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Delegalization of Arms Control—A Democracy Deficit in De Facto Treaties of Peace?

Antonio F. Perez*

I. INTRODUCTION AND SUMMARY

Delegalization of arms control is now an accomplished fact. In this period of potential dramatic revision of the international order, it is not surprising that the US is seeking increased flexibility in pursuing several strategies, including the full use of military and technological advantages. The motivations behind this include US interests, as well as long run global interests. What may be surprising, however, is the potential risk to our democratic processes from delegalization of arms control—that is to say, the danger posed by reduced use of arms control treaties with built-in processes of transparency and democratic accountability. The potential risk is particularly apparent in those cases where arms control treaties function in effect as treaties of peace, alliance, or neutrality that arguably should be subject to the control of the constitutional treaty makers. Notwithstanding these concerns, this Article argues that on balance the constitutional text, structure, and history compel the conclusion that the democracy deficit risked by delegalization of arms control is adequately attenuated through continuing congressional participation in the arms control process and, in any event, outweighed by the need for a vigorous executive to exercise the role it assumed at the very beginning of this Republic when “regime change” in Europe was also the question of the day.

II. THE FACT OF DELEGALIZATION OF ARMS CONTROL: BOTH MULTILATERAL AND BILATERAL

The premise for this symposium, the trend toward delegalization of arms control, now seems to be undeniable. Delegalization is often understood by political scientists to be a complex phenomenon composed of normative obligations, more or less precisely defined, with delegation of authority to

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neutral third parties for rule elaboration, interpretation, and enforcement. Normative obligations invoke a compliance pull, and in those cases where normative obligations are more precisely defined, claims of violated expectations can be framed as breaches of those obligations. Delegation of fact-finding or interpretive authority ensures transparency and publicity to multiply the compliance pull of these normative obligations. Yet even under this definition, delegalization remains an amorphous concept. With respect to arms control, delegalization of both multilateral and bilateral treaties may be implicated.

It seems clear that the US is less prepared to enter into multilateral arms control treaties and evidences reduced commitment to existing regimes. The Comprehensive Test Ban Treaty was rejected by the Republican-controlled Senate in 1999. The executive branch has walked away from negotiations to add a verification protocol to the Biological Weapons Convention. After a spirited domestic and international debate, the executive branch has also withdrawn the United States from the ABM Treaty, which the Clinton administration had not so long ago tried to transform into a multilateral obligation either through interpretation or explicit amendment.

In turn, Russia announced that it would no longer consider itself bound by START II. Diminished commitment to the Treaty on the Non-Proliferation of

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5 Walter Dellinger, Constitutionality of Legislative Provision Regarding ABM Treaty: Memorandum for the Counsel to the President (Office of Legal Counsel 1996), available online at <http://www.usdoj.gov/olc/abmjw.pwfd> (visited Feb 24, 2003) (“There are serious doubts as to the constitutionality of a provision of a bill stating that the United States shall not be bound by any international agreement entered into by the President that would substantively modify the Antiballistic Missile Treaty with the Soviet Union, including any agreement that would add other countries as signatories or convert that bilateral treaty into a multilateral treaty, unless the agreement is entered pursuant to the President’s treaty making power. The provision intrudes on the Executive’s exclusive constitutional powers to interpret and execute treaties and to recognize foreign States.”).
6 See Wade Boese, Russia Declared Itself No Longer Bound by START II, Arms Control Today 16 (July–Aug 2002). By announcing that it was no longer bound by the unratified START II, Russia implicitly referenced its customary international law obligation to respect the object and purpose of an unratified treaty. Article 18 of the Vienna Convention of the Law of Treaties, to which the US is not a party, but may well regard as evidence of customary international law of treaties, requires a state not to “defeat the object and purpose” of a treaty pending entry into force until “it has made clear its intention not to become a party” to that treaty. See Vienna Convention on the Law of Treaties, reprinted in 8 ILM 679 (1969).
Nuclear Weapons ("NPT") is manifested in the lifting of nuclear sanctions and acceptance of Pakistani and Indian acquisition of nuclear weapons capabilities. However, US policy on the NPT should perhaps be interpreted in light of the need to reforge an alliance with Pakistan as a frontline state in the war against terrorism, rather than as a move toward diminished commitment to nuclear nonproliferation.

The delegalization tendencies of the Bush administration seem to extend not only to multilateral agreements, but to bilateral agreements as well. One might have thought that the mutual gains in cooperative security with our new Russian ally obtained through obligatory, precise, and fully transparent arms control commitments—such as through a detailed new arms control agreement—would not pose the same kinds of concerns as reliance on multilateral institutions, which by definition are broader and more intrusive upon national prerogatives. Nonetheless, a close review of the Strategic Offensive Reductions Treaty of May 24, 2002 ("SORT") shows that it too is an example of delegalization, given its lack of precision and transparency. In what appears to be a radical departure from previous arms control agreements, SORT makes no serious effort to define in precise terms the obligations of the parties for weapons reduction, focusing only on deployment; it also makes no effort to develop procedures which would force the parties to produce information or engage in normative debate about treaty compliance.

In effect, this lack of precision amounts to a decline in the level of obligation far below what previous arms control negotiations have achieved. This decline in obligation occurs because of the relationship between precision and obligation in the enforcement of arms control treaties. Obligation implies that one is capable of identifying conduct that violates a treaty norm. Lack of precision renders less credible any claim that a treaty norm has been violated, because such a claim requires a much more complex chain of legal arguments.

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7 See Jim Hoagland, Nuclear Enabler; Pakistan Today Is the Most Dangerous Place on Earth, Wash Post A35 (Oct 24, 2002).
8 See Treaty Between the United States of America and the Russian Federation on Strategic Offensive Reductions, Arms Control Today 9 (June 2002).
9 See Wade Boese, Senate Reviews U.S.-Russian Nuclear Reductions Treaty, Arms Control Today 13 (Sept 2002) (reporting Secretary of State Colin Powell's testimony before the Senate Foreign Relations Committee that "inspections and data exchanges of the 1991 START accord would provide enough information on Russian activities, at least up to December 2009, when it expires"). See also Peter Slevin, Ambitious Nuclear Arms Pact Faces a Senate Examination; Minimal Details and Huge Warhead Cuts Embody Bush Policy, Wash Post A8 (July 7, 2002) ("Gone are the covenants, caveats and vast appendixes typical of nuclear deals.").
than would be required if the treaty text were lucid and precise. Thus, the reduced precision of SORT, as well as its lack of mechanisms for transparency and normative discourse, provides compelling evidence for delegalization even in the context of bilateral arms control agreements.

A. THE THEORY AND PRACTICE OF ARMS CONTROL DELEGALIZATION

Why arms control delegalization is taking root is, on some accounts, less clear. A realist account of arms control delegalization would argue that the United States should use its current relative power and supremacy to protect national security in light of increased threats from weapons of mass destruction. Realists understand that the ascendancy of any one nation is fleeting and historically unique, and should be exploited while the opportunity remains available. Multilateral institutions should only be resorted to when power is no longer sufficient to achieve national objectives. This relative power could be most effectively maximized either through nonlegal arrangements or, if necessary, bilateral legal commitments in which US negotiating advantages would be maximized. Alternatively, a so-called ideational or constructivist theory might well focus on the role of evangelical Christianity's world-reforming vision in the Bush administration's national security strategy. Finally, the decline in obligation and precision of arms control agreements may also be better understood in terms of a so-called second image or domestic politics explanation of treaty legalization, focusing on the delegation dimension of legalization. Is delegalization of arms control at the international level an executive branch backlash against excessive legalization at the domestic level? That is, the domestic politics explanation would consider the ABM Treaty controversy as having resulted from an executive branch reaction to Congress' ratification resolution of the chemical weapons convention.

Laurence Helfer identifies two key implementation strategies of the liberal theory of international law, which recognizes the importance of domestic politics: 1) incorporation of international law into domestic legal processes; and

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10 See George W. Downs, David M. Rocke, and Peter N. Barsoom, *Is the Good News About Compliance Good News About Cooperation?*, 50 Intl Org 379 (1996) (arguing that the appearance of increased compliance often masks a regime design calculated to reduce the level of obligation below the point where there is a risk of noncompliance).


2) supranational judicial review.Both of these strategies rely on judicialization for delegation of treaty definition, elaboration, and enforcement functions. The delegation function is defined as invoking neutral, third party review. But this may be too narrow a definition. Delegation of these functions may well be made to a nonneutral party or to a nonjudicial organ, such as the legislative branch. If the legislative branch is incorporated into the process of treaty definition, elaboration, and enforcement, its responsibilities will necessarily be carried out through legislation. Such overlegalization has been identified by Helfer as the source of a potential backlash response by the principals entering into the treaty. Robert Putnam’s central insight—that international negotiations are two-level games in which negotiators are negotiating with external partners at one level and simultaneously with domestic constituents at another level—can be extended to treaty implementation, breach and withdrawal questions. Thus, one can understand arms control delegalization as the reduction of delegation to a quasi-neutral, quasi-third party—that is, the legislative branch of the US government.

In recent years, largely in response to the Clinton administration’s decision not to submit the WTO Agreement to the Senate as an Article II treaty, commentators have debated whether in general Article II treaties and congressional-executive agreements are constitutionally interchangeable. Constitutional lawyers are really only beginning to focus on the delegation dimension of this analysis. Even if Article II treaties and congressional-executive international agreements are constitutionally interchangeable, they are certainly distinguishable in terms of the degree of delegation they entail.

For delegations to the Senate, the special supermajority requirement applicable to Article II treaties receiving advice and consent to ratification is comparable to the special supermajority requirement for constitutional amendment processes. Moreover, the Senate’s special role in giving advice and

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13 Id at 1848, and more generally throughout.
17 Note that for purposes of this Article, the Senate refers to the Senate acting under supermajority voting rules in its capacity as an Article II treaty maker, while the Congress refers to the House and Senate together acting under simple majority voting rules governing normal lawmaking.
consent to treaty ratification does not exhaust the potential for delegation to the Senate, given its continuing role in treaty oversight and amendment.\(^8\) Indeed, one-third of the Senate will be able to block future treaties if its views concerning the implementation of prior treaties are ignored by the executive branch.

Similarly, the Congress as a whole, through its appropriations power and oversight responsibility, could also operate to some degree as a delegate of responsibility for evaluating treaty compliance.\(^9\) In the case of congressional-executive agreements, a majority of both houses of Congress could block future congressional-executive agreements when their views concerning the implementation of prior congressional-executive agreements are ignored. Thus, even if the Senate approval process functions as a more formidable check on executive branch discretion, the potential role of the Congress as a whole should not be ignored. Indeed, it is possible that where the Senate supermajority requirement does not further democratic deliberation, but rather permits a powerful minority faction to block critical national decisionmaking, bicameral consideration of an issue via the congressional-executive agreement channel will more effectively further deliberative democracy than would the Article II treaty route.

Finally, the Senate or the Congress may still perform oversight and other checking functions by normal political means, whether or not oversight is explicitly delegated to them. For example, the Senate may link executive branch ambassadorial nominees, or the Congress may link appropriations requests, to executive branch implementation of a particular treaty or related treaty obligations. These political means are available even in the case of sole executive agreements, despite the fact that neither the Senate nor the Congress can claim a right to influence the implementation of these agreements as they do not participate in these agreements' initial authorization. This analysis brackets, of course, the question of whether the Senate or the Congress is constitutionally

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authorized to exercise its powers on the basis of conditions that are not germane to the exercise of those powers.

In sum, with certain caveats and qualifications, the move from Article II treaty, to congressional-executive agreement, to sole executive agreement, evidences a move toward reduced domestic delegation and, correlatively, reduced legalization of arms control policy for the United States.

B. DOMESTIC DELEGALIZATION AS A DEMOCRACY DEFICIT

One consequence of delegalization by means of reduced domestic delegation is a possible decrease in transparency and accountability—in other words, a potential democracy deficit in US arms control policy commitments. One significant consequence could be a reduction in the public’s commitment to arms control agreements, which is in turn a critical factor in external perception of the reliability of the nation’s commitments. Perhaps more importantly, our theory of government itself commands that the people bear ultimate responsibility for the survival and success of the nation. This responsibility is clearly implicated in US decisions concerning war and peace, as well as armament and disarmament.

Briefly, decreased delegation imperils both the quantity and quality of the democratic debate through which arms control agreements are legitimated. The precise nature of this risk requires explanation, however, for it is by no means self-evident that political transparency and accountability require that public policy be discussed and debated in legal or quasi-legal terms. Compared to the Congress, full-blown Senate advice and consent to an international agreement does facilitate a deeper understanding of the precise nature of the commitment. This is because, ceteris paribus, persuading a Senate supermajority, as opposed to a simple Congressional majority, necessarily requires the production of additional information, because the concerns of a greater number of views at the margins must be addressed. The articulation of increased information and standards related to the implementation of the treaty, moreover, is more likely to generate commitments of a less transient nature. This is because layers of argument will be added to the case for the treaty commitment, thus implicating values and principles of a more permanent nature. As a whole, the Senate and its members serve for longer periods, which individually and collectively enables them to focus on the long-term effects of their policy choices. Debate over a treaty may well function as a constitutive process for the political community, as obtaining the support of a supermajority may well require a level of public justification that compels the political community to develop an understanding of the treaty’s role in fashioning the commitments and interests of the nation. That understanding may well take the form of a binding legal commitment in the treaty, either express or implied through the cumulative effect of its particular provisions.
Once the legal character of these commitments and value choices is established, subsequent oversight may take a more principled form, facilitating democratic debate that is structured, in part at least, in terms of the long-term interests and values embedded in the prior decision to make a legal commitment. In short, the argument for domestic delegation suggests that the Senate may play a role parallel to the role played by the Supreme Court in ensuring that policy implementation conforms to higher order, albeit nonconstitutional, values, adopted as law by the supermajoritarian political process. Practically speaking, the ability to frame issues of treaty compliance in legal terms will enable elite decisionmakers who are skilled in legal discourse to communicate to the public that treaties require more sustained consideration, as well as greater attention to long-term implications, than do ordinary political questions. In other words, the Senate’s role can signal to the people that a question demands their full attention.

The case for demanding the people’s special attention for arms control treaties is particularly strong. The process of shaping arms control policy may well reinforce alliances or exacerbate adversarial relationships grounded in ideology rather than interest. Reducing the domestic role in the oversight process would reduce the level of transparency in national security policymaking by diminishing the opportunity for Congress to request a reasoned justification from the executive branch for how US policy comports with other countries’ understandings of US obligations. The likelihood, as well as the legal justifiability, of other countries’ adverse responses to US conduct will reveal information about the nature and reliability of US treaty partners, the strength of our international relationships, and the potential for conflict from a given course of action. Indeed, even when US implementation of a treaty is itself merely a question of discretion, the effect of US practice in shaping the meaning of the treaty may have implications for claims that can later be made about the compliance of other parties to a treaty. Reduction in the clarity and transparency of public debate as to these issues may have correlative effects on political accountability. Political actors may have less incentive to ask precise questions about US policy when potential responses from the executive branch are more likely to come in the form of subjective and unverifiable claims of national interest, rather than relatively objective and determinable claims about US compliance with international obligations. In sum, the benefit of legalization through the partial domestic delegation of treaty implementation is that increased transparency and democratic accountability will operate through a more studied and refined domestic political process, yielding more democratic and deliberative decisionmaking in this vital area.

This is not to say that only legalization can secure the benefits of full democratic engagement on an issue. The political community surely has the resources to engage in a debate about the wisdom of continued compliance with
a treaty and, assuming that alternative courses of action are each treaty-compliant, to determine how to exercise that pure policy discretion. In such cases, the level of domestic legalization is not in tension with democratic transparency and accountability. Alternatively, if the treaty in question were completely lacking in precision, then the democratic gains to be derived from domestic legalization would be trivial. For example, it is possible that the Senate’s advice and consent to ratification of SORT would yield no greater transparency and accountability of executive branch decisionmaking than congressional oversight of SORT implementation through the appropriations power. Thus, a constitutional treaty, like SORT, could fail to specify US commitments with sufficient precision, such that meaningful delegation to Congress through continuing oversight could not take shape.

That said, whether a congressional role is an adequate substitute for a constitutional treaty is, as a matter of US constitutional law, a separate question from whether, from the domestic standpoint, the loss of transparency and accountability due to delegalization of arms control can be sufficiently attenuated. At the extreme point, even where there would be no democratic gains from domestic legalization in terms of subsequent oversight, there would still be democratic gains in terms of transparency and accountability for the initial policy decision as to whether to enter into a treaty. At a minimum, then, one might conclude that some level of congressional participation is required, as a matter of constitutional law, for a US decision to enter into an arms control agreement binding as a matter of international law. It is possible, moreover, that an assessment of the constitutional text, structure, and history will compel the conclusion that Senate advice and consent is required irrespective of the degree of precision of the treaty in question. This Article now turns to that set of questions.

III. EXECUTIVE ENERGY AND DISCRETION VERSUS POLITICAL TRANSPARENCY AND ACCOUNTABILITY THROUGH SENATORIAL PARTICIPATION: MUST THE SENATE BE INVOLVED IN ARMS CONTROL?

If we examine arms control delegalization through the prism of a separation of powers analysis, then the critical question for US lawyers is whether an executive branch decision to delegalize arms control agreements is within executive powers or undercuts a constitutionally-mandated congressional role. For purposes of this Article, however, the difficult question of whether arms control domestic delegalization can proceed all the way to sole executive agreements is deferred, although the force of the argument for executive branch energy and discretion would seem to be applicable in that case as well, subject of course to Congress’ exercise of its own powers. Because the Senate and
Congress have taken conflicting positions on the application of the interchangeability doctrine to arms control agreements, this Article will focus on the narrow question of whether, assuming some congressional role is constitutionally mandated, it is the exclusive prerogative of the Senate, or whether it could be exercised by the Congress in the case of the SORT.

The Congress in enacting the Arms Control and Disarmament Act specifically provided that arms control agreements may be concluded only pursuant to Article II or congressional legislation, thus implying that, in some circumstances at least, congressional-executive agreements are constitutional. Support for a congressional role, to the exclusion of the Senate, might be grounded in Congress' authority to appropriate funds to "support Armies" but not for "a longer Term than two Years." Admittedly, a similar temporal limitation does not apply with respect to the Navy, thereby suggesting that congressional involvement in management of the army may have been required because of the special implications for democratic governance of a standing army. Nonetheless, because of the foreign relations and national security significance of any component of the military, Congress may still be able to rely on the express provisions relating to the army to insist on participating in arms control decisions. This is because, in the modern context, arms control decisions bear on the creation of a garrison state, which the Framers sought to avoid through the requirement of continuing congressional review of the standing component of the US military.

On the other hand, the Senate, in giving its advice and consent to the Agreement on Armed Conventional Forces in Europe, took the position that international agreements that "reduce or limit the armed forces or armaments of the United States in a militarily significant manner" can only be approved

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20 See Arms Control and Disarmament Act, Pub L 105-277 § 303, 112 Stat 2861 (2002), codified at 22 USC § 2573. For discussion, see Phillip R. Trimble and Jack M. Weiss, The Role of the President, the Senate and Congress With Respect to Arms Control Treaties Concluded by the United States, 67 Chi Kent L Rev 645 (1991). See also Phillip R. Trimble and Alexander W. Koff, All Fall Down: The Treaty Power in the Clinton Administration, 16 Berkeley J Intl L 55, 59–60 (1998) (albeit citing no pure arms control agreements, citing politico-military agreements, such as those providing for the annexation of Texas and Hawaii and termination of World War I after the Senate rejected the Versailles Treaty, as pertinent examples); Alan Axelrod, American Treaties and Alliances 92 (Congressional Quarterly 2000) (summarizing the joint resolution of Congress of July 2, 1921, authorizing President Harding to enter into the US–Germany Treaty of Peace of August 25, 1921 and approving provisions of Treaty of Versailles other than those found objectionable by the Senate).

21 US Const, art I, § 8, cl 12.


pursuant to the Article II treaty power. Given the conflict between the Congress and the Senate, it seems prudent to evaluate whether the Senate's position can be sustained. Such an evaluation should take place in the context of the best possible case for demanding, as a constitutional matter, the level of delegation that would accompany a mandatory Senate role as an Article II treaty maker.

This Article considers the concrete case of SORT, because the executive branch has taken the striking position that senatorial advice and consent to ratification is not necessary or desirable. The executive branch has taken this position largely because the SORT commitments entail weapons reductions programs that the US already intends to implement as a matter of national policy. Put another way, the executive branch contends that the larger shift in the US–Russian relationship signaled by abandoning START II, coupled with ABM Treaty withdrawal, does not require an additional policy judgment by the Senate. The President, it turns out, has submitted SORT to the Senate (although, as already noted, the transparency and accountability effects of this particular agreement are quite modest), not because he felt obligated to do so based on domestic constitutional law, but rather to fulfill a commitment to his Russian negotiating partner, President Vladimir Putin, to employ the same legal form as prior US–Russian arms control agreements. Arguably, because of the special significance of START II, if the Bush administration is correct as a matter of constitutional law that it was not required to submit SORT to the Senate for advice and consent to ratification, then surely it is also correct that any democracy deficit caused by some degree of arms control delegalization in other contexts is also within constitutional limits.

In brief, the case for required senatorial advice and consent to SORT ratification can be grounded on constitutional text, structure, and history, because of the need for Senate involvement in the policy shift that SORT represents. There is, however, a nontrivial argument that the Senate has already

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25 One academic explanation of the use of the Article II pathway, rather than congressional-executive agreements or sole presidential agreement pathways to treaty-making, is that the greater difficulty of achieving an Article II treaty enhances the credibility of the commitment thereby signaled, which turns out to be particularly important in the arms control setting. See John K. Setear, The President's Rational Choice of a Treaty's Preratification Pathway: Article II, Congressional-Executive, or Executive Agreement, 31 J Legal Stud S5, S27–28 (Jan 2002). It is not clear, however, whether the SORT case supports this argument, because at the same time that the President sought an Article II treaty, the substance of the commitment was eviscerated. See Editorial, A New Nuclear Treaty, Wash Post A20 (May 14, 2002) (stating that "critics argued ... that, though Mr. Bush had granted Mr. Putin the treaty he wanted, he had stripped it of real substance").
given its consent to the policy choices upon which SORT is predicated through the conditions the Senate imposed in its resolution giving advice and consent to ratification of the Treaty on Conventional Armed Forces in Europe ("CFE"). If so, then without reaching the general question of whether an Article II treaty is required for arms control agreements generally, one could still conclude that the President was correct on the merits of whether advice and consent is required for SORT. The broader rebuttal argument, however, sustaining the President's constitutional position, is that arms control agreements like SORT by their very nature seek to exploit the possibilities built into our Constitution for executive energy and discretion. Such energy and discretion is precisely what is needed in the kind of international environment the United States now faces. A checking function requiring concurrence of a supermajority of the Senate would instead paralyze the President and undercut his ability to exercise the full executive power the Constitution has granted him.

A. THE SPECIAL STATUS OF MODERN ARMS CONTROL AND SENATORIAL PARTICIPATION IN THE DECISION TO RATIFY SORT

In framing the issue of the Senate's right to participate in the decision to ratify SORT, one might first ask whether the Senate was involved in ratifying a Treaty of Peace ending the Cold War. A former National Security Council staff member and law professor has called the Four-Power Agreement reunifying Germany in effect a Treaty of Peace between the US and Russia. If so, surely the arms control arrangements related to the Cold War settlement, such as START I, START II, and now SORT, are in pari materia with that Treaty of Peace. It is an open question whether treaties of peace must be submitted to the Senate for advice and consent to ratification. James Madison, writing as Helvidius in opposition to President Washington's Neutrality Proclamation in respect to the French Revolutionary wars, maintained that the power to conclude peace could not reside in the executive alone. Woodrow Wilson seemed to subscribe to this position in seeking congressional approval to end World War I by treaty after the failure of the Senate to accept the Versailles

26 See note 24.
27 See generally Philip Bobbitt, The Shield of Achilles: War, Peace, and the Course of History, ch 23 (Knopf 2002) (treating the Treaty of Paris formally ending four-power occupation of Germany and consenting to German reunification as a treaty of peace—ending, not World War II, but rather the long Cold War between the US and USSR—and having international "constitutional" significance).
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Treaty, although Supreme Court dictum has suggested otherwise. That said, if the Treaty of Peace ending the Cold War was submitted to the Senate for its advice and consent, then any subsequent arms control arrangements modifying the Treaty of Peace arguably should be returned to the Senate for its advice and consent.

If the Senate must be involved in the decision whether to terminate war and establish peace, then the right historical analogy might well be President Monroe’s agreement with Great Britain for the partial demilitarization of the Great Lakes and Lake Champlain (the “Rush-Bagot Agreement”). The Rush-Bagot Agreement was the equivalent of an arms control agreement in its day, and a logical extension of the Treaty of Peace settling the War of 1812 with Great Britain. Although initially concluded as an executive agreement, the Rush-Bagot Agreement was submitted a year later to the Senate for its advice and consent to ratification.

Admittedly, some argue that the precedent is ambiguous, suggesting that submission to the Senate ex abuntante cautela does not undercut the effect of Madison’s initial decision not to submit the treaty to the Senate prior to its entry into force. Indeed, it may have been that President Monroe’s subsequent

30 See Ludecke v Watkins, 335 US 160, 168 (1948) (“The state of war’ may be terminated by treaty or legislation or presidential proclamation.”).
31 But see Memorandum of Christopher Schroeder, Acting Assistant Attorney General, Office of Legal Counsel, to Alan J. Kreczko, Special Assistant to the President and Legal Adviser to the National Security Council, Validity of Congressional-Executive Agreements That Substantially Modify the United States Obligations Under an Existing Treaty 1, Opinions of the Office of Legal Counsel, Department of Justice (Nov 25, 1996), available online at <http://www.usdoj.gov/olc/treaty.top.wpd> (visited Feb 24, 2003) (concluding that “[i]t lies within Congress’ power to authorize the President substantially to modify the United States’ domestic and international legal obligations under a prior treaty, including an arms control treaty, by making an executive agreement with our treaty partners, without Senate advice and consent”). Even though the Schroeder Memo makes broad claims for a Congressional Treaty Power, it acknowledges that Congress has only “some” power in this area, id at 8–9, and that this power is arguably greatest only when exercised incidentally to another enumerated power, such as the War Power, id at 8 n 17.

Of course, one can draw the logical inference that the war power itself operates as authority for a congressional role, indeed perhaps even to the exclusion of the Senate and perhaps sole presidential agreements, in all arms control treaties. This argument would be premised on the ground that all questions of force posture could well conduce to war or peace. This broad-ranging argument concerning the nature and constitutional allocation of the war power must be set aside, given the narrower purposes of this Article.

33 See id at 805 n 5, citing Act of Feb 27, 1815, ch 62, 3 Stat 217 (noting that “Rush-Bagot may have actually been a congressional-executive agreement [despite the later ratification] since Congress had earlier authorized the President to sell or lay up all the armed vessels on the
decision to submit the treaty to the Senate was connected to the fact that the British Minister actually asked Secretary of State John Quincy Adams whether the President would do so.34 Notwithstanding the President’s initial answer that he did not feel required to do so, assuaging British concerns about the validity of the US commitment may have motivated the President to seek the Senate’s advice and consent as a matter of political reinsurance. If so, some might argue that early practice with respect to the Rush-Bagot Agreement is precedent for the executive branch’s current position that it was not constitutionally required to submit SORT to the Senate for advice and consent to ratification, and that its decision to do so reflects a political judgment of the desirability of assuaging Russian concerns rather than evidence of a constitutional requirement.

Nonetheless, the fact that upon reflection the President did request senatorial participation is arguably attributable to his recognition that, like the settlement of the Cold War, Rush-Bagot had important implications for US force structure and force deployments. It embodied the military consequences of the political settlement of the war with Great Britain, which, like the Cold War, was in effect a forty-year war, dating back to Concord and Lexington.35 Peace with Great Britain enabled a major revision of US military and diplomatic strategy. Securing the northern border of the United States allowed her to redirect her energy toward the south and the west. Indeed, premised on this modus vivendi, the announcement of the Monroe Doctrine a few years later represented a strategic alliance between the US and Great Britain to ensure the liberation of Spanish, Portuguese, and French colonial possessions in the New World. This strategic cooperation in facilitating regime change in the New World in the first third of the 19th century represented a policy shift of enormous magnitude, with implications for security, trade, and culture that went far beyond the direct budgetary impact of Great Lakes demilitarization. It is hard to imagine US territorial expansion to the Pacific through the Mexican-American War without the implicit US–UK condominium in the Western Hemisphere. Indeed, the new strategic equation may have influenced US understanding of its international legal obligations as a relatively new member of the community of

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35 See Samuel Flagg Bemis, John Quincy Adams and the Foundations of American Foreign Policy 231 (Knopf 1949) (noting that the US and UK agreed to secure the peace by allowing the US to hold Canada “hostage” for US coastal cities, which remained for some time at the mercy of the British Navy). Like the ABM Treaty, then, Rush-Bagot established peace between the US and UK through their mutual assured vulnerability.
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states. For example, one should view Secretary of State Daniel Webster’s articulation of the so-called Caroline test for preemptive self-defense in the context of demilitarization of the Great Lakes. This is because the narrowness of Webster’s test for preemptive action may have been predicated on the strategic reality that neither British nor American force deployments in that Niagara River theater of operations presented any genuine risk to the security of either state.

1. SORT Submission as Fulfillment of the Requirement for a New Senatorial Policy Choice

On this line of reasoning, START I and II represent the military component of the implicit Treaty of Peace between the US and former Soviet Union ending the Cold War. One of the early manifestations of that treaty is Russian acquiescence in US force deployments in the southern former Soviet republics and US and Russian cooperation in the military campaign in Afghanistan itself. Even if never ratified by Russia because of the continuing controversy concerning the ABM Treaty, senatorial advice and consent to START II ratification defined the terms under which the US determined the force posture consistent with settlement of the Cold War. Congress continued to hold a broad interpretation of the ABM Treaty, precluding the kind of development and testing sought by the Reagan and Bush administrations. This resistance arguably signified Congress’ continued commitment to the compact embedded in arms control regimes since the ABM Treaty was concluded: only limited missile defense as an inducement to offensive reductions. Conclusion of SORT in an environment in which President Bush had effected the withdrawal of the United States from the ABM Treaty signaled a revolution in arms control policy. If this line of reasoning is sustainable, the Senate should now be able to approve or disapprove any shift from the policy adopted under START by the same two-thirds vote it enjoyed in the context of its prior ratification of US arms control policy.

2. The Senate’s CFE Resolution of Ratification as a New Policy Choice Obviating Submission of SORT to the Senate

Arguably, however, the senatorial understanding underlying the ABM–START bargain was revoked by the Senate’s resolution of ratification of the

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36 Damrosch, et al, *International Law: Cases and Materials* at 922–23 (cited in note 6), quoting John Moore, 2 *Digest of International Law* 412 (1906) (responding to the British claim that the sinking of a US vessel, the Caroline, within US territory was justified as lawful self-preservation and self-defense, Webster asserted that the use of self-defense should be confined to situations in which a government can show that the “necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation”).
CFE Treaty in 1997. In that resolution, the Senate insisted that any changes to the ABM Treaty needed to be submitted to it for its advice and consent to ratification. The Senate asserted its right to determine whether or not to expand the ABM Treaty to include some of the newly independent states of the former Soviet Union—and perhaps more significantly, to confirm the continued viability of the ABM Treaty with respect to the Russian Federation as sole successor of the former Soviet Union. At a minimum, the Senate’s resolution cast doubt on the continued status of the ABM Treaty as an international obligation of the United States prior to President Bush’s invocation of the extraordinary circumstances withdrawal clause. At a maximum, once the President’s brought the CFE Treaty into force in accordance with the Senate’s resolution, the executive branch arguably acquiesced in the view that the ABM Treaty no longer bound the United States. In any event, President Bush’s decision to invoke the extraordinary circumstances withdrawal clause of the ABM Treaty now has sealed the fate of the former Cold War policy of linking offensive reductions to a commitment not to develop defensive capabilities.

Arguably, one should not attach too much weight to this argument. It may be questioned whether the condition was a constitutionally permissible exercise of senatorial discretion. The Senate’s claim of authority might rely on the premise of a required senatorial role in treaty interpretation and treaty termination. The interpretive question was whether, as a matter of international law, succession to the bilateral ABM Treaty could take the form of a multilateral arrangement without requiring a new expression of an intention to be bound by each of the treaty parties. This novel question of treaty interpretation and the operation of the law of treaties was not a question requiring a new policy judgment by the Senate if the President were to conclude, as a matter of international law, that no new intention to be bound was required. A senatorial role, on this assumption, would then need to be predicated on a treaty law interpretation power that would be exercised in conflict with the President’s own interpretation. Even if it ever existed, such a power now seems quite doubtful except in the most extraordinary cases. If, then, the Senate’s conduct were

38 See generally Trimble and Koff, 16 Berkeley J Intl L 55 (cited in note 20) (analyzing whether such a condition is a constitutionally permissible limitation on executive discretion).
39 Compare, for example, Treaty of 1832 between the United States and Russia, S 161, 62d Cong, 2nd Sess (Dec 18, 1911), in 48 Cong Rec 453 (Jan 17, 1912), with Restatement (Third) of the Foreign Relations Law of the United States § 339, cmt a (1987) (expressing modern position based on sustained practice including sole presidential withdrawal in a number of cases, but suggesting constitutional limits to the exercise of this power, including the case where withdrawal “might create serious danger of war”).
grounded on a power to interpret treaties, the condition imposed by the Senate in the CFE Treaty arguably would be of questionable constitutionality.

That said, the Senate’s condition in the CFE resolution of ratification quite sensibly could have relied, not on the Senate’s own competence to interpret a treaty, but rather on the executive branch’s own interpretation of the status of the ABM Treaty. This is because, when the executive branch stated its own view that new agreements with the successor states of the former Soviet Union were required in order for them to be bound by the ABM Treaty, it implicitly conceded the dissolution of the ABM Treaty. Thus, the Senate’s condition was not necessarily predicated on its own interpretation of the ABM Treaty, but rather on the President’s interpretation and the consequences of that interpretation as a matter of US constitutional law. Under this view, the Senate was authorized, indeed obligated in the exercise of its own powers, to seek to constrain the executive branch from entering into international obligations for which, under the executive’s own view of the applicable international law, it had no constitutional authority to bind the United States. The executive’s view was, no doubt, grounded on a range of technical and diplomatic considerations involving nuclear nonproliferation and arms control policy with respect to the former Soviet Union. It is doubtful that, in a fast-changing international environment, these factors would have been calculable except by an organ, such as a unitary executive, capable of conceptualizing and implementing complex negotiating strategies over time.

If the Senate’s claim had been predicated on the executive’s own interpretation of the status of the ABM Treaty, this approach would reflect the Senate’s awareness of the limits on its role in foreign affairs questions requiring the exercise of presidential discretion. Applied to the particular case of SORT, let us assume for the sake of argument that the President concluded that any US obligations under SORT were in effect already established under existing US arms control commitments. If the Senate believed that deference to executive branch interpretation of international law was required in the CFE case and acted accordingly, then under its own precedent it should have to defer to the President’s judgment that SORT did not require the Senate’s advice and consent.

**B. EXECUTIVE ENERGY AND DISCRETION**

The constitutional sources supply overwhelming evidence that, in times of international crisis, it is only the President who can exercise what John Locke called the “federative” power. This power, when combined with the executive function, has in our constitutional tradition yielded a healthy deference by other

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constitutional organs to executive discretion. In the famous debate between Alexander Hamilton and James Madison concerning Washington’s Neutrality Proclamation (as proxies for George Washington and Thomas Jefferson, respectively), it seems well settled that Pacificus won the day in light of Jefferson’s and Madison’s own practices when each in turn became President. Washington’s authority as Commander-in-Chief to avoid war carried within it the seeds of presidential authority to take steps that risked war. Jefferson used the federative power to justify intervention against the Barbary Pirates, and also the purchase of the Louisiana Territory, which extended the US border and thereby increased the risk of foreign conflict. These examples suggest that the risks flowing from the vigorous exercise of the federative power cannot be separated from the benefits that would justify such action by the President.

Thus, Washington’s Neutrality Proclamation is evidence, not for a presumption of presidential passivity, but rather for the exercise of presidential discretion in a fast-changing international environment. The convoluted course of the French Revolution had, by 1793, turned in the direction of external subversion and regime change, drawing Europe into two camps over the future of monarchical government. Washington’s Proclamation sought to separate the US from this titanic struggle, not because the US should be isolationist as a matter of principle, but rather because an external policy of neutrality was the policy best calculated to ensure the security of the fledgling United States and the survival of its new form of government. There seems to be no doubt this is the role the constitutional plan envisaged for the President, because the office was designed with someone of Washington’s capacities in mind.

This view of the President’s constitutional role was confirmed by the Destroyers for Bases Deal, whereby President Franklin Roosevelt used his presidential power to strengthen the US’s ally, the British, during World War II. He thereby made war with the German Reich almost unavoidable, further limiting whatever may have been left of the Congress’ exclusive prerogative to declare war under the Constitution. Indeed, in these circumstances Washington may well have concluded, as Roosevelt did in 1940, that the nation’s security and the survival of its form of government required regime change in Germany. If so, it was necessary that the President be granted discretion as Commander-in-Chief

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41 See generally id at 15–18.
44 See Robert H. Jackson, Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers, 39 Op Atty Gen 484 (Aug 27, 1940) (relying on the Commander-in-Chief power and “the control of foreign relations which the Constitution vests in the President as a part of the Executive function”).
to forward deploy US forces pursuant to the Destroyers for Bases deal, notwithstanding the increased risk of conflict with Germany—just as he would have had the discretion to choose the path of neutrality if he had concluded again that neutrality was the best course. Deference to presidential energy and discretion cannot operate only as a ratchet toward accepting the risks of too peaceful a strategy, thereby failing to accept the risks of too aggressive a strategy. In principle, either neutrality or belligerency may produce decreased national security. The President's judgment regarding these prudential questions depends on a difficult and complex assessment of domestic and international circumstances. Short of some obvious abuse of power—for example, if the President used external conflict in order to justify the suppression of the civil liberties of Americans at home— the discretion accorded the President cannot turn on the direction in which he exercises that discretion.

IV. CONCLUSION

The need for executive branch energy and discretion was at the root of the creation of a unitary presidency. It has survived the impeachment trials of Andrew Johnson and Bill Clinton, as well as Richard Nixon's resignation, and throughout the Cold War enabled the executive branch to exercise the energy and discretion necessary to preserve the American way of life. In the current crisis facing the United States, the executive branch needs the capacity to negotiate and enforce both bilateral and multilateral arms control agreements with rogue states possessing chemical, biological, nuclear, and radiological weapons capabilities. To require subsequent approval from a supermajority of the Senate, or even a simple majority of both Houses of Congress, could cripple the President's capacity to advance the US agenda. But advance consent would require a delegation of authority so broad that congressional oversight would essentially be removed from the legalization process. Indeed, it could even undermine crucial cooperation between the executive and legislative branches by generating false expectations, misunderstandings, and mistrust. There could be cases where secrecy—so essential to national policymaking in the arms control context—would be compromised through excessively transparent decisionmaking, a risk the Framers understood and attempted to address in the

45 See Youngstown Sheet & Tube Co v Sawyer, 343 US 579 (1952) (holding that neither the President's Article II powers nor his powers as Commander-in-Chief of the Armed Forces justifies seizure of private businesses to settle labor disputes, even when the business is arguably vital to national defense).

constitutional design. In short, meaningful delegation and legalization can be purchased only at the price of efficacy.

Of course, as the Court wrote with respect to the power to abridge private contractual rights in the face of the Great Depression: "Emergency does not create power. Emergency does not increase granted power or ... diminish the restrictions imposed upon power granted." But emergency does call for constitutional comity, so that the branches of our government authorized to perform functions for the sake of the nation are not restrained from doing so by a coordinate political branch's refusal to exercise restraint in the application of its own powers. We may need to accept a return to the more vigorous executive branch exercise of the foreign affairs powers originally envisioned under our Constitution, after a false and brief sunlight of increased transparency and accountability in foreign policy decisionmaking at the end of the Cold War. But we can still rejoice in the fact that, even if the Senate under Article II and the Congress under Article I play diminished roles in foreign policymaking, Article III courts will continue to ensure that presidential power abroad is not turned against legitimate dissent at home.

47 See Federalist 64 (Jay), in Jacob E. Cooke, ed, The Federalist Papers 432, 434–35 (Wesleyan 1961) (observing that the need for secrecy and dispatch were accounted for in the framing of the Constitution).