationally unlawful and will engage American state responsibility.

II. The Different Decision Functions Concerned

Analytically, there are two separate questions here. First, the respective roles and relations of the Senate and the President in the making of one species of international agreement: treaties. Second, the respective roles and relations of the President and the Senate in the performance of treaties. Obviously, one cannot perform a treaty or, for that matter, engage in any other type of legal application, without determining what it calls for or what is called for in a particular situation, in short, without interpretation. Since there are many types of interpretation, I will, for convenience, call this one "performance-interpretation." (A third cognate question, at issue in the Carter administration, is the relation and respective roles of the Senate and the President in the termination of agreements.)

Because making, performing and terminating agreements are different and distinct functions, it should be no surprise that the configuration of roles and responsibilities of the branches should be different in each. These differences are made even more acute, again no surprise, because the branches between which the roles and responsibilities are distributed are structurally different. The execution of some important functions involves sequential movement from one branch to another, with each successive step of one branch requiring prior execution of the previous step by the other. That can be frustrating. Moreover, the allocation of these different roles and responsibilities is untidy, precisely because conflict and competition were intentionally designed into the system by putting the different branches in equipoise, with some assignments that overlapped and could, when discharged in different ways, often check each other.


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I believe that a significant, concurrent role is assigned, for constitutional and structural reasons, to the Senate in the first and third functions, but not in the second and that this regime has worked and promises to work better than any of the recently proffered alternatives.

III. Treaty-Making

The treaty-making function is not the major issue here, but because it impinges on treaty performance, it must be considered briefly. Under international law and overlooking custom for the moment, states may assume obligations in many ways — by negotiation and explicit agreement,4 by acquiescence,5 and probably by unilateral declaration of heads of state.6 The question of the pertinence of internal domestic procedures for any of these various modes is determined by international law.7 Sometimes it refers to domestic law requirements, as international law interprets them, and sometimes not. There may be a difference between what we say we have agreed to and what international law may say about that, in much the way that France may discover itself internationally bound by a Presidential statement which may not have been authorized by its constitution. China or Russia may claim that they are not bound by norms which have not undergone, let us say, formal incorporation in their own systems. International law may say they are bound. It prevails.

With regard to treaties,8 our domestic constitutional procedure, as it has developed, is fairly simple to describe in general terms. The President negotiates them, the Senate considers them and either rejects them, approves them or modifies them by the generic term “reservations.” If they are approved, the President may proceed to conclude them with the other party or parties. If modified, the President renegotiates them in accord with the Senate’s wishes or aborts the project. If ratifications are exchanged, the text of the agreement becomes, according to its terms, a treaty between the parties.

But some fundamental and unique properties of international law complicate things. For one thing, the legal boundaries of the “text” of the

7. See Vienna Convention, supra note 4, arts. 6, 7, 46, & 47.
8. On other modalities of agreement in the United States system, see McDougal & Lans, Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy I, 54 YALE L.J. 181 (1945).
treaty, which is central to the Senate's role, have become increasingly blurred, for a number of reasons. One is the use of unilateral statements issued immediately after agreements have been made and long before the issue of subsequent behavior arises, for example, the Shultz statement made on signature of the Afghan Accord guarantees\(^9\) or the West German unilateral statement presented to the Soviet Union upon the signing of the Moscow Treaty.\(^10\)

The purpose of these statements is, obviously, to change something in the text of the agreement or to clarify unilaterally a contingency which is, perhaps intentionally, ambiguous. The other party may note that this is improper, but unless it promptly denounces the treaty, uncertainty about the actual body of the agreement results which requires special interpretive efforts. Given the complex and modular audiences of contemporary nation-states, these side-statements, for all the uncertainty they generate, may be indispensable to even getting agreement.\(^11\) But uncertain boundaries of text mean that internal components of signatories playing some role in the treaty-making process may not know if they have everything or if everything they have is a treaty.

Another complicating factor is that though international agreement-making uses the rather uninflected language of legislation, it actually produces a spectrum of results, from very "soft" law which only expresses preferences or guidelines without incorporating enforcement methods, to soft law which, it is hoped, will develop into something more, to obligations which are expressed in firm terms, but which are subject to unilateral denunciation at will, to package deals which, by common agreement, manage to pass over critical areas of disagreement by artful ambiguity, to agreements which, it is understood, are likely to subsist only as long as

\(^9\) Accords on the Peaceful Resolution of the Situation in Afghanistan, Apr. 14, 1988, reprinted in 27 I.L.M. 577 (1988). Shultz said, in part, the following at the closing of the signing ceremony:

The obligations undertaken by the guarantors are symmetrical. In this regard, the United States has advised the Soviet Union that, if the USSR undertakes, as consistent with its obligations as guarantor, to provide military assistance to parties in Afghanistan, the U.S. retains the right, as consistent with its obligations as guarantor, likewise effectively to provide such assistance. Klass, Afghanistan: The Accords, 66 FOREIGN AFF. 922, 945 (1988).


they are compatible with some vital interests of each of the parties, on
through to longer-term, firm agreements.\textsuperscript{12}

Another blurring factor is that international law itself changes.\textsuperscript{13}

Sometimes the Senate's actions also blur boundaries. In the Senate's
reservations to the Covenant of the League of Nations, the so-called "res-
ervations" were intended to be, and were in fact, a refusal to consent.\textsuperscript{14}
Sometimes, as in the Panama Canal Treaty, "understandings" are put in
for domestic political purposes, and some may not even be notified for-
ma ny otherwise to the other party.\textsuperscript{15} But they are there, will be invoked later by
partisans of one position or the other and, in some scenarios, have the
potential for bedeviling performance, and thus require additional inter-
pretation. The 1979 Foreign Relations Committee's four categories of
conditions to treaties codified this blurring of boundaries.\textsuperscript{16}

Now, of course, treaties are legislative and all legislation is, in Dean
Pound's expression, only an experiment in social control. If a piece of
national legislation proves to be general or uncertain, legislatures, in con-
tinuous session, can revisit it when they wish. But international agree-
ments are crafted by the parties. Once concluded, the parties may not be
able to agree to renegotiate. Given the fact that there are no courts of
compulsory jurisdiction in the international system, the basic meaning
and the stability of meaning in treaties not only may commence with
greater uncertainty than corresponding legislation in domestic contexts,
but it may continue to be uncertain. This means that performance of
treaties by each of the parties requires ongoing interpretation, a matter I
will return to when we examine the performance of treaties.

The Vienna Convention on the Law of Treaties codified the rules of
international interpretation and tried to deal with some of these bound-
ary problems.\textsuperscript{17} Some of its conclusions would unquestionably restrict

\begin{itemize}
\item 12. W.M. Reisman, The Concept and Functions of Soft Law in International Politics, Ad-
dress to the 82nd Meeting of the American Society of International Law, Wash. D.C. (April
22, 1988).
\item 13. Vienna Convention, supra note 4, art. 53.
\item 14. R. Henig, The League of Nations 37-43 (1973) (fourteen Senate reservations to
Treaty of Versailles). See generally D. Miller, The Draft of the Covenant (1928) (his-
tory of Covenant by co-author of draft constitution for League).
\item 15. Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal,
Sept. 7, 1977, United States-Panama, 33 U.S.T. 1, T.I.A.S. No. 10029; Panama Canal Treaty,
Relations Comm., Report on the Panama Canal Treaties, S. Exec. Rep. No. 12,
95th Cong., 1st Sess. 5-13 (1978) (listing of amendments and understandings offered
by committee).
\item 17. See Vienna Convention, supra note 4.
\end{itemize}
the Senate’s role in treaty-making. But the Vienna Convention’s content, too, already may have been changed by events. Article 31, for example, precludes the use, in interpretation of treaties in the course of their performance, of the internal deliberations of each state in its internal processes unless “accepted by the other parties as an instrument related to the treaty.” In accord with that provision, the Executive has rejected suggestions that the United States is bound by what it says or what is said in the Senate in the advice and consent procedure if it has not been formally conveyed to the other party.

There are two difficulties here. The first is factual. In the Hostages and the Nicaragua cases, the United States submitted and relied on State Department memoranda prepared for the Senate, as indicative of American understanding of the provisions they illuminated, without showing that the other parties had accepted them as related instruments. The second is legal. International law does not have restrictive rules of admissibility. In my view, anything aired in advice and consent procedures that becomes available is going to be used in international performance interpretation. Of course, in all matters of evidence, questions of admissibility are distinct from those of credibility and weight. Use of the special artifact called legislative history is always complicated and requires interpretation.

If what different branches say to each other in the course of concluding treaties is, at least, admissible in interpretation by each party in the course of its performance, what of things not said to each other? Or of hypothetical executive concealments from or misrepresentations to the Senate of things pertinent to advice and consent? The Justice Department’s argument in Rainbow Navigation came perilously close to a claim of a right to speak without responsibility and was, in the context of that case, properly rejected. But what is the effect of inter-branch mis-

18. Vienna Convention, supra note 4, art. 31(2)(a)(b), art. 31(3)(a).
19. Probably the sharpest formulation was by Judge Sofaer in testimony in March, 1987: “When it [the Senate] gives its advice and consent to a treaty, it is to the treaty that was made, irrespective of the explanations it [the Senate] is provided.” The ABM Treaty and the Constitution: Joint Hearings Before the Senate Comm. on Foreign Relations and the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. 130 (1987) [hereinafter Joint Hearings].
22. See Reisman, The Other Shoe Falls: The Future of Article 36(1) Jurisdiction in the Light of Nicaragua, 81 AM. J. INT'L L. 166, 170 nn.29 & 30 (citing use of State Department memorandum in pleading to ICJ in Hostages case and use of that document in Judge Schwebel’s dissent in case).
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takes or misunderstandings? Lawful uses of executive privilege aside, intentional concealment would be wrong and could and should create a constitutional crisis at the domestic level. But if advice and consent were rendered on the basis of such false representations, their subsequent revelation would not invalidate the treaty or change the meaning agreed upon by the direct international parties, unless an international legal interpretative rule provided for it.

International law is not carved in stone. We could, of course, insist on and begin to agitate for a change in this norm, but I think it would be more disruptive than helpful. Most of the 160 some states in the United Nations do not have stable constitutional arrangements. If each could challenge and escape from an agreement that had violated some internal procedure of adoption, stability of expectation in the world community — the raison d'être of treaties — would decline precipitously.

IV. Performance-Interpretation

The question of what was agreed, externally or internally, is only part of the problem. Whatever was agreed inevitably changes. Life is Heraclitian. Nothing stands still. Once a policy has been prescribed, in a statute or a contract or a treaty, the pertinent parties begin to modulate their behavior in accord with and in reliance on it. Things may seem fairly simple in single performance treaties, like the return of the crown of St. Stephen — one crown; one return; one receipt; end of treaty. In performing continuing treaties, however, the other party or parties (including their distinct internal decision components) must each interpret or decide what is proper, in each instance in which the treaty concerns something it is doing. And each of these performance-interpretations is made in contexts in which myriad other bilateral and multilateral concerns, some evanescent, some more durable, shape and limit options.

Some of the ensuing unilateral interpretations, expressed in performance, are readily accepted by other treaty partners. Some are protested or challenged in the various ways provided by the treaty itself or available in international law. Some provoke bargaining, winning concessions in treaty-related or other matters. Some may redefine the proposed action or the treaty itself, and some may secure a retraction. Depending on the outcomes of those sub-processes, that particular performance adapts, changes or prevails, as the case may be.

These successive performance-interpretations are not picaresque events that occur and are forgotten. They become, under international law, part of the continuing expectations of the parties as to what their obligations are. In more than a figurative sense, performance constantly
becomes part of the agreement. Documents uttered in solemn fashion, let us say, by hearings and advice and consent, continue to evolve in the course of their performance. That evolution or development may go in ways that some of the parties or some components within some of the parties had not anticipated or possibly wished. Yet, at the international level, the agreement will continue to be valid until some event occurs which international treaty law characterizes as terminable or terminating.

This evolution or development of treaties and laws is not due to faithless executives or courts consciously deciding not to follow text and trying to aggrandize power. In the political hurly-burly, that sort of indictment is frequently levelled against courts and the executive. That is a fundamental misunderstanding of what is necessarily involved in performance-interpretation. It rests on the assumption that performance-interpretation is simply a matter of identifying and following a single rule.

If that were the case, we would hardly need lawyers; the matter could be turned over to people at the clerk-typist level equipped with little handbooks like those used by customs clerks making ad valorem assessments. We need lawyers precisely because many rules and authorized policies are engaged in particular performances and disputes about them, because the international context of decision is extraordinarily complex and always changing and because the aggregate consequences of different performance-interpretation options will have different effects on the ensemble of national legal objectives. The art of decision-making involves acquiring the sensitivity to, identifying, and then taking account of, all of these and fashioning a response that realizes or optimalizes as many of the policies and values as possible.

Performance-interpretation is aggravated by the boundary uncertainties mentioned earlier, but most of the problems arise in longer-term and general agreements which may not have dealt with the sort of issue that now arises, or when contexts, technologies and other policies that may have prevailed at the time of the making of the agreement have changed, or when the identity, alignment or behavior of some of the other parties changes in unanticipated ways. In these circumstances, performance-interpretation always involves at least four intellectual operations:

1. identification of the text or texts and a provisional construction of their meaning;
2. identifying and supplementing other pertinent authoritative policies that are not in the invoked instrument but are parts of the encompassing and often changing legal system and are pertinent to the problem at hand;
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3. policing or actualizing parts of the agreement that are no longer consistent with contemporary community policies, whose force must now be limited;

4. testing the aggregate consequences of alternative projected applications in terms of all the legal objectives that are pertinent.24

These operations are not an exclusive American prerogative. All other treaty parties engage in performance-interpretation when they perform or when they react to other parties' performance-interpretations and then themselves decide whether to protest, insist on a modification, declare the treaty void, or acquiesce. International tribunals engage in comparable operations. Because of all of these factors, the international agreement is, by its nature, dynamic and changing, sometimes in dramatic ways.

Now you may say, why have all this interpretation? If I say something, just do what I say. Don't interpret me. In fact, appliers have no choice but to interpret and reinterpret in all treaty performance. There is simply no practical alternative to this reinterpretation. And here's why.

The jealous prince or parliament may give its ministers or courts a single command and order them to execute exactly as prescribed or return for additional instructions. In this type of regime, if things are unclear, the minister returns for further instructions or the courts, in the language of Roman and continental jurisprudence, render a decision of non liquet, in which they say they cannot decide. But because ministers would be constantly at the door and the courts would constantly be issuing non liquets, jealous princes and parliaments learn to express their jealousy in other ways. Ministers who cannot make up their minds and perform are fired and, in continental systems, judges are ordered by the Code to supplement or else suffer criminal penalties.

Our own system would grind to a halt if, in each instance in which courts were faced with instruments that required input from them, they suspended operations and referred the matter back to Congress. The system would grind to a halt if, in cases in which executive agents had to interpret or had to respond to another party's performance-interpretation, they got in line on the Hill for additional legislation, which would, in its performance-interpretation, require additional instruction ad infinitum. Wholly aside from the swelling of the power of the legislature over the Executive and the shrivelling of checks and balances, it simply could not work.

24. For a more elaborate formulation, see M. McDougal, H. Lasswell & J. Miller, The Interpretation of Agreements and World Public Order (1967).
In this respect, the INF Committee Report missed the point when it flagged what it called the "constitutional assertion of a clearly delineated and unprecedented doctrine under which the President has wide latitude for treaty 'reinterpretations,' notwithstanding what the Senate may have been told in the course of granting consent to ratification." It was hardly unprecedented and, rather than an "assertion," it is driven by the very division and specialization effected by the Constitution. Dean Rostow, from a vantage of academic and practical experience that few others can claim, has written:

The phenomenon of presidential interpretation and reinterpretation of treaties . . . occurs daily in every nook and cranny of the law. When the President sends instructions to representatives of the United States at the United Nations . . . and at international conferences on dozens if not hundreds of subjects . . . he is interpreting and reinterpreting treaties as he "faithfully executes" the law. . . . This process of change and development is inherent in the growth of the law. Sometimes the changes are incremental and interstitial. Sometimes they are considerable. They are in fact inevitable as law confronts life every day of the week.

The issue is simply the competence to perform treaties internationally. If you cannot interpret, you cannot perform. If you cannot perform, power shifts to the authorized interpreter who de facto becomes the Executive. And if that putative Executive is structurally unable to perform, we are in deep trouble.

So, wholly apart from explicit constitutional assignments, the Executive must interpret in the course of performance of bilateral treaties and multilateral instruments, as courts must interpret them in the course of their adjudication. And with an equal inevitability, these instruments are prone to an evolution that involves a drift from what the parties thought when they concluded the agreement. Treaties have a greater propensity to drift because all the parties must interpret in the course of their own respective performances, while the rest constantly examine the interpretations in terms of their own interests and decide whether to protest, acquiesce or terminate. International courts and tribunals may accelerate the drift. National legislatures themselves contribute to this drift when they enact legislation which interprets or impacts on treaties and becomes part of that flow of practice that is, through time, the agreement.


Now all of this is obvious to any student of international law, indeed, to any student of law. So one reads with all the more disbelief, in the 1987 Senate Foreign Relations Report that

[the committee is aware of no instance in which a treaty was reasonably supposed by the Senate, when it consented to ratification, to mean one thing, and it was argued later by the Executive to mean something altogether different.]

Can one find any enduring treaties, or laws for that matter, that have not undergone interpretive transformations? Is there any lawmaker with the omniscience or prescience to anticipate every eventuality and to provide explicitly for it and then prohibit all applicative initiative? And if there were such an entity with such objectives, is language capable of this task?

Senate Report 167, Professor Koplow, the various Byrd or Biden Conditions, Judge Sofaer, Mr. Culvahouse, indeed President Reagan in his letter to the Senate of June 10, 1988, all concur in the notion that somewhere in there, not far from the proverbial pony and alongside “original intent,” you will find an “entrenched” meaning, which permanently limits performance-interpretation. Essentially, they disagree only on how to find or construe it. The Justice Department in Rainbow also adopts a theory of entrenchment but goes to another extreme, contending that what the Executive says to the Senate in the advice and consent context not only cannot become entrenched, but can have no legal effect or role in performance-interpretation unless such statements were “authoritatively and explicitly communicated to the Senate by the Executive and were part of the basis on which the Senate granted its consent.”

Respectfully, I submit that all of these views are wrong. We cannot have presidents who are only messenger boys and girls any more than we can have presidents who blithely ignore expectations that they help to

30. “[T]he 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.” 134 Cong. Rec. S6937 (daily ed. May 27, 1988).
31. Joint Hearings, supra note 19.
create. In faithfully executing treaties under our constitutional system, the president must certainly consider and take account of — here I intentionally use terms more compelling than the Legal Adviser’s “not disregard”35 — along with the texts of the relevant instruments, all the previous communications from and to the Senate and from and to other parties, including their behavior. And then the President must fashion a response that best approximates the major purposes of the treaty, the shared expectations of the parties, such as they are, and the policies of general law, all in terms of international and our own essential needs in the unique context of the moment. Applying the treaty is only part of the operation. The most important thing is making the right decision. That’s what “faithfully execute” means.

It’s not easy. Law is not mechanical. There is no escape from judgment. To paraphrase Harry Truman, there’s a lot of heat in the political kitchen. Manuel Noriega’s lawyers would have little difficulty showing that explicit and implicit Senate “entrenchments” in the advice and consent to the Canal Treaty, the UN Charter, the OAS Charter, the Rio Treaty, etc., did not authorize the President to go in and bust an indicted pusher and a confirmed dictator and enable the internationally validated, democratically elected civil government to take office. The vast majority of Americans and the Senate agree that President Bush’s Panama action faithfully executed the law. And it did. Leadership entails interpretive judgments in politics as responsibility entails them in morality. That leadership and responsibility must not be legislated out of our system.

V. Senate and House Methods of Control of Treaties That Drift

The inexorable dynamic of performance-interpretation by both the Executive and the courts does not mean that the legislature has no role in treaties or legislation, as the case may be, after their respective advice or consent and ratification or enactment. Separation of powers and checks and balances operate. Congress can enact new legislation if it feels that the Executive has interpreted and is performing a treaty to which it advised and consented in ways inconsistent with its intentions or, indeed, in ways inconsistent with its current wishes, just as Congress can relegislate if it feels that the courts have drifted away from its old or new legislative intentions. In the ABM controversy, Congress, dissatisfied with the per-

35. Joint Hearings, supra note 19, at 128 (“Of course, the President cannot, and should not, disregard views expressed during Senate proceedings which are of considerable importance.”); see also A. Sofaer, Treaty Interpretation and the Separation of Powers, Address to the American Law Institute, Chicago, May 19, 1988 (providing further insight into the “Sofaer Doctrine”).
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performance-interpretation the President planned, stopped SDI dead in its trajectory by simple legislation. The system worked correctly.

When Congress or the Senate decides to review and appraise the congruence of a performance-interpretation of a treaty to its goals, you may be sure it will not apply the Byrd or Biden Conditions. It may trumpet its fidelity to the text but it will do more than merely consult the text and statements of its own debates and implicit understandings in the past. For the flow of events will no more stop for the Senate than the tide will stop for King Canute. Like any other applier engaging in performance-interpretation, the Senate too will look at the flow of behavior of all parties, the changes in political and technological environments, the aggregate consequences of the different interpretive options available on the aggregate of security and other policies engaged. In the light of all of these considerations, it will decide whether to confirm or modify its previous communication. And given what is involved, you may be sure that it will not have much time left for law-making. That's why divisions of labor and specializations take place and executive branches are formed.

The ongoing checks and balances of our constitutional system have, thus, hardly left the Legislature defenseless against an Executive performance-interpretation with which it disagrees. It can make its views felt and, when it wishes, decisively applied, without intervening in the necessary performance-interpretation tasks of the Executive or distorting the constitutional regime of checks and balances.

VI. Conclusions

Power corrupts. That nostrum is at the psycho-philosophical basis of the Constitution and its system of checks and balances. The absence of power also corrupts. Some tend to forget that that nostrum is at the basis of any constitution, for these are artifacts that are created by human beings to establish and maintain the community's fundamental institutions for making decisions.

The complex of separate branches with some overlapping and sequential functions and checks and balances has achieved effectiveness and

37. The ultimate limitation that operates on Congress, as on the Executive, is international law. As of 1987, Congress apparently believed that it may override international obligations by ordinary legislative majorities with courts effecting the change on a principle of lex posteri-ori derogat priori. As I have elaborated elsewhere, I doubt if that simple legislative bookkeeping device is internationally valid, is in our interest, or is still accepted by our courts. See Reisman, An International Farce, supra note 2.
control in the area of treaty-making and performance and, one might add, provided the body politic with security and liberty. The proposals to change it are inconsistent with the fundamental conception of our Constitutional system. That, in itself, does not trouble me. I am not an atavist. Constitutional construction through time is not a slavish replication of older doctrines, but must adapt basic constitutive community policies to the needs of the Republic in changing international environments. The problem with this cluster of apparently different proposals — Sofaer, Byrd, Biden, Koplow, Culvahouse, Reagan — which converge so much, is that they all will misfire. They would make the Executive internationally ineffective and, because the Senate could hardly deal with the flow of international problems, they would render the United States ineffective. That would be tragic. We would not be at this relatively promising moment in world politics, were it not for our leadership, a leadership as urgent now as it was then.