ON THE RECORD: WHY THE SENATE SHOULD HAVE ACCESS TO TREATY NEGOTIATING DOCUMENTS

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The Treaty Clause of the Constitution describes the mechanism through which the United States enters into treaties with other nations. Though seemingly straightforward, the Clause is unique in that it is an "explicit constitutional mandate to share power." As such, defining the precise contours of this power has led to several conflicts between the executive and legislative branches. One such dispute concerns the fate of a treaty's negotiating record, particularly whether the President must, can, or should provide such records to the Senate when he submits a treaty for its advice and consent. At least three times in the last thirty years, the President and the Senate have openly disagreed about the existence and nature of this obligation, hampering the ability of the United States government to conduct effective foreign policy. However, despite the formidable problem this question poses, no legal scholarship has addressed it to date. This Note fills that void and argues that although this is likely a nonjusticiable political question, it is nonetheless a legal question deserving of legal analysis. Analyzing the costs of each extreme position—a total bar to Senate access or complete, unfettered Senate access—this Note concludes that both are undesirable. This Note then argues that the optimal solution would be for the Executive to provide relevant portions of the negotiating record to the Senate Committee on Foreign Relations on a classified basis, but only if the Committee determines that provisions of a treaty are ambiguous and recourse to the negotiating history would assist in elucidating the intent of the treaty parties.

INTRODUCTION

The treaty power of the United States, vested in Article II, Section 2, Clause 2 of the Constitution, declares: "[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."[1] Although seemingly straightforward, the Treaty Clause is unique in that it is an "explicit constitutional mandate to share power."[2] It is for this reason that the

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1. U.S. Const. art. II, § 2, cl. 2.

2. Louis Henkin, Constitutionalism, Democracy, and Foreign Affairs 46 (1990) [hereinafter Henkin, Constitutionalism]. Compare U.S. Const. art. II, § 2, cl. 1 (conferring commander-in-chief power solely on President), and U.S. Const. art. III, § 1 (giving Congress exclusive power to establish lower courts), with U.S. Const. art. II, § 2, cl. 2 (vesting treaty power in both President and Senate).

Clause and the contours of the power it confers have given rise to a tremendous amount of conflict[3] and scholarship.[4] This scholarship focuses on questions varying from whether the Senate may prospectively provide its advice and consent[5] to how to streamline the treatymaking process,[6] and also considers issues such as the general principles of treaty interpretation[7] and the particular roles of the Executive and Senate in such interpretation.[8] Despite the abundance of such literature, no scholarship to date has addressed whether the Executive must, can, or should provide the negotiating record of a bilateral treaty[9] to the Senate when he sub-

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3. See Henkin, Constitutionalism, supra note 2, at 2 ("[F]riction between President and Senate in the exercise of their shared authority in the making of treaties has agitated our political universe from President Washington's time through Polk's, Cleveland's, Theodore Roosevelt's, and Wilson's and in between . . . .").

4. See, e.g., infra notes 5–8 (collecting sources).

5. See generally Jean Galbraith, Prospective Advice and Consent, 37 Yale J. Int'l L. 247 (2012).

6. See generally Ronald A. Lehmann, Note, Reinterpreting Advice and Consent: A Congressional Fast Track for Arms Control Treaties, 98 Yale L.J. 885 (1989).

7. See generally David J. Bederman, Revivalist Canons and Treaty Interpretation, 41 UCLA L. Rev. 953 (1994) (suggesting new framework for treaty interpretation); H. Lauterpacht, Some Observations on Preparatory Work in the Interpretation of Treaties, 48 Harv. L. Rev. 549 (1935) (discussing role of negotiating record in treaty interpretation); Curtis Mahoney, Note, Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties, 116 Yale L.J. 824 (2007) (suggesting courts draw from contract theory in developing canons of treaty interpretation); James C. Wolf, Comment, The Jurisprudence of Treaty Interpretation, 21 U.C. Davis L. Rev. 1023 (1988) (analyzing three categories of interpretive norms for treaties and suggesting updates to Restatement "to reflect past and current practice in treaty interpretation").

8. See generally Lawrence J. Block et al., The Senate's Pie-in-the-Sky Treaty Interpretation: Power and the Quest for Legislative Supremacy, 137 U. Pa. L. Rev. 1481, 1481–82 (1989) (discussing how "battle between the Executive and the Congress over the formulation and implementation of American foreign policy" makes treaty interpretation more difficult); Abram Chayes & Antonia Handler Chayes, Commentary, Testing and Development of "Exotic" Systems Under the ABM Treaty: The Great Reinterpretation Caper, 99 Harv. L. Rev. 1956, 1956–57 (1986) (arguing President Reagan's reinterpretation of ABM Treaty was "a gross distortion of both the language and purpose of the Treaty"); David A. Koplow, Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties, 137 U. Pa. L. Rev. 1353, 1357 (1989) (arguing "[o]nce an interpretation of a treaty has become entrenched in United States domestic law through the joint action of the Senate and President, it cannot be altered unilaterally by a reinterpretation sponsored by either branch alone"); Abraham D. Sofaer, The ABM Treaty and the Strategic Defense Initiative, 99 Harv. L. Rev. 1972, 1972–73 (1986) [hereinafter Sofaer, ABM Treaty] (supporting broad reading of ABM Treaty based in part on negotiating records); Gary Michael Buechler, Note, Constitutional Limits on the President's Power To Interpret Treaties: The Sofaer Doctrine, the Biden Condition, and the Doctrine of Binding Authoritative Representations, 78 Geo. L.J. 1983, 1985 (1990) (proposing new "framework for describing the constitutional limits on a president's power to interpret treaties").

9. This Note addresses bilateral treaties, which are treaties between two nations. Treaties between more than two nations are multilateral treaties and, while they pose interesting questions of their own, are beyond the scope of this Note.

mits the treaty for the Senate's advice and consent. This is a recurring problem[10] and, in light of the recent dispute between President Barack Obama and a group of Republican senators over the negotiating record of the New START Treaty, a relevant one.[11]

This Note fills the void in the scholarship and addresses whether the President has any obligations with regard to a treaty's negotiating record. It argues that although courts would likely refuse to decide the issue on the merits and deem it a nonjusticiable political question, it is nonetheless a legal issue deserving of legal analysis—Congress and the Executive, after all, must interpret and be faithful to the Constitution.[12] To do so, they must understand the contours of the power it confers. This Note aims to provide such an understanding and analyzes the costs of each extreme position—a total bar to Senate access or complete, unfettered Senate access—concluding that both are undesirable. Ultimately, this Note argues that the optimal solution is for the Executive to provide relevant portions of the negotiating record to the Senate Committee on Foreign Relations on a classified basis if the Committee determines that provisions of a treaty are ambiguous and recourse to the negotiating history would assist in elucidating the intent of the parties. Congress, which has already shown a deft understanding of the issue and an ability to balance the competing concerns, may and should implement this solution through ordinary legislation.

Part I of this Note provides a general overview of the treaty power—both as it was conceived by the Founders and as it has functioned in practice. Part II provides an account of three recent examples of how the Treaty Clause's ambiguity has led to disputes between the Executive and the Senate over access to treaty negotiating records, demonstrating that this is a recurring problem that must be addressed. In light of the recent trend of congressmen bringing political disputes before courts,[13] Part III provides background on the political question doctrine and argues that recourse to litigation in this case would be unsuccessful, as the courts would likely deem the issue nonjusticiable pursuant to that doctrine. Part IV of this Note argues that, despite its likely status as a nonjusticiable political question, traditional legal analysis remains applicable, and con-

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10. See infra Part II (detailing recent disputes between Executive and Senate over senatorial access to treaty negotiating records).

11. See infra Part II.C (detailing conflict between President Obama and Republican senators over President Obama's refusal to turn over negotiation records of New START Treaty to Senate).

12. See U.S. Const. art. II, § 1, cl. 8 ("Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—'I do solemnly swear . . . that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution . . . .'"); id. art. VI, cl. 3 ("The Senators and Representatives before mentioned . . . shall be bound by Oath or Affirmation, to support this Constitution . . . .").

13. See infra note 122 and accompanying text (noting increased tendency of members of Congress to file suit against political branches).

cludes by calling on Congress to enact legislation pursuant to those principles in order to resolve the uncertainty surrounding the treaty power.

I. THE TREATY POWER

The treaty power, vested partially in the Senate and partially in the Executive, is a natural flashpoint for separation-of-powers conflicts. Its application is further complicated by the fact that, as with many constitutional provisions, its development in practice is potentially quite different from what the Founders intended. Part I of this Note provides the necessary foundation for a discussion of this complex area of constitutional law. Section A first outlines the treaty power and explores different theories of the Founders' intent. Section B then provides a brief overview of the mechanics of the treatymaking process as it functions today.

A. *The Treaty Power Conceived*

Under the Articles of Confederation, international diplomacy was the sole province of Congress.[14] Congress, however, was unwieldy and lacked the expertise necessary to engage effectively in foreign relations.[15] Rather than representing the interests of the nation as a whole, the Congress organized under the Articles of Confederation was often more interested in representing the interests of the individual states.[16] Moreover, Congress was not always in session, and the era's limitations in transportation and technology precluded rapid assembly or consultation, leading to the threat of undue delays in the conduct of foreign policy.[17] In short, the Framers' initial experience with Congress's foray into inter-

14. The Articles of Confederation did not provide for an executive. International diplomacy undertaken on behalf of the United States, therefore, was necessarily left to Congress. See Henkin, Constitutionalism, supra note 2, at 48 (noting under Articles of Confederation, Congress "had executive as well as legislative power" and "made treaties").

15. See Mark W. Janis, The American Tradition of International Law: Great Expectations 1789–1914, at 56 (2004) ("[I]t was the inability of the United States under the Articles of Confederation to live up to its obligations as a sovereign state under international law which proved to be one of the principal causes of the downfall of that early form of U.S. government."); cf. Louis Henkin, Foreign Affairs and the United States Constitution 175 (Oxford Univ. Press, 2d ed. 1996) (1972) [hereinafter Henkin, Foreign Affairs] (describing conduct of foreign affairs under Articles of Confederation as "anarchy").

16. Indeed, one of the reasons the Constitution vests the treaty power in the President and Senate, but not the House of Representatives, is to insulate the power from the interests of the individual states. See Block et al., supra note 8, at 1496 ("[T]he Framers' objective [in excluding the House from treatymaking] was to enable the federal government to comply with the international obligations of the United States without interference from the states.").

17. Cf. Henkin, Foreign Affairs, supra note 15, at 32 ("Unlike Congress, the President is always 'in session.' He can act quickly, informally, and secretly.").

national diplomacy left them frustrated.[18] When the Constitutional Convention met in 1787 to devise a new system of government for the United States, the Framers took the opportunity to rethink the means through which the nation would exercise its treatymaking power.[19] After relatively little debate, the Framers adopted the Treaty Clause as it appears in the Constitution today.[20]

The Treaty Clause 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."[21] Professor Louis Henkin has pointed out that the Treaty Clause is unique because it is "an explicit constitutional mandate to share power."[22] There is good reason for this mandate. The Supremacy Clause of the Constitution renders treaties the "supreme Law of the Land."[23] Treaties are therefore domestically binding, on par with the laws passed by Congress.[24] Given this binding force, "the Framers believed it was inappropriate to vest a republican executive with unfettered treaty-making power."[25] Had this power been vested exclusively in the Executive, it could have resulted in the unwanted effect of allowing the President to bypass the legislature alto-

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18. See id. (noting "[d]iplomacy by Congress was ineffectual . . . under the Articles of Confederation").

19. See id. at 36 ("The Framers did not wish to make it too easy to make treaties, but they were not content to leave them to clumsy, ineffectual diplomacy, negotiations, and drafting by the Congress (as under the Articles of Confederation).").

20. See id. at 443 n.4 ("The treatymaking process . . . received little consideration at the Convention.").

21. U.S. Const. art. II, § 2, cl. 2.

22. Henkin, Constitutionalism, supra note 2, at 46. Professor Henkin was hardly the first person to note the unique duality of the Treaty Clause. In Federalist No. 75, Alexander Hamilton wrote that, under the Constitution, treatymaking is distinct from both the legislative and executive functions:

> The power of making treaties is plainly neither the one nor the other. It relates neither to the execution of the subsisting laws, nor to the inaction of new ones, and still less to an exertion of the common strength. Its objects are CONTRACTS with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department, and to belong properly neither to the legislative nor to the executive.

The Federalist No. 75, at 504–05 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

23. See U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; *and all Treaties made, or which shall be made, under the Authority of the United States*, shall be the supreme Law of the Land . . . ." (emphasis added)).

24. Id.

25. Block et al., supra note 8, at 1484; see also Henkin, Constitutionalism, supra note 2, at 48 (noting treatymaking in Europe at time of Founders was traditionally sole province of executive power and suggesting Founders' experiences under King George III made them wary of entrusting such great degree of independent power to newly created office of President).

gether and unilaterally make laws by entering into treaties with other nations. It is clear, therefore, that the Framers' reasons for conditioning the treaty power as they did are well founded; however, discerning their intent as to the precise nature of this split power has generated much scholarly attention.[26] Of particular importance is the exact nature of the Senate's duty to provide its "advice and consent."

Scholars have differing views on what the Framers intended when they conditioned the President's power to make treaties on the Senate's "advice and consent." One faction argues that the Framers conceived advice and consent as more than mere ratification.[27] According to this account, "[t]he Framers . . . expected the Senate to serve as a council of advice to the President on treaty matters, participating during the negotiation stage through the end of the treatymaking process."[28] Early practice hints that this view has merit. In the beginning days of his presidency, George Washington went to the Senate to explain his proposed treaty with the Creek Indians—the very first of his administration—and ask for its advice.[29] The Senate, perhaps intimidated by Washington's presence, attempted to refer the matter to a committee.[30] Washington left in a "violent fret," stating that "[t]his defeats every purpose of my coming here."[31] Although he occasionally sought the advice of the Senate while negotiating treaties, Washington never again made a personal appearance before the Senate.[32] While this is the most infamous example of a President requesting the Senate's advice prior to submitting a treaty for ratification, Washington is not the only President to have done so. Presidents Polk and Jackson also consulted the Senate while negotiating treaties,[33] but the practice has been rare.

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26. See supra notes 5–8 (collecting sources).

27. See Arthur Bestor, "Advice" from the Very Beginning, "Consent" When the End Is Achieved, 83 Am. J. Int'l L. 718, 727 (1989) ("[T]he Framers of the Constitution believed they were designing a continuously consultative and collaborative relationship between President and Senate, one that would guarantee the nation a unified and consistent policy beyond the water's edge."); Louis Fisher, Congressional Participation in the Treaty Process, 137 U. Pa. L. Rev. 1511, 1512 (1989) ("[T]he treatymaking process is not divided into two stages that are exclusive and sequential: negotiation by the President followed by Senate action.").

28. Cong. Research Serv., S. Prt. 106-71, Treaties and Other International Agreements: The Role of the United States Senate 27 (2001) [hereinafter CRS Report]; see also Henkin, Foreign Affairs, supra note 15, at 177 (noting originally conceived role of Senate to advise President throughout treatymaking process, including "whether to enter negotiations, who shall represent the United States, what should be the scope of negotiations, the positions to be taken, the responses to be made, the terms to be accepted").

29. CRS Report, supra note 28, at 33 (quoting William Maclay, Sketches of Debate in the First Senate of the United States, in 1789–90–91, at 124 (George W. Harris ed., Harrisburg, Lane S. Hart Printer & Binder, 1880)).

30. Galbraith, supra note 5, at 258.

31. CRS Report, supra note 28, at 33.

32. Id.

33. Id. at 36.

Perhaps because it is rarely applied in practice, the conception of the Senate as an active participant in treatymaking is not universally accepted. Another group of scholars argue that "advice and consent" is better understood as a single action to be taken by the Senate once the President concludes negotiations.[34] Under this account, "the clause does not seem, on its face, to require the President to seek Senate advice and consent at any particular time (other than before the treaty is finally made) or continuously throughout the process."[35] Proponents of this view look to the Appointments Clause,[36] which immediately follows the Treaty Clause and under which "advice and consent" has never been interpreted to require the President to seek the Senate's advice regarding a presidential nominee.[37] This view also finds support in the manner in which the phrase "advice and consent" was used at the time of the framing. In Great Britain, the monarch passed acts "by and with the advice and consent" of Parliament—which consisted of a yes-or-no vote.[38] Rather than including the Senate in the negotiating process or seeking its advice prior to or during negotiations, proponents of this view maintain that the only constitutional requirement is for the President to submit a treaty to the Senate for approval before formally making it.[39] Ultimately, regardless of how the Founders conceived the treaty power, the latter view has come to be the accepted practice.[40]

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34. See, e.g., Michael D. Ramsey, The Constitution's Text in Foreign Affairs 138–41 (2007) ("[L]inking 'advice' with 'consent' in a single phrase . . . suggests that they are (or at least may be) unified actions taken together, in a single sitting.").

35. Id. at 138; see also Block et al., supra note 8, at 1485 ("[T]he advice component of the 'advice and consent' provision does not demand senatorial participation in all phases of treaty-formation, such as negotiation.").

36. The Appointments Clause, also found in Article II, Section 2, Clause 2 of the Constitution, provides that

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . .

U.S. Const. art. II, § 2, cl. 2.

37. Ramsey, supra note 34, at 139.

38. Id. at 140.

39. See Block et al., supra note 8, at 1485. Block argues that the Founders' intent was for the President to "play the lead and unhindered role in the conditional negotiation of treaties." Id. He argues that "the advice component of the 'advice and consent' provision does not demand senatorial participation in all phases of treaty-formation, such as negotiation." Id. Rather, the Senate's role is to "assure that the treaty would be in the nation's interest by recommending modifications ('advice') or by refusing to assent ('consent')." Id.

40. See Henkin, Foreign Affairs, supra note 15, at 177 ("Almost from the beginning, however, Presidents found [this] conception of the Senate's function uncongenial, perhaps unworkable; the Senate, for its part, also rejected it, seeking to deliberate and pass judgment later and independently, rather than to advise."). But see Galbraith, supra note 5, at 249–51 (arguing Senate has authority to prospectively issue its advice and consent,

B. *The Treaty Power in Practice*

Whatever the intent of the Founders, the manner in which the President and Senate interpret the Treaty Clause has developed over more than two hundred years of constitutional history. In this time, presidential consultation of the Senate for advice prior to submitting a treaty for consent has been an exceedingly rare practice. As Louis Henkin has noted, "'advice and consent' has effectively been reduced to 'consent.'"[41] This is not to suggest that individual senators have no role in treatymaking until the President submits a completed treaty for advice and consent. In several instances involving very high-profile treaties, negotiating delegations have included individual senators.[42] In some cases, senators themselves have taken action that spurred the President to enter into treaty negotiations.[43] These exceptions notwithstanding, treatymaking under the Constitution has evolved into a well-developed practice that essentially follows the same procedures each time. In order to give the discussion in this Note the proper context, these procedures are covered in brief below.

The United States enters into treaties governing a wide variety of topics, including, among other things, international arms control,[44]

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allowing President to make treaties within predetermined parameters without later having to return to Senate for consent).

41. Henkin, Foreign Affairs, supra note 15, at 177; see also CRS Report, supra note 28, at 106–07 ("As the process has evolved, the Senate as a whole does not give, and the President does not seek, its advice on a treaty until the end of the process when it is asked to give its advice and consent to ratification.").

42. In 1945, Senators Arthur H. Vandenberg and Tom Connally, along with Representatives Sol Bloom and Charles A. Eaton, were among the delegation that worked out the details of the U.N. Charter at a conference in San Francisco. Later, when Secretary of State Dean Acheson was negotiating the North Atlantic Treaty, the same two senators were with him "all the time." While the Carter Administration negotiated the Panama Canal Treaty, it sought consultation with at least seventy senators. Finally, during the SALT II negotiation process, twenty-six senators served in Geneva as official advisors to the United States delegation. CRS Report, supra note 28, at 37.

43. The Vandenberg Resolution, authored by Senator Vandenberg, ultimately led to the negotiations that culminated in the North Atlantic Treaty. CRS Report, supra note 28, at 37, 101. In 1958, Senator A.S. Mike Monroney introduced a Senate resolution proposing the International Development Association, which eventually became the World Bank. Id. at 101; S. Res. 264, 85th Cong., 104 Cong. Rec. 828 (1958) (enacted).

44. See, e.g., Treaty Between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, U.S.-Russ., Apr. 8, 2010, S. Treaty Doc. No. 111-5 [hereinafter New START Treaty]; Treaty Between the United States of America and the Russian Federation on Further Reduction and Limitation of Strategic Offensive Arms, U.S.-Russ., Jan. 3, 1993, S. Treaty Doc. No. 103-1 (START II); Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Reduction and Limitation of Strategic Offensive Arms, U.S.-U.S.S.R., July 31, 1991, S. Treaty Doc. No. 102-20 (START I); Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, U.S.-U.S.S.R., Dec. 8, 1987, S. Treaty Doc. No. 100-11 [hereinafter INF Treaty]; Treaty Between the United States of

cooperation on criminal investigations,[45] the status of migratory waterfowl,[46] and the status of foreign taxpayers.[47] As noted above, the impetus for entering into these treaties can come from the Executive, other domestic actors,[48] or foreign nations.[49] Once discussions begin, responsibility for negotiating the treaty falls entirely on the Executive.[50] While disagreements about the extent of the Senate's role under the treaty power exist,[51] it is undisputed that the power to actually make treaties resides solely within the executive branch.[52]

The first step in the treatymaking process is to negotiate the terms of the treaty with the other party. The President appoints a negotiating delegation and provides them with instructions regarding his objectives.[53] The delegation then meets with its counterparty, but the mechanics of the negotiation process itself differ for each treaty.[54] If the parties reach an agreement, the President transmits it to the Senate.[55] The package the

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America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, U.S.-U.S.S.R., May 26, 1972, 23 U.S.T. 3437 [hereinafter ABM Treaty].

45. See, e.g., Treaty Between the United States of America and Japan on Mutual Legal Assistance in Criminal Matters, U.S.-Japan, Aug. 5, 2003, S. Treaty Doc. No. 108-12.

46. See Convention Between the United States and Great Britain (for Canada) for the Protection of Migratory Birds, U.S.-Gr. Brit., Aug. 16, 1916, 39 Stat. 1702.

47. See Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, U.S.-Can., Sept. 26, 1980, T.I.A.S. No. 11,087.

48. See supra notes 42–43 (providing examples of treaties spurred by actions of individual senators).

49. See Quincy Wright, The Control of American Foreign Relations 248 (1922) ("Treaties may of course be initiated or suggested by a foreign power . . . .").

50. See Henkin, Foreign Affairs, supra note 15, at 177 ("[The President] decides whether to negotiate with a particular country . . . on a particular subject. He appoints and instructs the negotiators and follows their progress in negotiation. If he approves . . . , he seeks the consent of the Senate, and if he obtains it he can 'make' the treaty.").

51. See supra Part I.A (describing two competing theories of Framers' conception of Senate's role).

52. The language of Article II, Section 2, Clause 2 is unambiguous: "[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 . . . ." U.S. Const. art. II, § 2, cl. 2 (emphasis added); see also Henkin, Foreign Affairs, supra note 15, at 37 ("It is the President who makes treaties, if the Senate consents; the Senate cannot make a treaty."); CRS Report, supra note 28, at 6 ("[N]egotiation . . . is widely considered an exclusive prerogative of the President . . . .").

53. CRS Report, supra note 28, at 6. The President's appointment of negotiators may be subject to the advice and consent of the Senate under the Appointments Clause. Often, in order to avoid this time-consuming process, negotiators are diplomats or Foreign Service officers whom the Senate has already confirmed. Id.

54. For an in-depth description of the negotiating process for bilateral nuclear arms reduction treaties between the United States and U.S.S.R., see generally John H. McNeill, U.S.-USSR Nuclear Arms Negotiations: The Process and the Lawyer, 79 Am. J. Int'l L. 52 (1985).

55. CRS Report, supra note 28, at 7. Once the treaty is completed and sent to the Senate, Senate procedure is governed by Senate Rule XXX. Standing Rules of the Senate, S. Doc. No. 112-1, Rule XXX (2011).

President sends to the Senate includes "the text of the treaty, a letter of transmittal requesting the advice and consent of the Senate, [and a] letter of submittal of the Secretary of State which usually contains a detailed description and analysis of the treaty."[56] The Senate then reads the treaty into the record and refers it to the Committee on Foreign Relations.[57] If the Committee believes the Senate should approve the treaty, it favorably reports it to the entire Senate with a proposed resolution of ratification, along with any conditions it may recommend.[58]

When the treaty reaches the full Senate, it is read a second time.[59] The Senate then considers any proposed conditions and votes by a simple majority on whether to include these conditions in the resolution of ratification.[60] Two-thirds of the senators present must approve the final resolution of ratification for the treaty to receive the Senate's advice and consent.[61] If the Senate provides its advice and consent, it sends the treaty back to the President.[62] At this point, the President still has a meas-

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56. CRS Report, supra note 28, at 7.

57. Id.

58. Id. The Senate does not need to give its advice and consent to the treaty as the President presents it. Indeed, the Senate can attach reservations, understandings, declarations (collectively known as RUDs), or amendments to the treaty. See id. at 7, 11. There is an entire field of scholarship devoted to RUDs and amendments attached to treaties—much of it stemming from the ABM reinterpretation debate discussed infra Part II.A. While a full discussion of this scholarship is beyond the scope of this Note, it is instructive to provide a basic overview of how RUDs function. Reservations do not necessarily change the text of the treaty but can change the obligations of the United States under the treaty. Id. at 11. Understandings are interpretive statements that do not attempt to alter the treaty but to clarify the Senate's understanding of the treaty. Id. Declarations express the Senate's position on issues raised by the treaty but do not concern specific provisions. Id. Amendments change the text of the treaty. Id. at 7. Although it is possible to draw fine distinctions between these terms, diplomats and politicians do not always use them "with care and . . . attention to the differences among them." Henkin, Foreign Affairs, supra note 15, at 180.

The Supreme Court has upheld the Senate's practice of consenting to a treaty subject to conditions. See Haver v. Yaker, 76 U.S. (9 Wall.) 32, 35 (1870) (holding Senate need not simply accept or reject a proposed treaty "but may modify or amend it"). But see Buechler, supra note 8, at 1988 & n.19 (citing *Haver* as support for proposition that Supreme Court has upheld Senate practice of conditioning its consent but noting Senate "may not 'modify or amend' a treaty" but can only "suggest the terms that it would find acceptable and on which it would grant its advice and consent"). However, under international law, "all reservations and other terms and conditions attached to a nation's ratification of a treaty [must] be formulated in writing and communicated to the other party or parties to the treaty." Michael J. Glennon, The Senate Role in Treaty Ratification, 77 Am. J. Int'l L. 257, 259 (1983). These conditions effectively function as a "counteroffer" to the other party—which is free to accept or reject them. Id. at 263. If the other party rejects the conditions, it constitutes a rejection of the treaty. Id. However, if the other state expressly accepts the conditions, they become a part of the treaty. Id.

59. CRS Report, supra note 28, at 11.

60. Id.

61. Id.; see also U.S. Const. art. II, § 2, cl. 2.

62. CRS Report, supra note 28, at 12.

ure of discretion—he is not required to actually make the treaty.[63] Indeed, the President cannot ratify the treaty without the conditions attached by the Senate, so to the extent that the conditions might have altered the substance of the treaty, he is well advised to study the treaty to ensure it retains fidelity to his original objectives.[64]

If the President decides to make the treaty, he does so by signing an instrument of ratification.[65] By this instrument, the United States formally agrees to be bound by the terms of the treaty.[66] Upon signing the instrument of ratification, the President "directs the Secretary of State to take any action necessary for the treaty to enter into force."[67] Once the Secretary of State takes the necessary action, the President issues a proclamation that serves as legal notice that the treaty is in effect.[68]

II. THE ABM REINTERPRETATION, INF, AND NEW START DISPUTES

In the last thirty years, disputes concerning the exact meaning of "advice and consent" and the division of the treaty power between the Senate and the Executive have arisen with respect to three treaties. In these disputes, the Senate, for various reasons and with varying degrees of success, sought access to negotiating records for the ABM Treaty, INF Treaty, and New START Treaty. This Part provides an overview of these treaties and the Senate's efforts to secure their negotiating records. Section A deals with the ABM Treaty reinterpretation dispute. Section B describes the INF Treaty, signed in the wake of that dispute. Finally, section C details the recent disagreement between the President and the Senate over the negotiating record for the New START Treaty.

A. *The ABM Reinterpretation Dispute*

Between 1969 and 1972, the United States and the Soviet Union engaged in a series of negotiations regarding each country's nuclear weapons program.[69] These negotiations yielded the ABM Treaty,[70] which

63. Id.

64. Cf. United States v. Stuart, 489 U.S. 353, 375 (1989) (Scalia, J., concurring) ("If [the Senate's conditions] are not agreed to by the President, his only constitutionally permissible course is to decline to ratify the treaty, and his ratification without the conditions would presumably provide the basis for impeachment.").

65. CRS Report, supra note 28, at 12.

66. Id.

67. Id. For bilateral treaties—those that are the focus of this Note—the treaty enters into force "when the parties exchange instruments of ratification." Id. For multilateral treaties, instruments of ratification are "deposited" with a signatory, international organization, or at a specified location. Id. The treaty typically enters into force upon receipt of a designated number of instruments. Id.

68. Id.

69. Paul H. Nitze, From Hiroshima to Glasnost: At the Center of Decision 303–24 (1989).

sought to limit the development and deployment of anti-ballistic missile (ABM) systems.[71] Its rationale was rooted in the Cold War-era doctrine of mutually assured destruction (MAD)[72]—the realization that if either the United States or the Soviet Union launched a first-strike nuclear attack, the other side would automatically retaliate with a nuclear attack of its own.[73] President Lyndon Johnson, who initiated the negotiations after learning that the Soviets were developing ABM systems,[74] feared that the introduction of such systems would render MAD obsolete and thereby increase the risk of nuclear war.[75] As such, several provisions of the ABM Treaty explicitly banned ABM systems.[76]

President Richard Nixon and Soviet General Secretary Leonid Brezhnev signed the ABM Treaty in 1972, and the Senate promptly ratified it with overwhelming support.[77] The treaty received little attention until 1983. In March of that year, President Ronald Reagan announced his intention to develop a "space-based X-ray and laser weapons system that could shoot down Soviet missiles in flight."[78] President Reagan initially maintained that the program, termed the Strategic Defense Initiative (SDI) or "Star Wars," would comply with the ABM Treaty since it would begin as a research program and the United States would not actually deploy any ABM systems.[79] As research progressed, however, the

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70. Id. at 318; see also ABM Treaty, supra note 44, at 3437–48 (discussing countries' motivations for entering into treaty).

71. ABM Treaty, supra note 44, at 3437–47 (describing "anti-ballistic missile system" as "a system to counter strategic ballistic missiles or their elements in flight trajectory"); see also David Edward Grogan, Power Play: Theater Ballistic Missile Defense, National Ballistic Missile Defense and the ABM Treaty, 39 Va. J. Int'l L. 799, 806 (1999) ("[T]he ABM Treaty completely prohibits either [country] from deploying nationwide ABM systems.").

72. See Grogan, supra note 71, at 806 (noting "[t]he ABM Treaty codified the MAD doctrine . . . through two interrelated provisions").

73. Kenneth C. Randall, The Treaty Power, 51 Ohio St. L.J. 1089, 1099 (1990).

74. Nitze, supra note 69, at 286–87.

75. See Grogan, supra note 71, at 805 ("MAD also would not work to deter nuclear attack if either country could effectively shield its cities from nuclear weapons. If that were possible, then, in theory, a country could launch a first strike and protect its own population and industrial capacity from a retaliatory strike . . . .").

76. Article I of the treaty banned ABMs as defined in Article II and subject to the exemptions in Article III. ABM Treaty, supra note 44, at 3438. Article III allowed each nation's capital, as well as one ICBM field, to be protected by an ABM system. Id. at 3440. Article V required each party "not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based." Id. at 3441.

77. Randall, supra note 73, at 1098.

78. John Yoo, Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation, 89 Calif. L. Rev. 851, 854 (2001) (reviewing Frances Fitzgerald, Way Out There in the Blue: Reagan, Star Wars and the End of the Cold War (2000)).

79. See Department of Defense Appropriations for 1986: Hearings Before the Subcomm. on Defense Appropriations of the H. Comm. on Appropriations, 99th Cong., 1st Sess. 568–69 (1985) ("It should be stressed that the SDI is a *research program* that seeks to provide the technical knowledge required to support a decision on whether to develop

Reagan administration realized that development and testing of SDI would inevitably be constrained by the ABM Treaty.[80] The administration sought to circumvent this obstacle by offering a new interpretation of the treaty—a broader reading of its provisions that afforded considerably more latitude to develop and test SDI.[81]

Abraham Sofaer, a former federal judge and the Department of State's legal adviser, was instrumental in developing this new interpretation.[82] Sofaer relied heavily on the treaty's negotiating record.[83] He argued that during the negotiations, the United States "initially sought to ban development and testing of all systems or components based on 'other physical principles.'"[84] However, according to Sofaer, the Soviet delegation refused to agree to limit systems based on technologies that were not yet in existence.[85] All they were willing to do was issue an "Agreed Statement" which prohibited the *deployment* of such systems without prior formal discussions.[86] Sofaer thus concluded that the negotiating history supported the inference that the treaty's ban on the development and testing of space-based and mobile ABM systems covered only technology in existence when the parties entered the treaty in 1972.[87] Consequently, the development and testing of systems based on technology that did not exist in 1972 was to be governed by the treaty's less restrictive provisions applicable to land-based and fixed systems.[88] The "net effect" of Sofaer and the Reagan Administration's new, broad interpretation "was that development and testing [of SDI] would be permitted, and only deployment would be prohibited."[89]

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and later deploy advanced defensive systems. . . . All research efforts will be fully compliant with United States treaty obligations.").

80. See Koplow, supra note 8, at 1369 (noting "the constraints of the ABM Treaty loomed as a larger and more immediate hurdle to advanced development and testing of" the SDI program).

81. Id. at 1369–70. There has been a considerable amount of scholarship devoted to whether the President has the authority to unilaterally reinterpret a treaty or to offer an interpretation that differs from the one presented to the Senate at the time of the treaty's ratification. See, e.g., supra note 8 (collecting sources). While this issue presents interesting and difficult questions at the intersection of constitutional and international law, it is ultimately beyond the scope of this Note.

82. Wolf, supra note 7, at 1023 n.4.

83. Sofaer, ABM Treaty, supra note 8, at 1979–80. Sofaer also relied on the text of the treaty itself, id. at 1973–78, and post-negotiation statements by the United States, id. at 1980–85.

84. Id. at 1979.

85. Id.

86. Id.

87. Id. at 1980.

88. Id.

89. Koplow, supra note 8, at 1370.

Several senators were quick to decry the broad interpretation of the ABM Treaty.[90] In addition to arguing that the President had no authority to unilaterally reinterpret the terms of a treaty and then offer that interpretation as binding on the United States, they opposed Sofaer's reliance on the treaty's negotiating records.[91] When President Nixon submitted the treaty to the Senate in 1972, he provided no senator with access to any of the negotiating materials.[92] The records remained classified at the time the Reagan Administration offered its new interpretation, precluding Senate access at that time as well.[93] Some members of the Senate Armed Services Committee, concerned about both the legitimacy of the Reagan Administration's interpretation itself and the propriety of Sofaer's use of a classified, otherwise unavailable negotiating record, requested that the administration produce the negotiating records for Senate inspection.[94] The administration initially resisted this request and accused the senators of undermining national security in the interest of political posturing.[95] However, pressure from the Senate continued to

90. Senators Sam Nunn, Robert Byrd, and Joe Biden were leading opponents of the Reagan Administration's effort to reinterpret the treaty. Jonathan Fuerbringer, Senate Defeats Proposal To Advance White House's "Star Wars" Initiative, N.Y. Times, Sept. 18, 1987, at A6 (noting opposition of Senators Nunn and Byrd); Michael R. Gordon, Nunn Says Record on the ABM Pact Is Being Distorted, N.Y. Times, Mar. 12, 1987, at A1 (noting opposition of Senators Nunn and Biden). In a letter to President Reagan, Senator Nunn argued that the administration's effort to unilaterally reinterpret the ABM Treaty's terms could lead to a "constitutional crisis of profound dimensions." Michael R. Gordon, Reagan Is Warned by Senator Nunn over ABM Treaty, N.Y. Times, Feb. 7, 1987, at 1. These senators were not alone in their opposition. Two leading constitutional scholars, Laurence Tribe of Harvard Law School and Louis Henkin of Columbia Law School, testified before the Senate Committee on Foreign Relations and argued that any such reinterpretation of the terms of the treaty required the Senate's consent because it effectively changed its meaning and was therefore akin to making a new treaty. The ABM Treaty and the Constitution: J. Hearings Before the S. Comm. on Foreign Relations and the S. Comm. on the Judiciary, 100th Cong. 81–105 (1987) [hereinafter ABM Treaty Hearings].

91. See supra notes 83–87 and accompanying text (describing Sofaer's use of negotiating records).

92. See S. Comm. on Foreign Relations, The ABM Treaty Interpretation Resolution, S. Rep. No. 100-164, at 51 (1987) [hereinafter ABM Treaty Interpretation Resolution] ("So far as the Committee can determine, no member of the Senate was given access to any 'negotiating record' at the time the Senate considered the ABM Treaty, and the Reagan Administration has not argued otherwise.").

93. Chayes & Chayes, supra note 8, at 1968.

94. Id.; Steven Groves, Heritage Found., Backgrounder No. 2429, President Obama Should Give the Senate Access to the Negotiating History of New START 3 (2010), available at http://www.heritage.org/research/reports/2010/06/president-obama-should-give-the-senate-access-to-the-negotiating-history-of-new-start (on file with the *Columbia Law Review*).

95. See Michael R. Gordon, White House Criticizes Democrats for Threatening Arms Pact Delay, N.Y. Times, Feb. 7, 1988, at 1 (noting White House accused Democratic leadership of "erecting a roadblock" to treaty ratification (internal quotation marks omitted)).

mount, threatening to derail ratification of other key treaties.[96] The White House eventually acquiesced, and President Reagan instructed the State Department to provide the records to the Arms Control Treaty Review Support Office—a newly created Senate agency purposed with reviewing the records.[97]

B. *The INF Treaty*

In 1981, following the relative success of the ABM Treaty in reducing the number of nuclear weapons held by the United States and Soviet Union, President Reagan commenced a new round of negotiations with the goal of further reducing the superpowers' stockpiles. The result of these discussions was the 1988 Treaty on Intermediate-Range Nuclear Forces (INF Treaty), which committed the parties to eliminating ground-based missile systems with ranges between 500 and 5,500 kilometers.[98] President Reagan signed the treaty on December 8, 1987, and subsequently submitted it to the Senate for its advice and consent.[99]

While the success of the ABM Treaty may have spurred the United States and Soviet Union to negotiate additional arms-control agreements, its legacy had a different impact on the Senate's advice and consent process. In September 1987, against the backdrop of the ongoing ABM reinterpretation dispute and before negotiations had even concluded, the Senate Committee on Foreign Relations threatened to impede the passage of the INF Treaty or to refuse to consent altogether.[100] After

96. Senator Claiborne Pell, arguing that the administration's practices indicated it could not be trusted, requested access to the negotiating records for twenty treaties, including an investment treaty with Cameroon and a tax treaty with Denmark. Michael R. Gordon, Administration Stands Firm on ABM-Pact Interpretation, N.Y. Times, Sept. 22, 1987, at A15.

97. CRS Report, supra note 28, at 128 n.32. Upon receiving access to the negotiating record, senators began contesting Sofaer's conclusions—arguing that the negotiating record did not in fact support his "broad interpretation" of the treaty. See, e.g., 133 Cong. Rec. 13,143 (1987) (statement by Sen. Sam Nunn) (arguing examination of negotiating record belied administration's claims of support for broad reading). Eventually, increased political pressure from these senators, as well as outcry from allies of the United States, led the Reagan Administration to announce that, although it considered the broad interpretation legally sound, it would adhere to the initial, narrow interpretation in practice. Yoo, supra note 78, at 859–60. Ultimately, however, the Reagan Administration's interpretation of the ABM Treaty was moot. Id. at 860 (noting that "in 1987, congressional Democrats attached conditions to a Defense Department appropriations bill that forbade SDI tests that violated the narrow interpretation" of the treaty).

98. INF Treaty, supra note 44, arts. II, IV, V. The treaty resulted in the elimination of 2,611 nuclear warheads from the combined stockpiles of the United States and Soviet Union. S. Comm. on Foreign Relations, The INF Treaty, S. Exec. Rep. No. 15, at 2–3, 56–61 (1988) [hereinafter INF Treaty Report].

99. David K. Shipler, Reagan and Gorbachev Sign Missile Treaty and Vow To Work for Greater Reductions, N.Y. Times, Dec. 9, 1987, at A1.

100. See ABM Treaty Interpretation Resolution, supra note 92, at 66 (noting "the Administration's theory of treatymaking, having cast a dark shadow over the Senate's con-

President Reagan submitted the treaty to the Senate, the Foreign Relations Committee repeated its threat and demanded an assurance from the President that he would not subsequently offer an interpretation of the treaty that differed from the Senate's understanding at the time of ratification.[101] The Committee also demanded access to the treaty's negotiating records in an effort to preclude the administration from making arguments based on a secret record, as it had with the ABM Treaty, and so that it could crosscheck any representations the administration might make during the ratification process.[102]

Faced with these threats, the administration released the full negotiating record to the Committee.[103] However, rather than undertake a complete line-by-line examination of the record, the Committee made no findings "concerning the content of the record, or concerning the accuracy of Executive Branch representations" thereof.[104] The Senate concluded, for a variety of prudential reasons,[105] that to do so would undermine the treatymaking process and American diplomacy. Instead, the Senate attached a condition to the treaty,[106] known as the "Biden Condition," preventing any future President from adopting without Senate consent an interpretation different from that offered at ratification.[107] On May 27, 1988, the Senate ratified the treaty, with the Biden Condition attached, by a vote of ninety-three to five.[108]

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sideration of all future treaties, could severely complicate and greatly prolong the Committee's consideration of an INF Treaty—and thereby jeopardize early ratification of that treaty.").

101. See Michael R. Gordon, Key Democrats Threaten To Stall Missile Treaty over ABM Dispute, N.Y. Times, Feb. 6, 1988, at A1 (detailing efforts to "block a future President from re-interpreting the agreement without Senate approval").

102. Id.

103. Koplow, supra note 8, at 1377 n.102.

104. Id.

105. See infra Part IV.C (describing prudential concerns counseling against disclosure of negotiating record to full Senate).

106. See supra notes 58–64 and accompanying text (explaining conditions that Senate can attach to treaties during advice and consent).

107. The "Biden Condition" reads: "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." 134 Cong. Rec. 12,727 (1988) (quoting Condition 1).

108. Susan F. Rasky, Senate, by 93-5, Gives Reagan a Victory on Missile Treaty; Moscow Ceremony Planned, N.Y. Times, May 28, 1988, at A1. The Reagan Administration initially opposed the condition; nonetheless, after the treaty was ratified—with the Biden Condition—President Reagan exchanged instruments of ratification with Soviet General Secretary Mikhail Gorbachev. Randall, supra note 73, at 1104; see also supra notes 58–64 and accompanying text (noting that since Senate may alter treaty by attaching conditions, President need not make treaty even if Senate ratifies it). However, shortly after exchanging ratification instruments with the Soviets, President Reagan wrote in a letter to the Senate that the Biden Condition "causes me serious concern," and that "I cannot accept the proposition that a condition in a resolution to ratification can alter the allocation of rights and duties under the Constitution; nor could I . . . accept any diminution claimed to

C. *The New START Treaty*

On April 8, 2010, after almost a year of negotiations, President Barack Obama and Dmitri Medvedev, the president of the Russian Federation, signed the New Strategic Arms Reduction Treaty (New START) in Prague.[109] The treaty was a landmark agreement for President Obama insofar as it marked progress towards his goal of eradicating nuclear weapons—a pursuit which won him the Nobel Peace Prize in 2009.[110] President Obama submitted the treaty to the Senate for its advice and consent on May 13, 2010.[111] While the treaty enjoyed broad support among Senate Democrats, support among Republicans was tepid at best.[112]

On May 6, 2010, six Republican members of the Senate Committee on Foreign Relations addressed a letter to President Obama requesting access to the negotiating records of the New START Treaty, only one week before he formally submitted the treaty to the Senate.[113] The senators made the request because they were concerned that the treaty would have an adverse effect on the ability of the United States to develop and maintain its missile defense systems in Europe.[114] The senators pointed to language in the treaty's preamble, which they believed was ambiguous as to whether these systems were included within the treaty's scope.[115] Statements by a Russian official made subsequent to the treaty's signing, attesting that the treaty was operative "only if the United States

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be effected by such a condition in the constitutional powers and responsibilities of the Presidency." Message to the Senate on the Soviet-United States Intermediate-Range Nuclear Forces Treaty, 24 Weekly Comp. Pres. Doc. 779, 780 (June 10, 1988).

109. See New START Treaty, supra note 44, at 17 (recording date of signing). The treaty reduces the number of deployed strategic nuclear warheads by thirty percent compared to the 2002 Moscow Treaty and limits the number of deployed and non-deployed inter-continental ballistic missile (ICBM) launchers, submarine-launched ballistic missile (SLBM) launchers, and heavy bombers equipped for nuclear weapons. Id. at 3. The United States and Russia are to ensure compliance with the treaty through yearly inspections as well as remote monitoring. Id. at 14.

110. See Steven Erlanger and Sheryl Gay Stolberg, Surprise Nobel for Obama Stirs Praise and Doubts, N.Y. Times, Oct. 10, 2009, at A1 (noting Nobel Committee made its decision "based on Mr. Obama's actual efforts toward nuclear disarmament as well as American engagement with the world relying more on diplomacy and dialogue" and "his vision of a cooperative world of shared values, shorn of nuclear weapons").

111. 156 Cong. Rec. S3767–68 (daily ed. May 13, 2010).

112. See Peter Baker, Gamble by Obama Pays Off with Final Approval of Arms Control Pact, N.Y. Times, Dec. 23, 2010, at A6 (discussing President's efforts to secure Republican votes).

113. Groves, supra note 94, at 1.

114. Id.

115. The preamble reads: "Recognizing the existence of the interrelationship between the strategic offensive arms and strategic defensive arms, that this interrelationship will become more important as strategic nuclear arms are reduced, and that current strategic defensive arms do not undermine the viability and effectiveness of the strategic offensive arms of the Parties." New START Treaty, supra note 44, pmbl.

of America refrains from developing its missile defence capabilities quantitatively or qualitatively,"[116] did not allay their concerns. A second Russian official also stated that while there was no "unequivocal language from President Obama or Secretary [of State Hillary] Clinton . . . that there would be no strategic missile defenses in Europe, . . . everything that was said to us amounts to this."[117] Such representations led many to believe that the administration had reached a tacit, under-the-table agreement with Russia regarding the future of the United States' missile defenses.[118] Presumably, the senators sought access to the negotiating records because they believed that while the text of the treaty itself would not contain such an agreement,[119] it would be memorialized in the negotiating documents.[120]

Despite continued and persistent requests from the Republican senators, President Obama steadfastly refused to turn over the negotiating records. Nonetheless, the treaty gradually garnered enough Republican support to move out of Committee and to the full Senate, which passed a resolution of ratification on December 22, 2010, by a vote of 71 to 26.[121]

III. A RESOLUTION THROUGH THE COURTS?

The preceding three examples show that the uncertainty surrounding the allocation of rights and duties under the treaty power with respect to treaty negotiating records is a live and recurring issue. This uncertainty has hamstrung the foreign policy apparatus of the United States several times, threatening to derail key arms-control treaties, bring domestic political gridlock, and embarrass and discredit the United States on the international stage. As such, it is an issue desperately in need of resolution. However, as this Part argues, resolution through the courts is unlikely.

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116. Office of the President of Russia, Statement by the Russian Federation on Missile Defence (Apr. 8, 2010), available at http://eng.news.kremlin.ru/ref_notes/4 (on file with the *Columbia Law Review*).

117. Dmitri Simes, Is Obama Overselling His Russia Arms Control Deal?, Time (Apr. 27, 2010) http://www.time.com/time/world/article/0,8559,1984882,00.html (on file with the *Columbia Law Review*).

118. See id. ("Russian experts and officials . . . believe that America made a tacit commitment not to develop an extended strategic missile base.").

119. See id. (suggesting reason more explicit restrictions on missile defenses were not included was not because of U.S. strategic concerns, but because administration feared it would be unable to secure Senate ratification of any such agreement).

120. Frank Gaffney, New START Is a Non-Starter, Washington Times (Oct. 19, 2010), http://www.washingtontimes.com/news/2010/oct/19/new-start-is-a-non-starter/ (on file with the *Columbia Law Review*).

121. Baker, supra note 112.

Members of Congress have increasingly attempted to turn to the courts to solve separation-of-powers issues.[122] Private citizens also recently tried to use the courts to gain access to the negotiating record for the North American Free Trade Agreement (NAFTA).[123] However, members of the Senate seeking to resolve the uncertainty surrounding treaty negotiating records using a similar approach would likely run up against a formidable barrier—the political question doctrine. Section A of this Part describes the political question doctrine in general and explains that it would likely bar a court from ever reaching the merits of this issue.[124] Section B argues that foreign affairs in particular occupy a special place within political question doctrine jurisprudence, and insofar as this issue affects foreign affairs, this line of cases presents a further bar to a decision on the merits.

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122. See Anthony Clark Arend & Catherine B. Lotrionte, Congress Goes to Court: The Past, Present, and Future of Legislator Standing, 25 Harv. J.L. & Pub. Pol'y 209, 212 (2001) ("[S]ince the Vietnam War, federal legislators have been emboldened to bring suit against the President, other Executive Branch officials and agencies, and even their own House of Congress."); see also, e.g., Raines v. Byrd, 521 U.S. 811, 814 (1997) (addressing suit brought by members of Congress challenging constitutionality of Line Item Veto Act); Goldwater v. Carter, 444 U.S. 996, 997–98 (1979) (considering suit brought by Senator Goldwater against President Carter challenging validity of President's unilateral termination of treaty).

123. Ctr. for Int'l Envtl. Law v. Office of the U.S. Trade Representative, 237 F. Supp. 2d 17 (D.D.C. 2002); see generally William J. Katt, Jr., The New Paper Chase: Public Access to Trade Agreement Negotiating Documents, 106 Colum. L. Rev. 679 (2006) (evaluating lack of public access to trade agreement negotiating documents). It should be noted, however, that most free trade agreements, such as NAFTA, are not treaties per se but rather executive agreements that do not require the formal advice and consent procedure necessary to make a treaty.

124. In addition to the political question doctrine, several other doctrines such as standing, ripeness, and mootness may render the issue nonjusticiable. See Linda Champlin & Alan Schwarz, Political Question Doctrine and Allocation of the Foreign Affairs Power, 13 Hofstra L. Rev. 215, 231–32 (1985) (noting nonjusticiability exists separate from political question doctrine). The difference between these doctrines and the political question doctrine is that, while these other bars to justiciability "may be cured by altering the factual circumstances, e.g., presenting the issue at a different point in time, or by different plaintiffs," an issue declared to be a political question is nonjusticiable by its very nature and "therefore, the foreclosure of judicial scrutiny is in absolute terms." Moses David Brewer, Note, Casting a Constitutional Controversy as a Nonjusticiable Political Question: *Made in the USA Foundation v. United States*, 27 Brook. J. Int'l L. 1029, 1038 (2002); see also Champlin & Schwarz, supra, at 232 ("It would appear then that while a case dismissed because of party status might subsequently be adjudicated in other circumstances, a political question, as a nonjusticiable *issue*, would, like the ancient mariner, forever roam the seas, never to be resolved."). Because of the absolute bar to justiciability presented by the political question doctrine, and because of its special relevance to foreign affairs, see infra notes 176–187 and accompanying text, it is the exclusive focus of this Note, to the exclusion of the other aforementioned doctrines.

A. *The Political Question Doctrine in Theory*

The political question doctrine, with its genesis in *Marbury v. Madison*, is as old as judicial review itself.[125] In one of his last acts as President, John Adams appointed William Marbury as a federal justice of the peace.[126] However, James Madison, Adams's successor, refused to deliver Marbury his commission.[127] Marbury then sued Madison, seeking a writ of mandamus.[128] After determining that Marbury had a right to the commission, the Supreme Court addressed whether a remedy was available.[129] In dicta that subsequently formed the basis of the political question doctrine, Justice Marshall wrote:

> [T]he President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.[130]

Thus, *Marbury* laid the groundwork for the political question doctrine by holding that matters the Constitution clearly entrusts exclusively to the President—such as the appointment of a federal justice of the peace[131]—are not reviewable by courts.[132]

The logic of the opinion in *Marbury* rests on an interpretation of the Constitution's text.[133] Over time, however, the Court's political question jurisprudence became unmoored from its "anchor[] in an interpretation of the Constitution itself" and began to consider "prudential

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125. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (holding Supreme Court's duty is "to say what the law is"). The political doctrine exists for two primary reasons: first, "to ensure proper judicial restraint against exercising jurisdiction when doing so would require courts to assume responsibilities which are assigned to the political branches" and, second, "to ensure the legitimacy of the judiciary by protecting against issuing orders which courts cannot enforce." Kimberly Breedon, Remedial Problems at the Intersection of the Political Question Doctrine, the Standing Doctrine, and the Doctrine of Equitable Discretion, 34 Ohio N.U. L. Rev. 523, 523 n.4 (2008).

126. *Marbury*, 5 U.S. (1 Cranch) at 137–38.

127. Id. President Jefferson, a Republican, refused to deliver the commission to Marbury because he was a Federalist and the two parties were embroiled in a dispute.

128. Id.

129. Id. at 162.

130. Id. at 165–66.

131. See U.S. Const. art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . .").

132. *Marbury*, 5 U.S. (1 Cranch) at 165–66.

133. See Rachel E. Barkow, More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy, 102 Colum. L. Rev. 237, 246–53 (2002) (arguing political question doctrine's foundation is "in the text, structure, and history of the Constitution itself").

concerns."[134] This "prudential strand" of the political question doctrine gave the Court greater flexibility insofar as the justices could invoke it "at their discretion to protect their legitimacy and to avoid conflict with the political branches."[135] *Luther v. Borden*, perhaps the first case to consider the prudential strand of the political question doctrine, arose out of the Dorr rebellion, in which two governments claimed to be the legitimate government of the state of Rhode Island.[136] The Court, asked to decide the case under the Guarantee Clause of the Constitution,[137] noted the practical difficulties and consequences of doing so and remarked: "When the decision of this court might lead to such results, it becomes its duty to examine very carefully its own powers before it undertakes to exercise jurisdiction."[138] Although the Court ultimately based its decision that the issue was nonjusticiable on the text and structure of the Constitution, prudential concerns were clearly an influence.[139] The Court placed even greater weight on prudential considerations in *Pacific States Telephone & Telegraph Co. v. Oregon*, which also arose out of the Guarantee Clause.[140] The plaintiff in *Pacific States* argued that a tax law, passed pursuant to an amendment to the Oregon Constitution allowing citizens to propose and vote on laws via initiative and referendum, violated the federal Constitution's guarantee of a republican form of government.[141] Rather than decide the case on the merits, the Court set forth what it believed the implications of such a decision would be and then proceeded to reason backwards to a finding of nonjusticiability without paying much attention to the Constitution itself.[142]

While prudential concerns were merely factors in these earlier decisions, they formed the very basis of the Court's decision in *Coleman v. Miller*.[143] Addressing the issue of whether a proposed constitutional amendment loses its validity if the states do not ratify it within a reasonable amount of time, the Court noted that a decision on the merits would require it to balance "relevant conditions, political, social, and eco-

134. Id. at 253–63.

135. Id. at 253. Barkow argues that courts have used the prudential strand of the doctrine "to delegate judicial authority to political actors (even when the Constitution does not contemplate such a delegation) and to avoid deciding controversial cases." Id.

136. 48 U.S. (7 How.) 1, 36–38 (1849).

137. U.S. Const. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . .").

138. *Luther*, 48 U.S. (7 How.) at 39.

139. Barkow, supra note 133, at 257–58 (noting opinion "began by listing the parade of horribles that would ensue if the Court were to conclude that Oregon lacked a republican form of government").

140. 223 U.S. 118 (1912).

141. Id. at 137.

142. Id. at 141–42, 144; see also Barkow, supra note 133, at 257–58 (describing Court's decision in *Pacific States*).

143. 307 U.S. 433 (1939); see Barkow, supra note 133, at 258–59 (describing Court's application of political question doctrine in *Coleman*).

nomic" that courts are not well suited to examine.[144] The Court therefore declined to decide the issue, holding that it was "essentially political and not justiciable."[145]

While the prudential strand of the political question doctrine initially might have appeared to bear little relation to the classic strand, as articulated by *Marbury* and with its roots in the Constitution's text, the Supreme Court tied them together in the seminal case of *Baker v. Carr*.[146] Charles Baker sued the Tennessee secretary of state, alleging that the state legislature's failure to reapportion itself despite substantial population growth amounted to a violation of his Fourteenth Amendment rights.[147] When the case reached the Court, the issue presented was whether Baker's claim was justiciable or whether it was a political question.[148] The case divided the Justices—in addition to Justice Brennan's opinion for the Court, there were three concurrences and a dissent.[149] Justice Brennan found that the case was in fact justiciable and weaved together the two strands of the political question doctrine to articulate a six-factor standard by which to judge subsequent political question cases:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence.[150]

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144. *Coleman*, 307 U.S. at 453. Some constitutional amendments contain provisions specifying that they are only to be left open for ratification for a specified period of time. The amendment at issue in *Coleman*, the Child Labor Amendment, contained no such provision. Id. at 436.

145. Id. at 453–54.

146. 369 U.S. 186 (1962). *Baker* is widely regarded as the leading expression of the political question doctrine. See, e.g., Barkow, supra note 133, at 267–68 (citing *Baker* as preeminent political question case); Mark Tushnet, Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine, 80 N.C. L. Rev. 1203, 1213 (2002) (same).

147. *Baker*, 369 U.S. at 192–94.

148. Id. at 197.

149. Justices Douglas, Clark, and Stewart each wrote concurring opinions. Id. at 241, 251, 265. Justice Frankfurter, joined by Justice Harlan, dissented. Id. at 266.

150. Id. at 217.

With this test, the Court seemingly granted its imprimatur to the prudential strand of the political question doctrine—to be used in addition to the classical version rooted in *Marbury v. Madison*. While the Court's formal recognition might have been expected to spur widespread application of the prudential strand, several scholars have noted that quite the opposite is true. According to Rachel Barkow, *Baker* "signaled the beginning of the end of the prudential political question doctrine."[151] She notes that "in the almost forty years since *Baker v. Carr* was decided, a majority of the Court has found only two issues to present political questions, and both involved strong textual anchors for finding that the constitutional decision rested with the political branches."[152]

This analysis provides a useful framework for evaluating whether, if the Senate were to sue to compel the President to turn over the negotiating records of a treaty, a court would reach the merits or would dismiss the issue as a nonjusticiable political question.

B. *The Political Question Doctrine Applied*

Faced with the issue of what materials the Executive must provide to the Senate, aside from the treaty itself, a court is likely to find that the question is clearly committed to the political branches and that no judicially manageable standards for making such a determination exist, thereby rendering the issue a nonjusticiable political question.

1. *The Doctrine in General.* — The Constitution provides that the President shall make treaties, "by and with the Advice and Consent of the Senate."[153] However, aside from the two-thirds approval requirement, the Constitution is silent as to what exactly "advice and consent" entails. Prior cases have asked the Supreme Court to parse similarly vague constitutional language and use it to articulate excruciatingly specific standards of conduct; in many of those cases, the Court refused to do so.

In the wake of the Kent State massacre, a group of Kent State students sued the Ohio National Guard and asked the Court to "establish standards for the training, kind of weapons and scope and kind of orders to control the actions of the National Guard."[154] The Court held the issue nonjusticiable under the political question doctrine, reasoning that the Constitution explicitly vests Congress with the responsibility to set such

151. Barkow, supra note 133, at 267.

152. Id. at 267–68; see also Tushnet, supra note 146, at 1213 ("[T]he Court has not invoked the more obviously flexible criteria articulated in *Baker* . . . in any recent case, to the point where it seems fair to say that the only real components . . . are the first two: a textually demonstrable commitment to the political branches and the lack of judicially manageable standards.").

153. U.S. Const. art. II, § 2, cl. 2.

154. Gilligan v. Morgan, 413 U.S. 1, 6 (1973).

standards.[155] In a subsequent case, *Nixon v. United States*, a federal judge challenged the process the Senate had used to try him under the Impeachment Clause of the Constitution.[156] The judge asked the Court to determine the meaning of the word "try" as used in the clause, but it declined to do so.[157] Instead, the Court held that since the Constitution vests the power to impeach solely in the Senate, to the exclusion of the judiciary, the judiciary had no basis upon which to involve itself.[158]

These cases suggest that when the Constitution lays out a broad standard and entrusts the political branches with the sole authority to give that standard substance, the Court will defer to their judgment. Indeed, the Court in *Nixon* suggested that when "there is no separate provision of the Constitution that could be defeated by allowing" the political branches to define the rights and duties apportioned between them by such standards, the Court will not impose its own judgment.[159]

"Advice and consent" is just such a broad standard. The Constitution gives the judiciary no role whatsoever in the treatymaking power, leaving it entirely in the hands of the Executive and Senate. It mandates that treaties must receive the approval of two-thirds of the Senate but leaves any questions regarding a more specific understanding of advice and consent to the parties to which the power is entrusted. A court would therefore likely believe that, were it to step in and define the precise contours of advice and consent, it would be exceeding the bounds of its jurisdiction. The only political question doctrine case regarding the treaty

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155. Id. at 6, 10; see also U.S. Const. art. I, § 8, cl. 16 ("The Congress shall have Power . . . [t]o provide for organizing, arming, and disciplining, the Militia . . . .").

156. 506 U.S. 224, 226 (1993); see also U.S. Const. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments."). Walter Nixon, the former chief judge of the United States District Court for the Southern District of Mississippi, was convicted of lying to a federal grand jury and sentenced to prison. *Nixon*, 506 U.S. at 226. However, Nixon refused to resign from the judiciary and continued to collect his salary, spurring the House of Representatives to adopt articles of impeachment. Id. at 226–27. The Senate opted to try the impeachment pursuant to Impeachment Rule XI, under which a committee of Senators appointed by the presiding officer to "'receive evidence and take testimony'" presents a transcript of those proceedings as well as a full report summarizing the evidence to the full Senate for a vote on whether to convict. Id. at 227 (quoting S. Impeachment Rule XI, reprinted in S. Manual, S. Doc. No. 101-1, at 186 (1989)). After the full Senate voted to impeach Nixon by the necessary two-thirds majority, he sued, alleging that the Senate's procedure violated the "constitutional grant of authority to the Senate to 'try' all impeachments because it prohibits the whole Senate from taking part in the evidentiary hearings." Id. at 228 (quoting U.S. Const. art. I, § 3, cl. 6).

157. Id. at 238 (quoting U.S. Const. art. I, § 3, cl. 6).

158. Id. at 230–31.

159. Id. at 237; cf. id. at 238 (refusing to find that word "try" imposed identifiable textual limit on Senate's authority where "there [was] no separate provision of the Constitution that could be defeated by allowing the Senate final authority to determine the meaning of the word").

power to reach the Supreme Court, *Goldwater v. Carter*,[160] lends support to such an assertion.

On January 1, 1979, after nearly a decade of working to normalize relations, the United States formally recognized the People's Republic of China (PRC) as China's only legitimate government.[161] As a condition of normalization, the PRC required that the United States terminate its Mutual Defense Treaty with the Republic of China (Taiwan).[162] In order to expedite this process, President Jimmy Carter terminated the treaty without formally requesting or receiving the advice and consent of the Senate.[163] Senator Barry Goldwater, who believed that the President did not have the authority to terminate a treaty unilaterally, sued President Carter, seeking an injunction.[164] The Supreme Court dismissed the case as nonjusticiable but divided sharply as to the reason.[165] Justice Rehnquist's opinion, which garnered the most votes, held that the case presented a political question.[166] Rehnquist placed great weight on the Constitution's silence as to the Senate's role in treaty termination.[167] Rehnquist seized upon this silence and analogized the case to *Coleman v. Miller*, arguing that in cases where the Constitution is silent, disputes as to

160. 444 U.S. 996 (1979).

161. See David J. Scheffer, Comment, The Law of Treaty Termination as Applied to the United States De-Recognition of the Republic of China, 19 Harv. Int'l L.J. 931, 931 (1978) (noting normalization of relations between United States and PRC was accompanied by de-recognition of Republic of China).

162. See Guy M. Miller, Treaty Termination Under the United States Constitution: Reassessing the Legacy of *Goldwater v. Carter*, 27 N.Y.U. J. Int'l L. & Pol. 859, 861 (1995) (noting termination of United States-Republic of China Mutual Defense Treaty was longstanding condition of People's Republic of China before normalization of relations could occur).

163. See Luke A. McLaurin, Note, Can the President "Unsign" a Treaty? A Constitutional Inquiry, 84 Wash. U. L. Rev. 1941, 1956 (2006) (noting President Carter's action was unilateral in that he did not ask Senate for advice or consent prior to terminating treaty).

164. Goldwater v. Carter, 481 F. Supp. 949, 950, 954 (D.D.C.), rev'd en banc per curiam, 617 F.2d 697 (D.C. Cir.), vacated, 444 U.S. 996 (1979).

165. While Justice Rehnquist found that the case was nonjusticiable because it presented a political question, Justice Powell believed the case was nonjusticiable because Senator Goldwater did not have standing. *Goldwater*, 444 U.S. at 996–98 (Powell, J., concurring). Powell believed that if Senator Goldwater had standing, the case would have in fact been justiciable. Powell reformulated the standard articulated in *Baker* into three factors: "(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?" Id. at 998. Powell then evaluated the issue under these factors and concluded that if there were no standing issue, the Court would be required to answer the case on the merits. Id. at 998–1001.

166. Id. at 996–97, 1002 (plurality opinion).

167. See id. at 1003 ("Here, while the Constitution is express as to the manner in which the Senate shall participate in the ratification of a treaty, it is silent as to that body's participation in the abrogation of a treaty.").

what it prescribes present a political question that is best left to the political branches.[168] Rehnquist was also reluctant to resolve the dispute because it involved "coequal branches of our government, each of which has . . . resources not available to private litigants outside the judicial forum"—essentially reiterating his belief that the question was better suited to be resolved through the political process.[169]

In contrast to his finding that the Constitution is silent as to the Senate's role in treaty termination, Rehnquist noted that "the Constitution is express as to the manner in which the Senate shall participate in the ratification of a treaty."[170] Broadly speaking, this is true. However, as presented to a court, the issue discussed in this Note would not concern the broad nature of the Senate's role in treatymaking; rather, it would concern the precise nature of "advice and consent." On this question, the Constitution is indeed silent. Moreover, the dispute is clearly one between the Executive and Senate. As Rehnquist noted in *Goldwater*, the parties are coequal branches of the government that are able to resolve such disputes through the political process and free from the specter of judicial interference.[171] It stands to reason that the Court would therefore find such a case a continuation of the *Coleman-Goldwater* line, and hold that the Constitution's silence renders the issue nonjusticiable.

The political question doctrine is not without its critics. One influential scholar has argued that the purported application of the doctrine is in reality merely an adjudication of the constitutionality of the alleged act.[172] Others have argued that the doctrine, although perhaps viable at one point, has fallen out of favor with the Supreme Court.[173] The Supreme Court itself, affirming its duty "to say what the law is,"[174] has repeatedly undertaken to interpret vague constitutional provisions and

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168. See id. ("I believe it follows *a fortiori* from *Coleman* that the controversy in the instant case is a nonjusticiable political dispute that should be left for resolution by the Executive and Legislative Branches of the Government.").

169. Id. at 1004; see also Michael D. Karpeles, Note, Congressional Nuclear Freeze Proposals: Constitutionality and Enforcement, 23 Harv. J. on Legis. 483, 494–96 (1986) (outlining Justice Rehnquist's plurality opinion in *Goldwater*).

170. *Goldwater*, 444 U.S. at 1003 (plurality opinion).

171. Id. at 1004; see also infra notes 200–202 and accompanying text (arguing different institutional competencies of courts and political branches render some disputes better solved through political means).

172. Louis Henkin, Is There a "Political Question" Doctrine?, 85 Yale L.J. 597, 622 (1976) ("The 'political question' doctrine . . . is an unnecessary, deceptive packaging of several established doctrines that has misled lawyers and courts to find in it things that were never put there and make it far more than the sum of its parts.").

173. See, e.g., Barkow, supra note 133, at 267–68 ("[I]n the almost forty years since *Baker v. Carr* was decided, a majority of the Court has only found two issues to present political questions . . . .").

174. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

given them substance.[175] However, these arguments have not gone uncontested, especially with regard to the doctrine's applicability to foreign affairs—an area in which some scholars argue that "the doctrine is thriving and growing."[176] This particular application of the political question doctrine therefore warrants examination insofar as the treaty power touches on foreign affairs.

2. *The Political Question Doctrine, Foreign Affairs, and Advice and Consent.* — Foreign affairs hold a special place in the canon of political question jurisprudence. With perhaps more consistency than in any other area of the law, the Supreme Court has ruled that issues relating to foreign affairs are political questions falling outside its purview.[177]

Like the political question doctrine in general, the doctrine's unique application to foreign affairs finds its roots in *Marbury v. Madison*. Expounding on which types of cases are unfit for judicial review, Justice Marshall wrote that an executive officer's foreign affairs actions "can never be examinable by the courts."[178] Indeed, some scholars have argued that the notion that courts should avoid passing judgment on the foreign affairs actions of a President precedes the founding of the country itself.[179]

Several cases involving the application of the political question doctrine to foreign affairs have reached the Supreme Court since 1900. One such case is *Terlinden v. Ames*, in which the defendant argued that, after the German Empire succeeded the Kingdom of Prussia in 1871, Prussia's extradition treaty with the United States did not run to the German Empire but terminated.[180] The Court left the determination to the President, holding that such a matter was "in its nature political and not

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175. See generally, e.g., United States v. Munoz-Flores, 495 U.S. 385 (1990) (addressing on merits whether "special assessment" imposed by courts on defendants upon conviction for a federal misdemeanor constitutes a bill for raising revenue under Article I, Section 7); INS v. Chadha, 462 U.S. 919 (1983) (ruling on applicability of Presentment Clause to congressional action); Gregg v. Georgia, 428 U.S. 153 (1976) (finding death penalty does not violate Constitution's prohibition of "cruel and unusual punishment"); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding segregation in public schools violates Constitution's guarantee of equal protection); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (interpreting Necessary and Proper Clause as affirming Congress's power to pass laws not expressly provided for in Article I, provided those laws are in furtherance of legitimate congressional objective).

176. Champlin & Schwarz, supra note 124, at 217.

177. See Jide Nzelibe, The Uniqueness of Foreign Affairs, 89 Iowa L. Rev. 941, 953, 955 (2004) (noting, since Civil War era, Court has refrained from deciding separation of powers issues related to foreign affairs except when they directly implicate individual rights or property interests).

178. *Marbury*, 5 U.S. (1 Cranch) at 166.

179. See, e.g., Nzelibe, supra note 177, at 946–47 (arguing "foreign affairs is uniquely an executive function that warrants special deference from the courts [and] antedates the establishment of the Constitution" and noting that Blackstone and early English cases had previously affirmed distinction between judicial and political authority in foreign affairs).

180. 184 U.S. 270, 273 (1901).

judicial."[181] In 1918, the Court declined to decide which side of the Mexican Revolution represented Mexico's true government.[182] In that case, the Court reiterated that the conduct of foreign relations—in particular, the recognition of foreign governments—is outside the realm of judicial review.[183] The Court extended its holdings regarding the application of the political question doctrine to foreign affairs even further in *United States v. Curtiss-Wright Export Corp.*[184] Quoting a speech by John Marshall on the floor of the House of Representatives in 1800, Justice Sutherland wrote that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[185] While the Court has hinted in subsequent decisions that this holding may be overbroad,[186] it has nonetheless continued to hold that foreign affairs remain the exclusive province of the Executive.[187]

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181. Id. at 288.

182. Oetjen v. Cent. Leather Co., 246 U.S. 297, 303 (1918).

183. Id. at 302 ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." (citations omitted)).

184. 299 U.S. 304 (1936). The case involved defendants who had been indicted for conspiring to sell arms to Bolivia in violation of an executive order issued by President Roosevelt pursuant to a joint resolution of Congress. Id. at 311. The defendants had argued in the lower courts that the Joint Resolution effected an invalid delegation of legislative power to the President. Id. at 314. In reaching his decision, Justice Sutherland drew a distinction between the federal government's foreign and domestic power—finding that when the colonies declared their independence from Great Britain, the "powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America." Id. at 315–16. Sutherland then argued that, because participation in the exercise of this power is limited, "the President alone has the power . . . as a representative of the nation." Id. at 319.

185. Id. at 319 (quoting 10 Annals of Cong. 613 (1800)) (internal quotation marks omitted).

186. See Baker v. Carr, 369 U.S. 186, 211 (1962) ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.").

187. See, e.g., N.Y. Times Co. v. United States, 403 U.S. 713, 741 (1971) (Marshall, J., concurring) ("[I]t is beyond cavil that the President has broad powers by virtue of his primary responsibility for the conduct of our foreign affairs and his position as Commander in Chief."); Chi. & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial."); Made in the USA Found. v. United States, 242 F.3d 1300, 1313 (11th Cir. 2001) ("The Supreme Court has repeatedly recognized that the President is the nation's 'guiding organ in the conduct of foreign affairs,' in whom the Constitution vests 'vast powers in relation to the outside world.'" (quoting Ludecke v. Watkins, 335 U.S. 160, 173 (1948))).

The Court's insistence that foreign affairs is the sole province of the Executive branch has support in the text, structure, and history of the Constitution. Article II, Section 1 vests in the President the entire "executive Power." U.S. Const. art. II, § 1. Scholars have suggested that this clause confers upon the Executive "plenary authority to represent the United States and to pursue its interests outside the borders of the country, subject only to the explicit limits set forth in the text of the Constitution." Block, supra note 8, at 1483 (footnote omitted). Thomas Jefferson, undoubtedly familiar with the thinking of the

However, the most recent case to discuss the political question doctrine as applied to foreign affairs, *Zivotofsky v. Clinton*, found that a political question was not present.[188] It therefore deserves a searching analysis. The petitioner in that case, a United States citizen born in Jerusalem, sought to have his place of birth on his passport listed as "Jerusalem, Israel," as opposed to just "Jerusalem,"[189] pursuant to § 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003.[190] The State Department refused to follow § 214(d) and honor Zivotofsky's request.[191] It argued that to do so would require it to take a position on Jerusalem's political status against its longstanding policy, and that the case therefore presented a political question since the Executive alone has the power to recognize foreign sovereigns.[192] The District Court agreed and dismissed the case,[193] and the D.C. Circuit affirmed.[194] The Supreme Court, however, reframed the issue. Rather than asking the Court "to determine whether Jerusalem is the capital of Israel," Justice Roberts wrote that Zivotofsky was asking the Court to "enforce a specific statutory right," namely, § 214(d).[195] Deciding the case therefore required only the "familiar judicial exercise" of "decid[ing] if Zivotofsky's interpretation of the statute is correct, and whether the statute is constitutional," and so did not present a political question.[196] The Court's decision, however, did not diminish the longstanding importance of foreign affairs to the political question doctrine. Indeed, Justice Roberts noted that attempting to decide the political status of Jerusalem would present "'a lack of judicially . . . manageable standards for resolving'" the issue and that "'there is "a

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Framers, wrote that "[t]he transaction of business with foreign nations is executive altogether." Thomas Jefferson, Opinion on the Powers of the Senate (April 24, 1790), *in* 5 The Writings of Thomas Jefferson 161, 161 (Paul Leiscester Ford ed., New York, G.P. Putnam's Sons 1895).

188. 132 S. Ct. 1421, 1426–27 (2012).

189. Id. at 1425. It is important to note that the question of whether Jerusalem is a part of Israel is undecided, and that the United States government has not taken an official view one way or the other. See Zivotofsky v. Secretary of State, 571 F.3d 1227, 1228 (D.C. Cir. 2008) ("It has been the longstanding policy of the United States to take no side in the contentious debate over whether Jerusalem is part of Israel."), rev'd, 132 S. Ct. 1421.

190. § 214(d) of the Act provides that "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." Pub. L. No. 107-228, 116 Stat. 1350, 1366 (2002).

191. *Zivotofsky*, 132 S. Ct. at 1425–26.

192. Id.

193. Zivotofsky v. Secretary of State, 511 F. Supp. 2d. 97, 103 (D.D.C. 2007) (holding decision on merits would require court to "decide the political status of Jerusalem").

194. *Zivotofsky*, 571 F.3d at 1232–33 ("Because we conclude that Zivotofsky's complaint raises a nonjusticiable political question, we affirm the district court's dismissal of his suit for lack of subject matter jurisdiction.").

195. *Zivotofsky*, 132 S. Ct. at 1427.

196. Id.

textually demonstrable constitutional commitment"' to the President of the sole power to recognize foreign sovereigns."[197] The issue in *Zivotofsky*, however, did not require the Court to consider such thorny issues. Rather, it required the Court to weigh in on the constitutionality of a statute and decide whether that statute "impermissibly intrudes upon Presidential powers under the Constitution."[198]

It is possible that courts could characterize the dispute over negotiating records as a purely domestic issue; indeed, it involves a domestic political process and raises questions relating to the balance of power between domestic political institutions. Conceived in such a light, the dispute would not implicate the political question doctrine's foreign affairs strand of cases. However, such a characterization would be erroneous. There can be no doubt that any resolution of the issue would bear significantly on U.S. foreign policy. As it stands now, the President has full discretion whether to turn over the negotiating records of a treaty.[199] Counterparties at the negotiating table know this, and they would certainly know if the Supreme Court were to install a new regime. Therefore, if the Court were to decide the issue on the merits, it would undoubtedly affect treaty negotiations—and therefore clearly implicate foreign policy.

Moreover, as Justice Rehnquist wrote in *Goldwater*, "different termination procedures may be appropriate for different treaties."[200] Similarly, varying types of information and degrees of disclosure may be appropriate for different treaties. This is a judgment influenced by the negotiating counterparty, the type of treaty being negotiated, and the geopolitical climate at the time of negotiations. Courts are simply not equipped to make such judgments. As Jide Nzelibe, an expert in foreign relations law, has posited, the reason courts are loathe to reach questions relating to foreign affairs on their merits may be precisely because of concerns regarding their institutional competency. He argues that for a variety of reasons, the political branches are more finely attuned to the task of deciding issues relating to foreign affairs than the judiciary, and so the judiciary—which is aware of its relative incompetence in the area—declines to decide such cases.[201] Thus, insofar as the issue discussed in this Note involves the balance of power between two coequal branches under a constitutional provision bearing directly on the conduct of foreign affairs, a court is unlikely to reach the merits, but rather

197. Id. at 1427–28 (quoting Nixon v. United States, 506 U.S. 224, 228 (1993)).

198. Id. at 1428.

199. See supra Part II (describing instances in which Senate has requested access to treaty's negotiating records and demonstrating that President has sole discretion in determining whether to comply).

200. Goldwater v. Carter, 444 U.S. 996, 1003 (1979) (plurality opinion).

201. See Nzelibe, supra note 177, at 1009 ("[T]he political branches' distinct features and resources suggest that they continue to have institutional advantages over the courts in policing and interpreting the contours of the foreign affairs powers.").

would likely deem it a nonjusticiable political question and leave its resolution to the political branches.

IV. A POLITICAL ANSWER TO A POLITICAL QUESTION

Although courts may never decide whether the Executive needs to grant the Senate access to the negotiating records of a treaty during its advice and consent process, the issue nevertheless ought to be addressed. A court's determination that resolution of an issue is best left to the other coordinate branches of government is not akin to a finding that there is not an actual dispute, or that such a dispute is not legal in nature—it is merely an assessment that the courts are ill suited to resolve such a dispute. Numerous issues deemed political questions by the courts, including the treaty termination dispute in *Goldwater*, have ultimately been resolved by recourse to the political process.[202] Indeed, the very issue of whether the Executive must grant the Senate access to negotiating records has hitherto been left to the nonjudicial branches, with varying outcomes.[203] It is precisely because the outcomes vary that some kind of definitive resolution is needed. "Certainty," after all, "is the mother of repose."[204]

Insofar as this is a legal issue, this Part endeavors to analyze it with traditional legal principles. Congress and the President, with their concomitant obligations to interpret and apply the Constitution, would be well served by a robust understanding of the legal arguments underpinning their actions. Section A therefore looks at the way courts have traditionally regarded a treaty's negotiating history. Section B attempts to discern the intent of the Founders regarding the current dispute. Section C, borrowing from the language of the political question doctrine, looks at prudential concerns associated with the treatment of a treaty's negotiating record. Finally, Section D proposes that the optimal solution would be for the Executive to provide negotiating records to the Senate Committee on Foreign Relations on a classified basis if doing so would assist in interpreting ambiguous treaty provisions.

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202. See, e.g., *Nixon*, 506 U.S. at 237–38 (leaving determination of exact impeachment trial procedures to Senate); *Goldwater*, 444 U.S. 996, 1002 (1979) (leaving process of treaty termination to political branches); Coleman v. Miller, 307 U.S. 433, 459–60 (1939) (leaving political branches to determine when proposed constitutional amendment becomes stale and loses its validity); Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918) (leaving decision to recognize foreign governments to political branches).

203. See supra Part II (discussing three attempts by Senate to gain access to negotiating records).

204. Walton v. Tryon (1753) 21 Eng. Rep. 262 (Ch.) 262; 1 Dick. 244, 245 (Lord Hardwicke).

A. *Negotiating Records in the Courts*

Like any text, treaties can be ambiguous. And, as with other legal documents, ambiguity of language poses problems of interpretation. While treaties are perhaps unique in their dual nature—they are both international agreements and binding domestic legislation[205]—they are not unique in the fact that legal institutions must from time to time interpret them and attempt to divine their meanings. Different legal regimes, reflecting the different roles that treaties play internationally and domestically, have therefore developed frameworks under which to interpret treaties. These frameworks typically allow interpreters to consider negotiating records, demonstrating the importance of such records in giving treaty terms meaning.

The Vienna Convention, to which the United States is not a party, governs the interpretation of treaties among its signatories.[206] It addresses negotiating histories in Article 32, and allows their use to interpret a treaty when relying on the text alone would leave "the meaning ambiguous or obscure" or would lead "to a result which is manifestly absurd or unreasonable."[207] The Constitution's Supremacy Clause renders treaties on par with legislation passed by Congress;[208] therefore, to the extent that their terms affect domestic matters, the Supreme Court interprets them.[209] Since the Vienna Convention does not bind the United

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205. See Duncan B. Hollis, Executive Federalism: Forging New Federalist Constraints on the Treaty Power, 79 S. Cal. L. Rev. 1327, 1327–28 (2006) (noting treaties live "double li[ves] . . . [as] creature[s] [of] international law, which sets forth extensive substantive and procedural rules by which [they] must operate . . . [and] creature[s] of national law, deriving [their] force from the constitutional order of the nation state[s] that concluded [them]").

206. Vienna Convention on the Law of Treaties art. 31, opened for signature May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

207. Id. art. 32.

208. The Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; *and all Treaties made*, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2 (emphasis added).

209. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (holding it is Supreme Court's duty to "say what the law is"); see also Sullivan v. Kidd, 254 U.S. 433, 442 (1921) ("[T]he question of the construction of treaties is judicial in its nature . . . ."); Jones v. Meehan, 175 U.S. 1, 32 (1899) ("The construction of treaties is the peculiar province of the judiciary. . . ."); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 283 (1796) (opinion of Cushing, J.) (holding that Court's construction of treaty "is not bound" by private opinions of negotiators); Bederman, supra note 7, at 956 ("In the United States, courts ultimately decide the meaning of treaties."). The question of who has the authority to interpret treaties insofar as they operate internationally, however, is open and has been subject to dispute between the Executive and Senate. See supra Part II.A (describing ABM reinterpretation dispute).

States, the Supreme Court has developed its own canon of interpretation for treaties.

The Supreme Court has frequently compared treaties to contracts between nations.[210] Having classified them as such, the Court has borrowed from contract law and stated that its goal in interpreting treaties is to effectuate the intent of the parties.[211] In a practice analogous to the interpretation of contracts, the Court often looks beyond the four corners of the agreement to evidence that sometimes includes negotiating records.[212] While some scholars have criticized this practice as incon-

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210. See Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979) ("A treaty . . . is essentially a contract between two sovereign nations."); Louis Henkin, The Treaty Makers and the Law Makers: The Niagara Reservation, 56 Colum. L. Rev. 1151, 1164 (1956) ("A treaty is a contract between nations."); see also Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court, 482 U.S. 522, 533 (1987) ("In interpreting an international treaty, we are mindful that it is 'in the nature of a contract between nations.'" (quoting Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 253 (1984))); O'Connor v. United States, 479 U.S. 27, 33 (1986) ("The course of conduct of parties to an international agreement, like the course of conduct of parties to any contract, is evidence of its meaning."); Santovincenzo v. Egan, 284 U.S. 30, 40 (1931) ("As treaties are contracts between independent nations, their words are to be taken in their ordinary meaning . . . ."); *Sullivan*, 254 U.S. at 439 ("[T]reaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals . . . ."); Rainey v. United States, 232 U.S. 310, 316 (1914) (adopting lower court's finding that "[t]reaties are contracts between nations and by the Constitution are made the law of the land"); United States v. Am. Sugar Ref. Co., 202 U.S. 563, 577 (1906) (observing that when treaty provisions were accepted, they "became . . . contracts").

211. See, e.g., Geofroy v. Riggs, 133 U.S. 258, 271 (1890) ("It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties . . . .").

212. See Factor v. Laubenheimer, 290 U.S. 276, 294–95 (1933) ("In ascertaining the meaning of a treaty we may look beyond its written words to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter . . . ."); Nielsen v. Johnson, 279 U.S. 47, 52 (1929) ("When [a treaty's terms are] uncertain, recourse may be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter . . . ."); Lauterpacht, supra note 7, at 568 ("The Supreme Court has . . . as a matter of constant practice had recourse to preparatory work for the interpretation of treaties . . . ."); see also *Aérospatiale*, 482 U.S. at 550 (Blackmun, J., concurring in part and dissenting in part) (citing negotiation records as evidence of treaty's meaning); Warren v. United States, 340 U.S. 523, 527 & n.4 (1951) (citing proceedings of international treatymaking conference); Cook v. United States, 288 U.S. 102, 116–18 (1933) (reviewing negotiations to clarify treaty's meaning); Doe v. Braden, 57 U.S. (16 How.) 635, 654–55 (1853) (discussing treaty negotiations and historical context).

The Court also looks to legislative history—the statements made during the Senate's ratification process. James Wolf has argued that when these different sources conflict, the legislative history should be controlling. Wolf, supra note 7, at 1036 ("[I]f a conflict exists between legislative purpose . . . and the negotiators' purpose derived from a secret negotiating record, a court should opt for an interpretation based on the legislative purpose."). But see United States v. Stuart, 489 U.S. 353, 373–74 (1989) (Scalia, J., concurring) (arguing treaties are bilateral, unlike legislation, which is unilateral, and it is therefore more appropriate to resort to negotiating records when interpreting treaties than to legislative histories).

sistent with international norms,[213] the Court nevertheless continues to interpret treaties in this manner.

To the extent that courts use negotiating records as evidence of a treaty's meaning when giving a binding interpretation, the negotiating record itself can be considered, to some degree, authoritative. Therefore, the Senate could claim that access to a treaty's negotiating record is necessary if its advice and consent is to be truly informed. Otherwise, it may face an onerous proposition—that it ratified a treaty believing it imposed one set of obligations, only to find that, once challenged in court, it has an entirely different meaning. However, this argument presents at least two problems. First, a court's pronouncements would only affect domestic treaty obligations; the international obligations of the United States and the obligations of the other treaty party would remain unchanged.[214] Second, a court's use of negotiating records presupposes that these records are available. In cases involving issues that do not implicate national security, such as disputes over investment treaties, negotiating records are often made public once the treaty takes effect. However, in the disputes detailed in this Note, the negotiating records to which the Senate sought access remained classified because of significant national security concerns.[215] As such, they would likely be unavailable for a court's review, vitiating the Senate's concern. Moreover, if the President, who has access to such records, were to find himself a party to a lawsuit in which a treaty's meaning was an issue, he could not rely on the negotiating record to make his arguments without being compelled to turn them over,[216] thus rendering any dispute over access moot.

Courts' consideration of negotiating records in treaty interpretation weighs in favor of granting the Senate access to such records so that it can fully understand the treaty to which it is consenting. However, the

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213. See Bederman, supra note 7, at 964 ("American courts are frequently accused of being too quick to look behind the text of a treaty and thus to ignore the plain meaning of the words."); Koplow, supra note 8, at 1384 n.129 (noting whereas the Vienna Convention "places a special primacy upon the 'ordinary meaning' of the text of a treaty, . . . United States courts . . . are generally more concerned with the parties' intentions, and more willing to look outside the four corners of the treaty document in order to adduce its meaning").

214. Cf. ABM Treaty Hearings, supra note 90, at 81 (statement of Prof. Louis Henkin) ("[T]he President can only make the treaty to which the Senate consented."). Under Professor Henkin's understanding of the treaty power, once the Senate consents to a treaty, the treaty's meaning is fixed as the meaning the Senate ascribed to it when it provided its consent. Id. Therefore, while the Supreme Court may alter its meaning domestically, the international rights obligations of the United States would remain unchanged. But see id. at 130 (statement of Abraham D. Sofaer, State Department legal adviser) ("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.").

215. See supra Part II (detailing Executive-Senate conflicts over negotiating records of ABM, INF, and New START Treaties).

216. See Fed. R. Civ. P. 26(b)(1) (requiring parties to disclose information relevant to any party's claim or defense).

force of this argument is somewhat muted by the fact that a court may not even have access to the records, and because its decision would have no bearing on international obligations. Proper analysis of the issue therefore demands consideration of both the Founders' intent and prudential concerns.

B. *The Founders' Intent*

As noted above, the Framers' beliefs about the exact balance of power under the Treaty Clause is subject to dispute.[217] Some scholars believe the Framers intended the Senate to serve as a type of privy council to the President—intimately involved and advising him on all aspects of negotiations.[218] If this is the case, senatorial access to negotiating records does not violate the Framers' intent since they believed the Senate would be privy to such information anyway. Others contend that "advice and consent" is a unitary action. Proponents of this theory maintain that it is the President's responsibility to negotiate a treaty—without the Senate's involvement—and the Senate's responsibility to either ratify it or refuse to do so.[219] If this is the correct account, it weakens any claim the Senate may have to the negotiating records based on the structure of the Constitution and the intent of the Founders. It is therefore instructive to undertake a closer examination of these competing narratives.

The Treaty Clause is silent as to the exact nature of the allocation of power between the Executive and Senate. The statements of those who were intimately involved with the republic's founding therefore take on an added significance. John Jay, writing as Publius, argued that under the Treaty Clause the President would direct negotiations and decide how to manage sensitive information.[220] In Federalist No. 64, he wrote:

> It seldom happens in the negociation of treaties of whatever nature, but that perfect *secrecy* and immediate *dispatch* are sometimes requisite. There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives, and there doubtless are many of both descriptions, who would rely on the secrecy of the president, but who would not confide in that of the senate, and

217. See supra Part I.A (describing Framers' intent in drafting Treaty Clause).

218. See supra notes 27–33 and accompanying text (discussing theories of Senate's role in treatymaking); see also Henkin, Constitutionalism, supra note 2, at 50 ("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.").

219. See supra notes 34–39 and accompanying text (describing views of scholars who believe Senate's only constitutionally mandated role is to ratify treaties negotiated by Executive).

220. Abraham D. Sofaer, War, Foreign Affairs and Constitutional Power: The Origins 49 (1976) [hereinafter Sofaer, Foreign Affairs].

> still less in that of a large popular assembly. The convention have done well therefore in so disposing of the power of making treaties, that although the president must in forming them act by the advice and consent of the senate, *yet he will be able to manage the business of intelligence in such manner as prudence may suggest.*[221]

Thus, it appears that Jay believed one of the reasons the Founders vested the President with the power to negotiate and make treaties was because the President is better suited to act with the requisite secrecy and expediency. The Senate, a body composed of numerous members with varying interests, does not possess the same characteristics that Jay believed made the President the most attractive repository of the treaty power. This suggests that unfettered Senate access to negotiating records would trample the concerns of at least one of the most influential Founders.

But could it be that the Founders believed such secrecy was necessary only while negotiations were ongoing, and that there would be no harm in disclosing the record once the negotiations were concluded and the treaty submitted to the Senate? For an answer to this question, we need look no further than President George Washington's letter to the House of Representatives concerning the Jay Treaty.[222] When asked to appropriate funds necessary to effectuate the Jay Treaty, the House requested access to the treaty's negotiating record, and Washington refused.[223] Although the letter was in response to a request from the House, not the Senate, Washington's sentiments are nonetheless instructive:

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

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221. The Federalist No. 64, at 434–35 (John Jay) (Jacob E. Cooke ed., 1961) (third emphasis added).

222. Special Message from George Washington to the House of Representatives of the United States (Mar. 30, 1796) [hereinafter Message from Washington], *in* 1 A Compilation of the Messages and Papers of the Presidents: 1789–1897, at 194 (James D. Richardson ed., Washington, DC, Government Printing Office 1899).

223. Buechler, supra note 8, at 2001 n.72 (noting Washington transmitted entire negotiating record of Jay Treaty to Senate but refused to give record to House of Representatives). The House requested the documents because it wanted to review the treaty's expediency—a task Washington believed the Constitution afforded no role to the House. See David M. Golove & Daniel J. Hulsebosch, A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition, 85 N.Y.U. L. Rev. 932, 1055–56 (2010) (describing House's request and Washington's letter in response).

> or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers.[224]

According to Washington, therefore, the potential harm of making negotiating records available was not muted by the fact that negotiations had concluded, and he believed that the fate of the record should remain subject to the President's discretion. It appears, then, that to require senatorial access to a treaty's negotiating records may run contrary to the way in which at least two of the most influential Founders expected advice and consent would function.

C. *Prudential Considerations*

In addition to looking at the ways courts use negotiating records in their interpretation of treaties and the Founders' intent regarding such records, a third category of considerations is relevant to a legal analysis of whether senatorial access is desirable: prudential concerns. This section discusses several prudential concerns that are applicable to the dispute and the impact Senate access would have on these concerns.

1. *Concerns Regarding Secrecy.* — As the Framers indicated, one of the reasons the Constitution vests the power to make treaties in the Executive was because of concerns about secrecy.[225] "[D]iplomatic negotiations demand secrecy," and "a President who turns down a Senate request for information" may be doing so "out of a fear that the Senate would leak confidential information and thus harm America's position in a treaty negotiation."[226] An early example suggests that the Founders' concerns were not misplaced. When President Washington submitted the Jay Treaty to the Senate for its advice and consent, he included the negotiating record along with the treaty itself.[227] The Senate agreed to keep the negotiating record secret; however, two senators leaked details to a Republican newspaper, which subsequently published them.[228] This explains the reticence Washington expressed regarding the release of negotiating records in his subsequent letter to the House of Representatives.[229] The reservations of Washington and the Founders remain apposite. Given today's increasingly toxic political climate, such concerns are indeed perhaps more relevant now than ever. Granting Senate access to negotiating records would therefore undoubtedly increase the risk that information contained therein will be made public.

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224. Message from Washington, supra note 222, at 194–95.

225. See supra Part IV.B (discussing Founders' intent in vesting treatymaking power in Executive).

226. Howard R. Sklamberg, The Meaning of "Advice and Consent": The Senate's Constitutional Role in Treatymaking, 18 Mich. J. Int'l L. 445, 468 (1997).

227. Sofaer, Foreign Affairs, supra note 220, at 96–97.

228. Id.

229. See supra note 224 and accompanying text (discussing importance of preserving secrecy of records even after negotiations have concluded).

2. *The Conduct of Foreign Policy.* — Secrecy for its own sake is hardly a sufficiently compelling reason for the Executive to retain control of negotiating records. However, secrecy does bear on the ability of the United States to carry out effective foreign policy. Negotiating records have traditionally been kept confidential because doing so encourages negotiators to speak freely and candidly.[230] Negotiations are a fluid process, in which a variety of positions are taken and abandoned, offers made and rescinded, ideas considered and rejected. Some of the tentative positions taken during a negotiation may be politically sensitive, and the party taking them may not want them disclosed or publicized. Therefore, if the United States' partners at the negotiating table were aware that the Senate would later review the record, it would significantly inhibit candor and constructive discussions. Negotiators "might be forced to express only safe and uncontroversial views, and thus to bypass creative or still tentative ideas"; as a result, "[c]hances to learn might be lost" and "premature closure with respect to difficult issues would become more likely."[231] Disclosure of the negotiating record for every treaty under every circumstance would therefore have a deleterious effect on the conduct of the foreign policy of the United States.[232]

3. *The Accuracy of a Negotiating Record's Portrayal.* — Presumably, senators desire access to negotiating records so that they may develop a better understanding of a treaty's terms, or to ensure that the Executive's representations regarding a treaty are accurate. However, the efficacy of relying on a negotiating record to do so under all circumstances is questionable. Bilateral treaties, unlike multinational treaties, typically do not have formalized, agreed-upon negotiating records.[233] Rather, "[t]he corpus of the negotiating record—which grows irregularly and inconsistently over the years, reflect[s] the piecemeal fits and starts of the negotiations."[234] In essence, any given portion of the negotiating record provides only a snapshot in time, and as such is of limited assistance in understanding the final product. Indeed, insofar as negotiators may adopt and then later discard positions, relying on the negotiating record may in fact be misleading.[235]

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230. Buechler, supra note 8, at 2000.

231. Sissela Bok, Secrets: On the Ethics of Concealment and Revelation 175 (1982); see also ABM Treaty Hearings, supra note 90, at 47 (statement of J.W. Fulbright, Chairman of the S. Foreign Relations Comm.) ("If everyone knew [a negotiating record] was going to be public, it would be a great restraint upon free and open discussion.").

232. See Buechler, supra note 8, at 2001 ("The release of these records would cause a great deal of harm in the long run to our foreign policy." (internal quotation marks omitted)).

233. See Koplow, supra note 8, at 1385 ("The negotiating history of [a bilateral treaty] is particularly uneven and incomplete.").

234. Id. at 1386.

235. See Katt, supra note 123, at 692 ("Incomplete information can be easily misused or misinterpreted because '[t]ransparency reveals behavior, but not intent.'" (quoting

Another concern regarding the accuracy of the negotiating record's portrayal is the potential for bias. As noted above, bilateral treaties usually do not have a formal "joint record." The result is that unless the other negotiating party agreed to turn over its preparatory materials—an unlikely proposition—the record would necessarily be incomplete because it would contain only materials provided by the United States. There would be no way for the Senate to discern what the intent of the other treaty party was. Any documents contained within the record would therefore likely reflect the bias of the United States's negotiating delegation.[236]

4. *The Senate's Institutional Competence.* — Over the past two centuries the Senate as an institution has developed mechanisms to carry out its constitutionally appointed duties. Notwithstanding the intent of the founders, the Senate's practice with regard to advice and consent has been largely that of a ratifying body—the President negotiates and makes the treaty without involvement from the Senate, and the Senate decides whether or not to consent.[237] The materials the Senate receives, such as the text of the treaty itself and an executive report, and the mechanisms it has developed to review them effectively, are specifically tailored to this function. The Executive "controls a huge foreign-policy apparatus," while the Senate has only a "limited foreign-policy staff."[238] The Senate, therefore, does not have the institutional capacity or the institutional knowledge to examine a treaty's entire negotiating record effectively.

The Senate itself has acknowledged that an institutional practice of examining the entire negotiating record for every treaty would be a laborious undertaking with little benefit.[239] After President Reagan granted the Senate access to the negotiating records of the INF Treaty in the wake of the ABM reinterpretation dispute, it issued a report charging the Executive and Senate with "the task of ensuring that Senate review of

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Ann Florini, The End of Secrecy, *in* Power and Conflict in the Age of Transparency 13, 24–25 (Bernard I. Finnel & Kristen M. Lord eds., 2000))).

236. See Wolf, supra note 7, at 1037–38 ("[N]egotiators' purpose may . . . suffer from the defect of national bias. . . . Extrinsic evidence actually produced . . . will more likely come from records of the United States State Department than from other foreign ministries. As a result, courts may interpret treaties in a decidedly pro-American way."). Likewise, the Senate could interpret treaties with the same bias.

Such bias may have occurred in the ABM Reinterpretation dispute. See supra Part II.A (describing dispute). Abraham Sofaer concluded that the intent of the signatories was to ban only technology that existed in 1972. Sofaer, ABM Treaty, supra note 8, at 1980. However, Sofaer did not have access to Soviet materials, and was therefore left to draw this conclusion by recourse to American materials, conduct, and negative inferences. Perhaps unsurprisingly, his conclusions were favorable to the course of action proposed by the United States.

237. See supra Part I.B (describing how treaty power has historically functioned).

238. Sklamberg, supra note 226, at 465–66.

239. See INF Treaty Report, supra note 98, at 100 (acknowledging examination would "impose upon [the Senate] a considerable task with no clear purpose").

'negotiating records' does not become an institutionalized procedure."[240] In the report, the Senate cited each of the preceding prudential concerns as a reason why the Senate should not undertake to review the entire negotiating record of every treaty.[241] It stated that to do so would "weaken the treatymaking process" and "damage American diplomacy."[242] The "central aim of the ratification process," the report concluded, "is to build, between the Executive and the Senate, a clear 'shared understanding' of the treaty text and the obligations which that text entails."[243] Building such a shared understanding of the text does not require unfettered access to a treaty's negotiating record.

D. *A Suitable Framework*

As the preceding sections outline, there is little to support the assertion that the Constitution requires the Executive to grant the Senate access to a treaty's negotiating record.[244] Moreover, several prudential considerations militate against senatorial access in all circumstances.[245] However, that does not end the debate, for access may be appropriate in some instances.[246] This section explains the circumstances in which access is appropriate and recommends that the Senate adopt a legislative framework under which the President would be required to grant access in such situations.

In the aftermath of the ABM reinterpretation dispute, the Senate was suspicious of the Reagan Administration's treatymaking practices and demanded, and was granted, access to the negotiating records for the INF Treaty.[247] Upon receiving the records, the Senate reversed course. In the INF Treaty Report, the Senate announced that, for a multitude of reasons, the review of a treaty's negotiating record should not become an institutionalized practice.[248] However, the Senate did affirm its right to reference the record "where such reference can be useful in explaining the effect of treaty provisions which may appear ambiguous or about

240. Id.

241. Id.

242. Id.

243. Id.

244. See supra Part IV.A–B (analyzing Court's traditional approach to negotiating records and discussing Framers' intent in drafting Treaty Clause).

245. See supra Part IV.C (discussing prudential considerations).

246. In *Goldwater*, Justice Rehnquist suggested that different procedures for abrogating a treaty may be appropriate in different circumstances. Goldwater v. Carter, 444 U.S. 996, 1003 (1979) (plurality opinion). The logic of Justice Rehnquist's dictum extends to senatorial access to treaty negotiating records—access may be warranted in some circumstances, but not others.

247. See supra notes 102–103 and accompanying text (describing successful effort of Senate to obtain negotiating record).

248. See supra notes 239–243 and accompanying text (describing Senate's rationale for limiting review of INF Treaty's negotiating records).

which questions may arise."[249] This approach provides a sensible framework for a legislative solution.

It is uncontested that the Executive has the power to interpret treaties to ensure that the United States complies with its international obligations.[250] As both international norms[251] and historical practice[252] demonstrate, the President can and has used a treaty's negotiating record to assist with interpretation when that treaty's terms are ambiguous. However, the Senate has a duty to interpret treaties as well—one that is enshrined in the Treaty Clause's advice and consent requirement. The current practice, under which the Executive has the exclusive ability to control access to negotiating records, creates an information asymmetry that undermines the Senate's constitutionally mandated role to provide advice and consent. Moreover, such "unchecked authority to control information creates tremendous incentives for abuse of that authority."[253] A solution should correct this asymmetry, but must also remain mindful of the pitfalls of unfettered access.[254] Therefore, in order that it may faithfully carry out its duty to provide advice and consent, the Executive should grant the Senate Committee on Foreign Relations access to treaty negotiating records in situations where a failure to do so has the greatest possibility for abuse, namely, where the treaty terms are ambiguous.

There must be limitations to the Senate's right to this information, however, both in terms of the scope of materials and breadth of institutional allowance. The proposed framework argues that the Executive should provide access for treaties whose terms are ambiguous. If the treaty is unambiguous, its rationale does not apply. The negotiating record would not shed additional light on already clear terms, and the Executive would be hard-pressed to justify an interpretation that ran contrary to their meaning. For the same reasons, the rationale for access does not extend to the full record and so access should not be so broad as to encompass its entirety. Rather, the Executive should grant access

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249. INF Treaty Report, supra note 98, at 100.

250. See Wolf, supra note 7, at 1037 ("In international law the President's interpretation of a treaty may be authoritative.").

251. See Vienna Convention, supra note 206, art. 32 (providing circumstances under which recourse to treaty's negotiating records for purposes of interpretation is acceptable under international law).

252. See supra notes 82–87 (noting reliance of Judge Sofaer, who advised President Reagan, on negotiating records of ABM Treaty to interpret its provisions).

253. Katt, supra note 123, at 695. The ABM Reinterpretation dispute is evidence of such an abuse. The Reagan Administration premised a new treaty interpretation on a reading of vague treaty terms supplemented by a secret negotiating record. See supra notes 83–89 and accompanying text. However, once the negotiating records were turned over to the Senate for review, it was revealed that those claims were essentially baseless and the administration could rely on them only because the record was unavailable. See supra note 97 (noting access to negotiating record belied administration's claims).

254. See supra Part IV.C (describing prudential concerns militating against granting full senatorial access to negotiating records).

only to those materials that relate to the particular provisions suffering from ambiguity. This would prevent the Senate from getting bogged down in materials that have little relevance to the Senate's charge. The Executive should also limit the materials provided to those that were available to, or generated by, both sides during the negotiations. This would prevent the Senate from developing an unduly biased picture of the treaty in favor of the United States.

Finally, negotiating records should not be provided to the entire Senate. As John Jay argued, one of the reasons the Founders excluded the House from the treatymaking power was because they felt it was too large to maintain the appropriate level of secrecy.[255] In the early years of the republic, the House was approximately the same size as the Senate is today.[256] Granting access to the full Senate therefore implicates the same concerns about secrecy that the Founders expressed.[257] Moreover, the full Senate does not have the institutional knowledge or capacity to provide an effective, in-depth review of a voluminous and potentially technical record.[258] Such an undertaking would likely consume the Senate's resources, diverting its attention from other pressing matters. But if Senate access is desirable, then to which members should it be granted? The Senate Committee on Foreign Relations is the ideal candidate. While the Senate writ large does not possess the necessary expertise to analyze negotiating records, the Committee's purpose is to analyze and evaluate treaties and assist with developing American foreign policy.[259] Thus, the nature of its work lends itself to just such an undertaking. Moreover, the Committee routinely deals with confidential, sensitive information, putting concerns over maintaining secrecy to rest.

This framework, granting the Senate Committee on Foreign Relations access to the portions of negotiating records that relate to ambiguous treaty terms, should be adopted for at least three additional reasons. First, limiting review to the Committee on Foreign Relations prevents the Senate from being overwhelmed by a mass of information, the likes of which it is ill equipped to analyze. At the same time, it commits the task of reviewing the information to a body that has the institu-

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255. See supra note 221 and accompanying text (noting power to make treaties was vested in President because he is better situated to maintain secrecy).

256. See Christopher St. John Yates, Note, A House of Our Own or A House We've Outgrown? An Argument for Increasing the Size of the House of Representatives, 25 Colum. J.L. & Soc. Probs. 157, 179 (1992) (noting size of House of Representatives was 105 members in 1790).

257. See The Federalist No. 64, supra note 221, at 392–93 (expressing reservations about giving Senate access to sensitive materials, and even more hesitation over entrusting House—then composed of 105 members—with same information).

258. See supra Part IV.C.4 (arguing full Senate is ill suited to undertake comprehensive review of treaty's negotiating records).

259. U.S. S. Comm. on Foreign Relations, History of the Committee, http://www.foreign.senate.gov/about/history/ (on file with the *Columbia Law Review*) (last visited Oct. 23, 2012) (giving broad history of Committee's role).

tional knowledge to do so effectively and efficiently. It therefore allows for comprehensive review of potentially ambiguous treaty terms while leaving the Senate free to conduct its daily business.

Second, this approach allows the Senate to give truly informed advice and consent. With access to the record, the Committee on Foreign Relations can give substance to unclear provisions, thereby giving the Senate a more complete picture of the treaty it is being asked to ratify. It also corrects the informational asymmetry and precludes the Executive from basing future interpretations on materials that were unavailable to the Senate at the time of ratification.

Finally, and perhaps most importantly, this framework provides certainty. The disputes outlined in this Note have caused domestic political disruptions and hampered the ability of the United States to conduct effective foreign policy. Legislating the proposed regime would address the concerns of both the Executive and Senate, avoid future disputes, and allow the important work of treatymaking to proceed without further distraction or delay.

CONCLUSION

The treaty power contains a unique constitutional mandate requiring the Senate and Executive to share the power it confers. Moreover, treaties, the products of its operation, are binding law both domestically and internationally. This duality renders the power exceedingly complex. As such, it is ripe for both separation of powers disputes and scholarly discussion. However, the scholarly literature has yet to address one such recurrent dispute: the role of treaty negotiating records in the Senate's advice and consent process. This Note fills that gap. Although a resolution is unlikely to come from the courts, the gravity of the issue and its implications for the ability of the United States to conduct foreign policy demand a resolution. Insofar as resolution of this issue will likely be left to the political branches, it is imperative that they have a full understanding of the debate. Such an understanding leads to the conclusion that while unfettered Senate access to negotiating records carries with it myriad grave risks and would potentially have a detrimental effect on the ability of the United States to negotiate treaties effectively, a total bar to access presents equally daunting pitfalls. The legislative solution proposed by this Note therefore seeks a balance between these two extremes, attempting to allay the concerns of both branches while seeking a middle ground upon which to facilitate future Senate ratification of treaties.

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