

The Unconstitutionality of Long-Term Nuclear Pacts that are Rejected by Over One-Third of the Senate

Andrew T. Hyman *

In recent years, some Americans have invented the doctrine that treaties and executive agreements are wholly interchangeable The Committee on the Judiciary cannot agree that the President acting alone, or the Congress and the President acting together, should bypass the treaty procedure whenever the approval of two-thirds of the Senators present and voting appears doubtful. The treaty clause is an integral part of the Constitution, which both Senators and Representatives have taken an oath to protect and defend.¹

I. INTRODUCTION

The United States Constitution confers on the President the "Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present Concur."² Some scholars have suggested that the President and Congress can circumvent this clause requiring a two-thirds Senate majority vote simply by labeling all international accords "agreements" instead of "treaties."³ Not-

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¹ S. REP. NO. 1716, 84th Cong., 2d Sess. 9 (1956) (this report was submitted by Senator Dirksen on behalf of the Judiciary Committee). As indicated by the text accompanying this note, the report took issue with those who say that the Constitution allows for complete interchangeability of treaties and executive agreements. The main theme of this report, though, was that the Constitution should be amended to explicitly ban accords inconsistent with the Constitution.

² U.S. CONST. art. II, § 2, cl. 2.

³ See generally Myres S. McDougal & Asher Lans, *Treaties and Congressional Executive Agreements: Interchangeable Instruments of National Policy: I*, 54 YALE L. J. 181, 261 (1945). The views of McDougal and Lans are in marked contrast to the pre-1940 consensus. See generally Francis B. Sayre, *The Constitutionality of the Trade Agreements Act*, 39 COLUM. L. REV. 751, 755 (1939) (Assistant Secretary of State Sayre distinguished between treaties on the one hand and executive agreements covering adjustments of detail or temporary arrangements on the other hand). Also see generally Edwin Borchard, *Shall the Executive Agreement Replace the Treaty*, 53 YALE L. J. 664 (1944) (arguing against the notion of complete interchangeability of treaties and executive agreements).

withstanding this fashionable doctrine of complete interchangeability, and despite the haziness of the line separating treaties from agreements, many major accords necessarily fall within the meaning of the word "treaty" as used in Article II of the Constitution, just as many routine or short-term accords obviously need not be Article II treaties.

In 1987, President Reagan presented to Congress a proposed nuclear cooperation "agreement" with Japan.⁴ More than one-third of the Senate voted in opposition to the pact.⁵ Nevertheless, this U.S.-Japan Pact was enforced, in violation of the Article II treaty clause which had prevailed since 1787.

According to its terms, the U.S.-Japan Pact is ordinarily irrevocable and "shall remain in force for a period of thirty years."⁶ During this time the United States and Japan are supposed to cooperate in the production of huge quantities of weapons-usable plutonium, for use in the world's first commercial-size breeder reactors outside of Russia. President Clinton sees merit in a worldwide ban on plutonium production, but the U.S.-Japan Pact is impeding U.S. support for such a ban.⁷ Meanwhile, the European nuclear agency (EURATOM) is requesting the same unprecedented long-term concessions that the United States was willing to make to Japan,⁸ with negotiations currently in process.

The remainder of this article will not address the merits of whether accords like the U.S.-Japan Pact warrant support, or whether advocates of a worldwide ban on plutonium production have the better

⁴ H.R. DOC. NO. 128, 100th Cong., 1st Sess. 5 (1987). This agreement was transmitted to Congress pursuant to the Atomic Energy Act of 1954, § 123(d), 42 U.S.C. § 2153(d) (1988), and it remains in force to this day. *See* Agreement for Cooperation Between the Government of the United States and the Government of Japan Concerning Peaceful Uses of Nuclear Energy, Nov. 4, 1987, U.S.-Japan, Hein's No. KAV 1050. The State Department contends that the pact is valid because of "the critical fact" that the Executive Branch complied with all relevant acts of Congress. Letter from Fred McGoldrick, Principal Deputy Director, Office of Nuclear Energy Affairs, U.S. State Department, to Andrew Hyman (July 26, 1994) (on file with author). Nonetheless, compliance with acts of Congress does not free the Executive from complementary constitutional strictures.

⁵ 134 CONG. REC. 4558 (1988). Of 83 Senators present, 30 voted against the pact.

⁶ H.R. Doc. No. 128, *supra* note 4, at 19.

⁷ *See, e.g.*, Thomas W. Lippman, *infra* note 118 and accompanying text. Throughout this article, "plutonium production" refers to the extraction and purification process known technically as "plutonium reprocessing." The other process for making bomb-usable material is called "high enrichment of uranium," and neither process is necessary to operate normal nuclear plants.

⁸ Fred McGoldrick, Problems of Assurance of Nuclear Supplies, Address Before the Atomic Industrial Forum (May 27, 1987), *in* DEP'T ST. BULL. Sept. 1987, at 48.

arguments.⁹ The crucial legal issue is whether President Clinton may enforce a major long-term accord such as the U.S.-Japan Pact, which limits the suspension rights of the United States, notwithstanding the manifest inability to obtain two-thirds Senate approval. This article will demonstrate that the President may not blatantly violate the Constitution's Article II treaty provisions by enforcing such an accord, and that the U.S.-Japan Pact is the only such violation in United States history. The Pact will continue to be unlawful as long as the President refuses to seek the requisite concurrence of the Senate.

II. BACKGROUND

The requirement of a two-thirds Senate vote was designed to ensure that strong national consensus exists before the United States commits itself to a course that involves the American people in activities beyond their sovereign control. Some scholars believe that the treaty process anachronistically excludes the House of Representatives,¹⁰ but the President can negotiate treaties which, by their terms, are conditioned upon House approval.¹¹ It is also sometimes argued that the treaty process necessarily leads to protectionism and isolationism. However, few treaties have been derailed by the Senate, the most noteworthy one being the Treaty of Versailles negotiated by President Wilson.¹² History shows that the primary effect of the two-thirds requirement has been that treaties "are by necessity truly national and not merely partisan . . . The two-thirds rule has often colored negotiations, since those who make treaties have to be aware, as Wilson really

⁹ See, e.g., *Time to Ban Plutonium Production*, N.Y. TIMES, July 10, 1993, at 18.

¹⁰ See, e.g., LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 175 (1972).

¹¹ This has often been the case; on one occasion the House even went so far as to kill a treaty which two-thirds of the Senate had approved (a trade treaty with Mexico was signed in 1883, the Senate approved it by a two-thirds vote, but the House refused to go along). See generally V. JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 222 (1906). Even when House approval is not required by a treaty, it is often necessary in order to implement its terms (though the House then has a strong moral duty to make good on the country's promise).

¹² ROYDEN J. DANGERFIELD, IN DEFENSE OF THE SENATE 310 (1933). According to Dangerfield, 787 treaties were formally considered by the Senate from 1788 to 1928, and only seven of them were defeated by a minority of Senators. *Id.* at 312. The only memorable one of those seven treaties, the Treaty of Versailles, established the League of Nations at the end of World War I. When that treaty was before the Senate, a majority of Senators decided to add several reservations to it, and those reservations caused President Wilson to oppose final Senate approval. It is well-known that Wilson's opposition doomed the treaty, which lost by a vote of 49 Senators in favor of ratification to 35 against. 19 THE NEW ENCYCLOPEDIA BRITANNICA 839 (1983). Wilson "made the serious error of not including any Republicans or any senators from either party in his delegation" to the Paris Peace Conference. Harry S. Truman, WHERE THE BUCK STOPS 359 (Margaret Truman ed., 1989). (Wilson was also "intransigent and childish" in responding to the Senate's complaints about the treaty.)

was not, of the danger of losing the needed support."¹³

Proponents of circumventing the treaty process contend that the President always has complete discretion to negotiate an executive agreement instead of a treaty, and that congressional authorization or approval may (in the case of "congressional-executive agreements") or may not (in the case of "sole-executive agreements") be required.¹⁴ This ill-conceived theory is of recent date, and thus has not yet been addressed by the courts. This article will not explore in detail the prospects for judicial review; suffice it to say that the courts have been willing to deal with similar issues.¹⁵

As will be shown below, any significant long-term international

¹³ 1 BRADFORD PERKINS, *CAMBRIDGE HISTORY OF AMERICAN FOREIGN RELATIONS* 68 (Warren I. Cohen ed., 1993). See also Michael J. Glennon, *The Constitutional Power of the United States Senate to Condition its Consent to Treaties*, 67 CHI.-KENT L. REV. 533, 570 (1991). As Glennon states:

The requirement of two-thirds Senate approval is directed at ensuring that significant international commitments undertaken by the United States have the overwhelming support of the American people. We have learned, to our sorrow, that when significant national commitments are made without the support of the people, the results can be tragic and costly, in systematic legitimacy as well as human life.

¹⁴ See McDougal & Lans, *supra* note 3. There are various ways in which the President can bring an international accord into force. See generally Jack S. Weiss, Comment, *The Approval of Arms Control Agreements as Congressional-Executive Agreements*, 38 UCLA L. REV. 1533, 1535 (1991). In addition to the options listed by Weiss, the President can negotiate a treaty explicitly requiring House approval. V. MOORE, *supra* note 11, at 222.

¹⁵ Often the validity of international accords has been challenged by private plaintiffs, and several such cases are addressed below. Legislators too have sometimes litigated the validity of international accords. For instance, in *Goldwater v. Carter*, 144 U.S. 996 (1979), the President and Senator Goldwater were at odds over the President's claim of right to terminate a mutual defense treaty with Taiwan absent Senate approval. The Justices evenly split on whether the case presented a nonjusticiable "political question," and Justice Powell concurred in the Court's refusal to address the merits, arguing that the case would not be ripe until "either the Senate or the House has rejected the President's claim." *Id.* at 998. As far as the U.S.-Japan Pact is concerned, over a third of the Senators present did in fact reject the pact, so the ripeness and political question doctrines do not appear dispositive of whether the Supreme Court would address the merits. In *Edwards v. Carter*, House members sued the President for making a treaty to dispose of the Panama Canal without House approval, and the courts willingly addressed the merits. 580 F.2d 1055 (D.C. Cir. 1978), *cert. denied* 436 U.S. 907 (1978). In *Dole v. Carter*, Senator Dole sued the President for agreeing to return a crown to Hungary absent Senate consent, and the court found no justiciable controversy because the court was not aware of any judicially manageable standards for resolving the issue. 569 F.2d 1109, 1110 (10th Cir. 1977). In *Cranston v. Reagan*, congressional plaintiffs as well as private plaintiffs claimed that nuclear pacts with Norway and Sweden violated the Atomic Energy Act, and the court predictably dismissed the case because neither the Senate nor the House made an "attempt to pass a concurrent resolution disapproving either of the Agreements . . . despite their statutorily-guaranteed opportunity to do so." 611 F. Supp. 247, 251-253 (D.C. 1985).

compact (i.e. one which is significant enough to warrant the President's personal scrutiny) is necessarily an Article II "treaty," whereas other compacts may or may not have to be classified as "treaties." An international compact is not "long-term" if it specifies that each party can take action to revoke the deal on short notice for any reason.¹⁶

Unfortunately, the international nuclear policy of the United States is now controlled by people who have apparently accepted the "extreme"¹⁷ theory that any international pact may be approved as a congressional-executive agreement. This theory "explicitly contravenes"¹⁸ and "consciously disregards the intent of the framers."¹⁹ It is also contrary to Supreme Court precedent, to the accepted usage of the word "treaty" under the Articles of Confederation, to early commentary regarding treaties and agreements, and to the past practices of the political arms of government. In truth, compliance with acts of Congress does not free the Executive from complementary constitutional limitations on international deal-making.

Part III of this article provides further background about the current constitutional controversy. Part IV explores the constitutional

¹⁶ The United States can revoke any treaty at any time for any reason, regardless of what the treaty itself says, because the latest expression of the sovereign will is controlling. *Whitney v. Robertson*, 124 U.S. 190 (1888). However, there is general agreement that the superseding of a treaty by subsequent act of Congress "does not relieve the United States of its international obligation or of the consequence of violation." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115.1 (1987) [hereinafter RESTATEMENT].

¹⁷ Kenneth C. Randall, *The Treaty Power*, 51 OHIO ST. L. J. 1089, 1094-95 (1990).

¹⁸ Weiss, *supra* note 14, at 1559.

¹⁹ *Id.* at 1562. Incidentally, there are variations on this theory, according to which any pact may be processed as a congressional-executive agreement, if it concerns a topic within the enumerated powers of Congress, regardless of whether the pact is binding for a considerable time. However, the explicit right to withdraw from an accord, such as the Uruguay Round of GATT, Apr. 15, 1994. 33 I.L.M. 1144, is a major safeguard protecting American sovereignty. The Uruguay Round of GATT was approved by a Senate vote of 76 to 24 on December 1, 1994. 140 CONG. REC. S15379 (1994). See generally *The World Trade Organization and the Treaty Clause*, Prepared Statement of Laurence H. Tribe Before the Senate Committee on Commerce, Science, and Transportation, October 18, 1994 [hereinafter Tribe's Statement], reprinted in *GATT Implementing Legislation: Hearings before the Senate Comm. on Commerce, Science, and Transportation*, 103d Cong. 2d Sess. 285 (1994); Memorandum from Laurence H. Tribe, Harvard Law School, to various government officials (November 28, 1994) reprinted in 140 CONG. REC. S15077-01(1994). According to the Justice Department, "although we insist on the variety of legal instruments by which the United States may make agreements with foreign nations, we do not dispute Professor Tribe's view that some such agreements may have to be ratified as treaties." Memorandum from Walter Dellinger, Assistant Attorney General, U.S. Department of Justice, to Ambassador Michael Kantor, United States Trade Representative (November 22, 1994) at 4, n. 13 (on file with the Harvard Law School Library). See generally *infra* note 40.

principles in greater depth, and dispels any notion that the meaning of the Constitution's treaty provisions is entirely obscure.²⁰ Part V brings this constitutional analysis to bear on the U.S.-Japan Pact. Part VI concludes that long-term nuclear accords are necessarily Article II treaties, and are thus unconstitutional and ultra vires when rejected by one-third of the Senate.

III. THE PRESENT CONSTITUTIONAL CONTROVERSY IN BRIEF

Until World War II, even the most ardent opponents of the Article II treaty process acknowledged its inescapability.²¹ Today's prevailing view is quite different. According to the American Law Institute:

Since any agreement concluded as a Congressional-Executive agreement could also be concluded by treaty . . . either method may be used in many cases. The prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance.²²

The Reporters' Notes to the *Restatement* seek to justify the prevailing view, a view which the American Law Institute does not endorse.²³ According to Reporters' Note 8, "scholarly opinion has rejected" the idea "that some agreements can be made only as treaties, by the procedure designated in the Constitution." In fact, however, many scholars do not agree with the reporters' position,²⁴ and consider the

²⁰ See generally CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, S. RPT., 103d Cong., 1st Sess. 52 (1993). According to the Congressional Research Service, "the understanding of the Drafters remains largely obscure" and it remains unclear "whether any subject that is dealt with by treaty may also be effected by an executive agreement . . ." *Id.* at 53.

²¹ For example, Secretary of State John Hay wrote to President McKinley in 1899 that "I see no escape from it, since the Fathers in their wisdom chose to assume that one-third of the Senate in opposition would always be right, and the President and the majority generally wrong." HENKIN, *supra* note 10, at 377. Incidentally, Hay had been an aide to President Lincoln, and would later serve as Theodore Roosevelt's Secretary of State.

²² RESTATEMENT, *supra* note 16, § 303 cmt e.

²³ RESTATEMENT, *supra* note 16, § 303, Reporters' Note 8. The Reporter's Notes reflect the views of the reporters, and do not necessarily reflect the views of the American Law Institute. *Id.* at xi. According to the American Law Institute, "treaties constitute one category of international agreement that constitutionally requires a particular process and has a particular status." *Id.* at 146. This position of the American Law Institute seems to be at odds with the reporters' notion that the President, the House, and the Senate are subject to no requirements whatsoever in deciding what process to use for a given international accord. Incidentally, the Chief Reporter for the RESTATEMENT is listed as Louis Henkin. *Id.* at v; see generally HENKIN, *supra* note 10.

²⁴ Randall, *supra* note 17, at 1094-95. Randall writes that "many scholars" articulate positions different from the "extreme" view that "congressional-executive agreements and treaties are entirely interchangeable." *Id.* Unfortunately, the extreme view is currently the prevailing view.

reporters' view "contrary to the intent of the framers."²⁵ Although the reporters mention as precedent several recent international commitments which purportedly bypassed the Article II treaty process,²⁶ all of the commitments cited in Reporters' Note 8 were approved by two-thirds of the Senators present. There was never any Article II issue when Senators overwhelmingly supported joint resolutions on the following matters:²⁷ the Bretton Woods Agreement,²⁸ membership in the International Labor Organization,²⁹ and the U.N. Headquarters Agreement.³⁰

²⁵ Weiss, *supra* note 14, at 1560. To support their thesis in Reporter's notes 8, the reporters cite an article by McDougal and Lans. *See generally supra* note 3. The reporters omit to mention that the Senate Judiciary Committee has rejected the doctrine of McDougal and Lans. *See supra* text accompanying note 1. The reporters also rely upon an opinion of the Attorney General, regarding the United Nations, but in that opinion the Attorney General specifically declined to consider "whether or not there are circumstances under which a given international compact must take the form of a treaty." 40 Op. Att'y Gen. 469, 470 (1946). Furthermore, the reporters seek to buttress their position with a book by the Chief Reporter, Mr. Henkin, but in fact Mr. Henkin's book is ambiguous; he writes that "the President can seek approval of any agreement by joint resolution of both houses of Congress instead of two-thirds of the Senate only" and at another point Mr. Henkin writes that "one is compelled to conclude that there are agreements which the President can make on his sole authority and others which he can make only with the consent of the Senate." HENKIN, *supra* note 10, at 175, 179.

²⁶ RESTATEMENT, *supra* note 16, § 303 Reporters' Note 8.

²⁷ There is no reason why treaties need to be designated as such. According to the RESTATEMENT: "Whatever their designation, all agreements have the same legal status, except as their provisions or the circumstances of their conclusion indicate otherwise." RESTATEMENT, *supra* note 16, § 301 com a. By the same token, there is no reason why treaties cannot be approved by the Senate under the designation of a joint resolution. *See Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901). In *Fourteen Diamond Rings*, the Supreme Court faced a situation in which two-thirds of the Senate had formally consented to a treaty with Spain, and Senators thereafter sought to impose a condition upon this consent, by way of a joint resolution (the President had not yet put the treaty into operation). The Supreme Court, in an opinion by Chief Justice Fuller, held that the joint resolution "was adopted by the Senate by a vote of 26 to 22, not two thirds of a quorum : and that it is absolutely without legal significance on the question before us." *Id.* at 180. Justice Brown concurred that, if the Senate had approved the joint resolution by a two-thirds vote, then the resolution would have been effective as part of the treaty, but only if the President and the other contracting party consented. *Id.* at 182. Of course, the President as well as the other contracting parties did indeed consent to the International Labor Organization, the Bretton Woods Agreement, and the U.N. Headquarters Agreement, and those accords can therefore be considered valid Article II treaties. Although those three accords did not proclaim themselves to be "treaties," and the Senate did not refer to them as Article II "treaties," those facts are not dispositive of whether they were in fact Article II treaties; the Supreme Court has long held that "[t]he Constitution looked to the essence and substance of things, and not to mere form." *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 573 (1840).

²⁸ The Senate vote was 61 to 16. 91 CONG. REC. 7780 (1945).

²⁹ Passed by unanimous consent in the Senate. 78 CONG. REC. 11343 (1934). *See also* 78 CONG. REC. 12238 (1934) (providing more information about the Senate vote).

³⁰ The Senate gave its final approval to the Headquarters Agreement "without objection." 93 CONG. REC. 10400 (1947).

International accords such as NAFTA³¹ and the 1947 GATT accord³² have also gone into effect without blatantly violating Article II, Section 2 of the Constitution, because such accords never represented long-term commitments. NAFTA, as well as the 1947 GATT accord, allow the United States to withdraw upon six months' notice.³³ In

³¹ The North American Free Trade Agreement, December 17, 1992, Hein's No. KAV 3417 [hereinafter NAFTA]. The Senate's final vote on NAFTA was 61 in favor to 38 against the pact, short of the two-thirds that would have been needed for a treaty. 139 CONG. REC. 16712-13 (1993). Article 2205 of NAFTA specifies that a party may withdraw from the agreement with six months' written notice. Incidentally, President Clinton negotiated side accords to NAFTA which were not formally presented to Congress or to the Senate. In discussing those side accords, Senator Stevens succinctly restated the position that treaties and executive agreements are not always interchangeable:

Although the President has some discretion to choose the instrument that he will use to enter into an international agreement, he must respect the confines of the instrument he chooses. I believe the Constitution refers to treaties, to compacts and to agreements as some of the choices the President has. But, I believe that there are some parameters on any President in choosing the instrument that he is going to use for international accords.

139 CONG. REC. 16352 (1993).

³² The General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A74 (1947) [hereinafter 1947 GATT]. Article XXXI of the 1947 GATT provides that parties can speedily withdraw if they so choose. The 1947 GATT was not submitted to the Senate, nor was it formally submitted to Congress. John H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249, 253 - 265 (1967). The 1947 GATT has been used to support the notion that "no consistent pattern supports any substantive common law principle requiring that significant agreements or long-term agreements take the form of Article II treaties." Weiss, *supra* note 14, at 1557. This statement is incorrect inasmuch as the 1947 GATT accord cannot properly be regarded, constitutionally, as a long-term commitment, since it is revocable at will. Of course, even an accord which purports to allow for revocation at will can represent a long-term commitment, if the accord sets up a mechanism for actions against signatories who revoke the accord, but the 1947 GATT accord does not contain such a mechanism.

³³ This is not to say that such accords could not or should not be dealt with as treaties; it is often advisable to seek treaty approval of a revocable accord in order to obtain widespread support, even when there is no legal requirement that the treaty mechanism be used. Furthermore, even if an accord does not necessarily fall within the Framers' definition of "treaty" (due to its revocability), it still may require treaty approval if Congress would otherwise be violating another part of the Constitution. See generally *infra* note 40. Incidentally, the debate over NAFTA has spawned an extraordinary onslaught of constitutional argumentation. See Bruce Ackerman and David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995). Ackerman and Golove dwell upon the Senate's approval in 1947 of a trusteeship accord submitted by President Truman. See 93 CONG. REC. 8850 (1947). That accord passed without noticeable opposition from a single Senator, and there was not the slightest controversy about its validity. *Id.* According to Ackerman's and Golove's line of reasoning: (1) the Senate surrendered its exclusive treaty role during a four-year period culminating with the 1947 accord, (2) the Senate's failure to challenge an insignificant remark by President Truman "speaks louder than a formal amendment" of the Constitution, (3) the law in this area remains where it was left in 1947, (4) we now have no authority to displace these judgments, and (5) President Truman codified this constitutional amendment in 1947. See Bruce Ackerman and David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 895, 903, 908, 913, 924 (1995). Despite this attempt to make a mountain out of a molehill, the 1947 trusteeship accord has no precedential value on the question before us, because over two-thirds of the Senate acquiesced to it. Even if 34% of the Senate had opposed the accord, it would still have been valid because, for example, it did not imply any commitment that the United States would not unilaterally terminate the accord. See 12 BEVANS 951. See generally Francis B. Sayre, *Legal Problems Arising from the United Nations Trusteeship System*, 42 AM. J. INT'L L. & POLICY 263, 289-290 (1948) (Sayre, by the way, was President Wilson's son-in-law). President Truman realized that the treaty clause was carefully designed as a limitation upon presidential power, and he certainly never codified an amendment of it. See *infra* note 134. See generally *infra* note 40 (Professor Tribe's conclusion with regard to this matter).

stark contrast, long-term pacts like the thirty-year nuclear accord between the United States and Japan are, by their terms, ordinarily irrevocable, and they therefore fall squarely into the group of compacts that are necessarily "treaties" under the Constitution. Thus, long-term pacts like the U.S.-Japan Pact cannot be valid without implicit or explicit approval of two-thirds of the Senate.

IV. HOW TREATIES AND EXECUTIVE AGREEMENTS DIFFER

To determine the constitutionality of an international accord, the first place to look is to the words of the Constitution, and to the definitions used by its authors. If the Constitution is ambiguous on its face, then it may be necessary to seek guidance in similar provisions of prior laws, most notably the Articles of Confederation. The intended meaning of the Constitution can also be clarified by the early legal commentaries written while the Framers were still able to recount their deliberations. Furthermore, an examination of case law can produce evidence as to constitutionality, as can an analysis of precedents set throughout the country's history by the executive and legislative branches of government. For the sake of thoroughness, all of these sources are consulted below, although it would be sufficient to study the words of the Constitution's treaty provisions, which are in many respects unambiguous.

A. Terms of the Constitution and their Definitions

Article II of the Constitution sets forth a brief rule on the formation of international treaties.³⁴ This rule can always be changed through the amendment process,³⁵ but until then the rule remains the

³⁴ U.S. CONST. art. II, § 2, cl. 2.

³⁵ George Washington said:

If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no changes by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed.

George Washington, Farewell Address (Sept. 17, 1796), in 35 WRITINGS OF GEORGE WASHINGTON 214, 229 (John C. Fitzpatrick ed., 1940).

There have been attempts to amend the Constitution's treaty provisions. For instance, the House Judiciary Committee once proposed an amendment that it felt was necessary to give Congress power to allow treaties, but that proposal ultimately failed. H.R. REP. NO. 2061, 78th Cong., 2d Sess. (1944). The constitutional amendment process is the only safe way for the people to exercise their virtually unlimited legal power.

law of the land in keeping with the clear and ordained intent of the Framers.³⁶

The Constitution gives the President power to make treaties, if two-thirds of the Senate concurs. The Framers intended that treaties, including commercial ones, be dealt with only in this way,³⁷ regard-

³⁶ Abraham Lincoln said: "The intention of the lawgiver is the law." Abraham Lincoln, First Inaugural Address (March 4, 1861), *in* INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES 133, 135 (1989).

³⁷ Treaties could conceivably be made in other ways, if it were admitted that the express treaty provisions of the Constitution are not exclusive. For instance, one could argue that Congress has an implied treaty power, since Article II, Section 2 says the President "shall have power" instead of "shall have *the* power" to make treaties. Nevertheless, it is well-established that the treaty power was meant to be an exclusive power that cannot be exercised without the approval of two-thirds of the Senate (the approval of the House may or may not also be required). As President Washington stated:

Having been a member of the General Convention, and knowing the principles on which the Constitution was formed, I have ever entertained but one opinion on this subject; and, from the first establishment of the Government to this moment, my conduct has exemplified that opinion, that the power of making treaties is exclusively vested in the President, by and with the advice and consent of the Senate, provided two-thirds of the Senators present concur, and that every treaty so made and promulgated, thenceforward became the Law of the land . . .

George Washington, Letter to the House of Representatives (Mar. 30, 1796), *in* 35 WRITINGS OF GEORGE WASHINGTON 2, 3-4 (John C. Fitzpatrick ed., 1940) (emphasis added).

The records of the Constitutional Convention confirm the exclusivity of the treaty power. For example, Mr. Morris argued that Congress would be unwilling to declare war if two-thirds of the Senate were needed to approve a peace treaty. JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION 685 (E.H. Scott ed., 1893). Likewise, the Founders realized that commercial treaties "may be so framed as to be partially injurious" to minorities, and it was in order to provide "security" for minorities that the Founders permitted one-third of the Senate to block commercial treaties. George Mason, Comment on Draft Constitution, *in* SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 209 (James H. Hutson ed., 1987). The Constitution does give Congress power to regulate foreign commerce. U.S. CONST. art. I, § 8, cl. 3. However, as Mason observed, the Constitution qualifies that grant by prohibiting the entry of the United States into commercial treaties which are opposed by one-third of Senators present. The Necessary and Proper Clause does allow Congress to make "laws" to carry out its powers, but not "treaties." U.S. CONST. art. I, § 8, cl. 19. Treaty-making power is distinct from lawmaking power. *See* U.S. CONST. art. VI, cl. 2. The Constitution clearly states where the treaty-making power resides: with the President and the Senate. U.S. CONST. art. II, § 2, cl. 2.

less of whether the treaty relates to peace, military alliance, cooperation, or anything else.³⁸ As John Jay wrote,

[t]he power of making treaties is an important one especially as it relates to war, peace, and commerce; and it should not be delegated but in such a mode, and with such precautions, as will afford the highest security that it will be exercised by men the best qualified for the purpose, and in the manner most conducive to the public good.³⁹

The Framers viewed treaties as only one type of transnational accord. The language of Article I, Section 10 of the Constitution includes: "No State shall enter into any Treaty, Alliance, or Confederation" and "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power." Thus, the word "treaty," as used in the Constitution, does not signify every compact with a foreign country, since otherwise there would be no way for a state to make an "agreement or compact" with a foreign power. This suggests that the Framers intended that the national government also have the ability to enter into compacts distinct from "treaties,"⁴⁰ while at the same time it is manifestly clear from the text of the Constitution that not every "treaty" can be characterized as an "agreement." If that alternative were always available, then the word "treaty" in Article I, Section 10 would be surplusage.⁴¹ Although

³⁸The language of Article II does not restrict the types of treaties that the President and Senate can make. Alexander Hamilton observed that the treaty powers of Great Britain are similarly unrestricted, inasmuch as the King of Great Britain can "of his own accord make treaties of peace, commerce, alliance, and of every other description The King can perform alone what the President can only do with the concurrence of a branch of the legislature." THE FEDERALIST NO. 69, at 419 (Alexander Hamilton) (Clinton Rossiter ed. 1961). It has long been recognized that, because the "power to make treaties is given by the Constitution in general terms, without any description of the objects to be embraced by it," then consequently this power includes "all those subjects, which in the ordinary intercourse of nations had usually been made subjects of negotiation and treaty." *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 595 (1840) (emphasis added).

³⁹THE FEDERALIST NO. 64, at 390 (John Jay) (Clinton Rossiter ed. 1961).

⁴⁰Professor Tribe correctly discerns an important constitutional limitation on international accords, which are ratified by mere congressional majority. They are presumably valid only insofar as they "could have been accomplished by a combination of Congressional delegation and the President's inherent power over foreign affairs". Laurence Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1223, 1277 (1995). See generally Roosevelt, *infra* note 49 (Theodore Roosevelt on the limits of executive power).

⁴¹The Constitution does not explicitly delegate to the President any power to enter into non-treaty accords. However, the Supreme Court has held that the Tenth Amendment reservation of nondelegated powers is inapplicable in the realm of foreign affairs, because foreign affairs powers had already been delegated by the states before 1789. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (opinion delivered by Justice Sutherland). The Supreme Court in *Curtiss-Wright* said the "broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution . . . is categorically true only in respect of our internal affairs." *Id.* at 315-16. The Court correctly pointed out that "the power to make such international agreements as do not constitute treaties in the constitutional sense" exists "as inherently inseparable from the conception of nationality." *Id.* at 318. Nevertheless, the Supreme Court has stated that "there may be matters . . . that an act of Congress could not deal with but that a treaty followed by such an act could." *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

neither the text of the Constitution nor the records of the Convention explicitly defines the difference between a "treaty" and an "agreement or compact,"⁴² the definitions of the Framers have not been permanently lost.

The Supreme Court has observed that "the international jurist most widely cited in the first 50 years after the Revolution was Emmerich de Vattel."⁴³ In 1775, Benjamin Franklin declared that Vattel's *The Law of Nations* "has been continually in the hands of the members of our Congress now sitting . . ." ⁴⁴ The Supreme Court has quoted *The Law of Nations*⁴⁵ in order to prove how the Framers employed the word "treaty," as follows:

Vattel, page 192, sec. 152, says: "A treaty, in Latin *foedus*, is a compact made with a view to the public welfare, by the superior power, either for perpetuity, or for a considerable time." Section 153. "The compacts which have temporary matters for their object, are called agreements, conventions, and pactions. They are accomplished by one single act, and not by repeated acts. These compacts

⁴² The Constitution does make it "absolutely clear" that treaties are, by definition, not completely interchangeable with non-treaties, because the Constitution allows states to make "agreements" or "compacts" with foreign powers (if Congress assents) while forbidding states to make "treaties" with foreign powers (even if Congress assents). Tribe's Statement, *supra* note 19, at 4. *See also* U.S. CONST. art. I, section 10. The Supreme Court long ago concluded that the word "treaty" has the same basic meaning in Article II, Section 2 as it does in Article I, Section 10. The Court said in *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 571 (1840): "In speaking of the treaty-making power . . . [w]hatever is granted to the general government is forbidden to the states, because the same word is used to describe the power denied to the latter, which is employed in describing the power conferred on the former." However, the Supreme Court has also recognized that the language of Article I ("treaty, alliance, or confederation") limits the meaning of the word "treaty" according to the rule of construction *noscitur a sociis*. *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893). According to this rule, "when two or more words are grouped together, and ordinarily have a similar meaning, but are not equally comprehensive, the general word will be limited and qualified by the special word." 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.16 (1992). Thus, the words "treaty, alliance, or confederation" in Article I are usually understood to include only those treaties which may encroach upon national authority. The meaning of the word "treaty" in Article II, though, is not limited by any nearby words.

⁴³ *U.S. Steel Corp. v. Multistate Tax Comm'n.*, 434 U.S. 452, 462 (1977).

⁴⁴ *Id.*

⁴⁵ 3 EMMERICH DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* (Charles G. Fenwick trans., 1916) (this volume consists of an English translation of the 1758 edition).

are perfected in their execution once for all; treaties receive a successive execution, whose duration equals that of the treaty." Section 154. Public treaties can only be made by the "supreme power, by sovereigns who contract in the name of the state."⁴⁶

Vattel also wrote that short-term pacts, unlike long-term pacts, may be classified either as "treaties" or "agreements:"

Treaties which do not call for continuous acts, but are fulfilled by a single act, and are thus executed once for all, those treaties, unless we prefer to give them another name (see §153), those conventions, those compacts, which are executed by an act done once for all and not by successive acts, are, when once carried out, fully and definitely consummated.⁴⁷

These passages from Vattel account for the distinction which the Framers made between treaties and other compacts. Long-term pacts which are important enough to warrant the attention of the supreme power who contracts in the name of the state (i.e. the President) are necessarily treaties within the meaning of the Constitution, and other pacts may or may not be "treaties."⁴⁸

This nation's first Secretary of State, Thomas Jefferson, echoed the distinction between transitory agreements which can be conveniently dropped, and treaties which may provide otherwise. Jefferson wrote the following words of caution to President Washington:

It is desirable, in many instances, to exchange mutual advantages by Legislative Acts rather than by Treaty: because the former, though understood to be in consideration of each other, and therefore greatly respected, yet when they become too inconvenient, can be dropped at the will of either party: whereas stipulations by Treaty are forever irrevocable but by joint consent, let a change of circumstances render them ever so burthensome.⁴⁹

⁴⁶ *Holmes v. Jennison*, 39 U.S. (14 Pet.) at 572 (this case is discussed at length in Section D below). Numerous scholars have agreed that Vattel's definition of "treaty" applies to the Constitution. See e.g. Abraham C. Weinfeld, *What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts?"* 3 U. CHI. L. REV. 453 (1936). Vattel was cited repeatedly during the Constitutional Convention. See *infra* note 58.

⁴⁷ VATTEL, *supra* note 45, § 192.

⁴⁸ At one time, the Department of State Legal Adviser contended that "Vattel's distinction has nothing to do with 'important' or 'unimportant.'" *Congressional Oversight of Executive Agreements - 1975: Hearings on S. 632 and S. 1251 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 392 (1975) [hereinafter *1975 Senate Hearings*] (Department of State Legal Adviser's reply to Senate Office of Legislative Counsel memorandum on certain Middle East agreements). Apparently the State Department Legal Adviser, Mr. Monroe Leigh, did not realize that routine agreements made by subordinate officials would not be treaties according to Vattel's distinction because those agreements do not require approval from the supreme "sovereigns who contract in the name of the state."

⁴⁹ Thomas Jefferson, Report of the Secretary of State to the President (Jan. 18, 1791), in 18 PAPERS OF THOMAS JEFFERSON 565, 570 (Julian P. Boyd ed., 1971). See also 2 Charles Henry Butler, *THE TREATY-MAKING POWER OF THE UNITED STATES* 372-73 (1902) (stating that "the danger of reciprocal legislation is that either country can repeal or modify its own legislation and deprive citizens of the other country of the protection formerly afforded"). See generally *supra* note 16. Incidentally,

The definition of "treaty," as that word is used in the Constitution, is not the same as the definition that is prevalent in modern international law. The Supreme Court has explained that,

the word treaty has more than one meaning. Under principles of international law, the word ordinarily refers to an international agreement concluded between sovereigns, regardless of the manner in which the agreement is brought into force. Under the United States Constitution, of course, the word "treaty" has a far more restrictive meaning.⁵⁰

Under the Constitution, the word "treaty" necessarily applies to accords of importance and permanence, which in turn depends upon whether the accord is important enough to warrant the President's scrutiny, and upon whether the accord is irrevocable for a considerable time. A quarter century is manifestly a "considerable time,"⁵¹ and

Presidents have often entered into commitments binding only upon themselves. *See, e.g.*, THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 510, (1920) (stating that "it was far preferable that . . . we might be proceeding under a treaty which was the law of the land and not merely by a direction of the Chief Executive which would lapse when that particular executive left office."). James Wilson, who attended the Constitutional Convention, and was also a U.S. Supreme Court Justice, explained that public officials who lack power to authorize treaties may nevertheless authorize promises and engagements with other countries, provided that those compacts bind only the officials who have approved them, rather than invalidly attempting to bind the nation after those officials have left office. *See* 1 THE WORKS OF JAMES WILSON 155 (James D. Andrews ed., 1896).

⁵⁰ *Weinberger v. Rossi*, 456 U.S. 25, 29 (1981) (citations omitted). The *Weinberger* Court also observed that: "[a] 'treaty' which requires only the consent of the President is not an Article II treaty," thus implying that some international accords do "require" more than the President's consent.

⁵¹ Congressman Otis Pike once asked National Security Adviser Henry Kissinger the following question: "For how long a period of years could an executive agreement be made which was not required to be a treaty? Could it be for 25 years, for example?" Dr. Kissinger replied that a 25-year agreement would, in his opinion as a political scientist and not as a presidential assistant, "look more like a treaty to me." *The Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Antibalistic Missile Systems (ABM Treaty) and the Interim Agreement Between the United States of America and the Union of Soviet Socialist Republics on Certain Measures with Respect to the Limitation of Strategic Offensive Arms (Interim Agreement), Including an Associated Protocol, Signed in Moscow on May 26, 1972: Hearings Before the Senate Comm. on Foreign Relations, 92d Cong., 2d Sess. 391, 407 (1972)* (Congressional briefing by National Security Adviser Kissinger on the five-year Interim Agreement submitted to Congress instead of the Senate) [hereinafter *Kissinger Briefing*]. Suppose Presidents Clinton and Yeltsin signed an accord to put people on Mars within 25 years. This would have to be an Article II treaty if it forbade U.S. withdrawal (e.g. in the event Russia invaded a neighbor) and unless the U.S. merely leased Russian equipment in return for an up-front payment (the U.S. would then have no ongoing obligation).

anything over six years is "considerable" for constitutional purposes.

Six years is the maximum term of office for federal elected officials, and therefore commitments which exceed six years greatly impinge upon the American people's liberty to reshape foreign policy. The Constitution was intended to secure the people's liberty to manage their affairs, both domestic and foreign, and the liberty to manage foreign affairs cannot be legally forfeited if a third of Senators vote "no." The U.S.-Japan Pact is the only international accord ever enforced by the United States, over the objections of more than one-third of the Senate, which has pledged continued enforcement for more than six years.

The twin standards of importance and duration are easily applied to international accords, and they are also judicially manageable. As will be seen below, these standards of importance and duration are supported by usage of the terms "treaty" and "agreement" during both the Articles of Confederation and the early years of the Constitution. They are also substantiated by the case law, as well as by the conduct of American foreign affairs since 1776.

B. "Treaties" Under the Articles of Confederation

The Framers considered the duration of compacts to be very important. They required, in the Articles of Confederation, that any state seeking congressional approval for an interstate treaty specify accurately "how long it shall continue."⁵²

Under the Articles of Confederation, each state was akin to a foreign nation with respect to every other state, so a "treaty" between two confederated states was analogous to an international "treaty" under the Constitution. It follows that the meaning of an interstate "treaty" under the Articles of Confederation can illuminate the meaning of the same word in Article II of the Constitution.

Under the Articles, the states granted powers to the Federal Congress, including the exclusive power to make treaties with other nations.⁵³ With regard to treaties between states, the Articles of Confederation said: "No two or more states shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled . . ."⁵⁴ Thus, when commission

⁵² ARTICLES OF CONFEDERATION art. VI (1781).

⁵³ ARTICLES OF CONFEDERATION art. IX (1781) (requiring two-thirds approval of Congress for foreign treaties).

⁵⁴ ARTICLES OF CONFEDERATION art. VI (1781). This article also required congressional assent for any "conference, agreement, alliance, or treaty" between a state and any "King, prince or state," but the word "state" as quoted here has always been understood to mean a state outside of the Confederation. *See generally supra* note 42 (describing rule of *noscitur a sociis*). Incidentally, the fact that Article VI referred to any "agreement, alliance, or treaty" is further evidence that the founders consistently distinguished between the words "agreement" and "treaty."

ers from Virginia and Maryland met at Mount Vernon in 1785 to settle differences over their common waterways, a controversy arose as to whether the resulting Mount Vernon Compact⁵⁵ had to be submitted to Congress for approval. One of the leading Virginia legislators, James Madison, wrote the following to James Monroe:

The Compact with Maryd. has been ratified. It was proposed to submit it to Congs. for their sanction, as being within the word Treaty used in the Confederation. This was oppd. It was then attempted to transmit it to our Delegates to be by them simply laid before Congs. Even this was negatived by a large Majority.⁵⁶

Mr. Madison felt that the Mount Vernon Compact was necessarily a "treaty, confederation, or alliance" within the meaning of the Articles of Confederation, but his fellow Virginia legislators felt otherwise.

This controversy about the Mount Vernon Compact flared up again at the Constitutional Convention in Philadelphia, where Mr. Madison said that:

no two or more states can form among themselves any treaties &c. without the consent of Congs. Yet Virgia. & Maryd. in one instance - Pena. & N. Jersey in another, have entered into compacts, without previous application or subsequent apology.⁵⁷

A week later, Maryland Attorney General Luther Martin responded that the "treaty between Virginia and Maryland about the navigation of the Chesapeake and Potomac, is no infraction of the confederacy."⁵⁸ It appears from these statements that the Framers agreed about the meaning of the free-standing word "treaty," but disagreed about whether its meaning should be limited by the adjacent terms in the phrase "treaty, confederation, or alliance." After all, it is a canon of

⁵⁵ The success of the Mount Vernon Conference, which was hosted by George Washington, led the Virginia legislature to set up a wider conference, the Annapolis Convention, which in turn led directly to the Constitutional Convention of 1787. The Mount Vernon Conference was thus "the preliminary to the preliminary." CLINTON ROSSITER, 1787: THE GRAND CONVENTION 54 (1966). See also George Mason, The Mount Vernon Compact, in 2 PAPERS OF GEORGE MASON, 812, 812-23 (Robert A. Rutland ed., 1970) (containing, among other things, the text of the compact). Incidentally, the Mount Vernon Compact is still in force. VA. CODE ANN. § 7.1-7 (Michie 1993).

⁵⁶ James Madison, Letter to James Monroe (Dec. 30, 1785), in 8 PAPERS OF JAMES MADISON 465, 466 (Robert A. Rutland & William M.E. Rachal eds., 1973) (original emphasis). Madison supported the actual compact but felt that proper procedures should be followed.

⁵⁷ Madison, *supra* note 37, at 190 (for June 19, 1787).

⁵⁸ ROBERT YATES, SECRET PROCEEDINGS AND DEBATES OF THE FEDERAL CONVENTION 119 (1909) (emphasis added) (Martin made his remarks on June 27, 1787 and during the course of those remarks he repeatedly cited Vattel as authority).

statutory construction that when words are grouped together and usually have similar meanings, the more general words are limited by the special words.⁵⁹ Madison and Martin agreed that the Mount Vernon compact was a "treaty," but disagreed about whether it was a "treaty, confederation, or alliance."⁶⁰

There was never any quarrel as to the duration of the Mount Vernon Compact. The thirteenth article of that compact said: "never to be repealed or altered by either without the Consent of the other." The only dispute concerned whether the Articles of Confederation were intended to affect such compacts not harming the union of states.⁶¹ The prevailing view in the Virginia House of Delegates was that the Articles of Confederation were irrelevant to purely local arrangements between Virginia and Maryland.

The Supreme Court of the United States agreed with the Virginia House of Delegates many years later in the case of *Wharton v. Wise*,⁶² in which the Court decided whether the Mount Vernon Compact had been validly formed under the Articles of Confederation. The Court held that "the articles inhibiting any treaty, confederation, or alliance between the States without the consent of Congress were intended to prevent any union of two or more States, having a tendency to break up or weaken the league between the whole."⁶³ The *Wharton* Court concluded that "the compact of 1785 was not prohibited by the Articles of Confederation. It was not a treaty, confederation or alliance within the meaning of those words as there used . . ." ⁶⁴ The Court thus agreed that a pact could necessarily be a "treaty" within the prohibitory language of the Articles of Confederation, but only if that "treaty, confederation, or alliance" weakened the league, which the Mount Vernon Compact did not.⁶⁵

⁵⁹ See SINGER, *supra* note 42, at § 47.15 (describing rule of *noscitur a sociis*).

⁶⁰ In a report on the Mount Vernon Compact presented to the Governor of Maryland in 1885, a member of the Baltimore Bar, I. Nevett Steele, said that the "question which presents itself is, whether the compact was a 'treaty, confederation or alliance,' within the true meaning of those words as used in the Articles of Confederation, and it seems probable that there was a difference of opinion on this question among the public men of the time." Appellant's Brief, *Wharton v. Wise*, 153 U.S. 155 (1894) (No. 1054), *microformed* on U.S. Supreme Court Records and Briefs (Scholarly Resources, Inc.).

⁶¹ The commissioners at the Mount Vernon Conference felt that a compact between the two states for providing naval protection ought to be submitted "to Congress for their Consent to enter into Compact." 2 Mason, *supra* note 55, at 815. Similarly, the Virginia House of Delegates felt that a trade compact involving more states than just Virginia and Maryland would require the involvement of Congress. Madison, *supra* note 56, at 471.

⁶² *Wharton v. Wise*, 153 U.S. 155 (1894).

⁶³ *Id.* at 167.

⁶⁴ *Id.* at 171.

⁶⁵ The *Wharton* Court essentially ruled against James Madison, without ever mentioning his name. However, the Supreme Court was aware of Mr. Madison's view that Virginia and Maryland had violated the Articles of Confederation by entering into the Mount Vernon Compact absent congressional consent. See *supra* note 60.

Of course, the word "treaty" in Article II of the Constitution is free of any limiting context. The limiting context in the Articles of Confederation was the decisive reason for the legitimacy of the Mount Vernon Compact. Neither the Founders nor the *Wharton* Court ever expressed any doubt that the Mount Vernon Compact would have required congressional consent if the Articles of Confederation had inhibited any "treaty" instead of any "treaty, confederation, or alliance."

The history of the Mount Vernon Compact shows that the Framers pondered the meaning of the word "treaty," just as there is analysis today of whether the U.S.-Japan Pact is a "treaty." Both documents are indeed "treaties" within the definition used by the Framers, and for the same reasons - both were made by the highest authorities and both ordinarily forbid revocation for a considerable period of time.

C. Early Treatises on the Subject of "Treaties"

The distinction between treaties and other agreements was examined by scholars throughout the early years of the Constitution. This indirect evidence about the Constitution's treaty provisions is useful since much of the direct evidence from the Constitutional Convention has been lost to history.

St. George Tucker was a judge, and a representative alongside James Madison at the Annapolis Convention, which was the "preliminary" to the Constitutional Convention.⁶⁶ In 1803, Tucker cited Vattel as authority for the meaning of the word "treaty" in the Constitution:

Here we find a distinction between treaties, alliances, and confederations; and agreements or compacts. The former relate ordinarily to subjects of great national magnitude and importance, and are often perpetual, or made for a considerable period of time; the power of making these is altogether prohibited to the individual states . . .⁶⁷

This excerpt, and its citation to Vattel, shows yet again that Vattel's definition of "treaty" was relied upon during the early years of the Constitution. It was then understood that accords of great national magnitude and importance, and made for a considerable period of time, must be "treaties." Tucker went on to say that,

agreements, or compacts, concerning transitory or local affairs, or such as cannot possibly affect any other interest but that of the

⁶⁶ See generally *supra* note 55.

⁶⁷ ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 310 app. (1803). See generally *Holmes v. Jennison*, 39 U.S. (14 Pet.) at 571 (stating that "treaty" has the same basic meaning throughout the Constitution).

parties, may . . . be entered into by the respective states, with the consent of congress. The compact between this state and Maryland, entered into in the year 1786, may serve as an example of this last class of public agreements.⁶⁸

This second excerpt shows, once more, that Vattel's definitions of "treaty" and "agreement" were indeed used by the public figures of the Revolutionary era in their debate about the legality of the Mount Vernon Compact. That compact was neither a nationally significant "treaty, alliance, or confederation," nor a mere transitory "agreement." Rather, the Mount Vernon Compact was, as its name suggests, a "compact" within the meaning of Article I, Section 10 of the Constitution.⁶⁹

According to Tucker's analysis, compacts of national magnitude

⁶⁸ TUCKER, *supra* note 67, at 310 app.

⁶⁹ This helps to explain why the Framers of the Constitution added the catchall term "compact" in the phrase "agreement or compact," instead of just using the word "agreement." They wanted to ensure that future pacts like the Mount Vernon Compact would fall within the meaning of Article I. As the Supreme Court has observed:

In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added. The many discussions which have taken place upon the Construction of the Constitution, have proved the correctness of this proposition; and shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous or unmeaning; and this principle of construction applies with peculiar force to the two clauses of the tenth section of the first article, of which we are now speaking, because the whole of this short section is directed to the same subject; that is to say, it is employed altogether in enumerating the rights surrendered by the states; and this is done with so much clearness and brevity, that we cannot for a moment believe that a single superfluous word was used, or words which meant merely the same thing.

Holmes v. Jennison, 39 U.S. (14 Pet.) at 570-71. There has never been any doubt that the Framers did intend that future pacts similar to the Mount Vernon Compact should fall within the ambit of the Compact Clause. Tucker had no doubt of this. *See supra* text accompanying note 68. Joseph Story viewed this issue the same way; he wrote that "the consent of Congress may be properly required" for interstate compacts regulating "the mutual comfort, and convenience of states, bordering on each other." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 272 (1833). The Supreme Court has endorsed this position of Tucker and Story; in the case of *Virginia v. Tennessee*, 148 U.S. 503 (1893), the Court held that Virginia and Tennessee did form an Article I "agreement or compact" when those two states ratified their mutual boundary. *Id.* at 521. The Court also held in *Virginia v. Tennessee* that congressional approval of the boundary agreement could be "fairly implied" because Congress did not raise any "questions or dispute." *Id.* at 522. *But cf.* U.S. Steel Corp. v. Multistate Tax Comm'n., 434 U.S. 452, 462 (1977) (holding that "not all agreements between states are subject to the strictures of the Compact Clause").

and considerable duration are necessarily "treaties" within the meaning of the Constitution. This analysis leaves plenty of room for other "treaties" under the Constitution. Tucker, like Vattel, did not rule out treaties in which the parties consent to a brief duration, nor did he say that all short-term pacts are immune from the treaty requirement. He simply said that accords which have national importance and are made for a considerable time necessarily fall within the meaning of the word "treaty" as used in the Constitution.

Another early commentator, Joseph Story, recognized that Tucker's discussion was somewhat lacking. Seven years before Story participated in *Holmes v. Jennison* as a Supreme Court Justice, he called Tucker's treaty analysis "loose and unsatisfactory,"⁷⁰ but did not go so far as to say that Tucker was wrong. Story pointed out that treaties are often made "for short periods, and upon questions of local interest, and for temporary objects," and he desired greater clarity with regard to such accords. Story, in fact, agreed with Tucker that important long-term accords are necessarily "treaties," as is evidenced by Story's wholehearted endorsement of Chief Justice Taney's opinion in *Holmes*.⁷¹ Story's concurrence in the *Holmes* case shows that he and Tucker were "united in theory,"⁷² in that both viewed Vattel as authority for the meaning of the word "treaty" in the Constitution.⁷³

D. Several Court Cases Regarding Pacts With Other Nations

Chief Justice Taney quoted extensively from Vattel's *Law of Nations* in his *Holmes* opinion.⁷⁴ That opinion, joined by Justice Story and two others, contains the most explicit guidance ever given by the Supreme Court regarding the definition of the word "treaty."⁷⁵ Al-

⁷⁰ STORY, *supra* note 69, at 271.

⁷¹ Justice Story declared that Taney's opinion in *Holmes* "is a masterly one and does his sound judgment and discrimination very great credit . . . I entirely concurred in that opinion with all my heart; and was surprised that it was not unanimously adopted." BERNARD C. STEINER, LIFE OF ROGER BROOKE TANEY 212 (1922). *See also supra* text accompanying note 46.

⁷² President John Adams, during his retirement, remained inquisitive about the principles, the characters, and the views of the American Bar. In particular, he wanted to know this: "Are Tucker and Story united in theory?" John Adams, Letter to Benjamin Waterhouse (Jun. 5, 1813), *in* 10 THE WORKS OF JOHN ADAMS 38 (Charles Francis Adams, ed., 1856).

⁷³ It bears emphasis that the frequent occurrence of unimportant and short-term treaties throughout U.S. history does not in any way contradict the idea that significant long-term accords are necessarily "treaties."

⁷⁴ *Holmes v. Jennison*, 39 U.S. (14 Pet.) at 571.

⁷⁵ *See generally supra* text accompanying note 46. One of the nine justices was absent, and another, Justice Catron, was substantially in accord with Taney's opinion even though he did not technically join in that opinion. The Supreme Court's Reporter observed "that a majority of the Court concurred in the opinion" of Chief Justice Taney. *Holmes v. Jennison*, 39 U.S. (14 Pet.) at 598. Indeed, the Court's holdings in *Holmes* have "been respected and given effect in an unbroken line of later decisions." *Bryant v. Zimmerman*, 278 U.S. 63, 70 (1928).

though the *Holmes* opinion ostensibly dealt with Article I "treaties," the Court in dicta said that its logic applies also to Article II "treaties."⁷⁶

The plaintiff, George Holmes, had been arrested in Vermont on a warrant issued by Governor Jennison, in order that Holmes could be extradited to Canada to face murder charges. The Supreme Court of Vermont decided that Holmes could lawfully be extradited, but, on appeal, four of the eight sitting U.S. Supreme Court Justices held that the extradition "agreement" between Vermont and Canada violated Article I, Section 10 of the Constitution. A fifth Justice, Mr. Justice Catron, "had intended to concur" with the opinion delivered by Chief Justice Taney, but Justice Catron was not prepared to say that an Article I agreement would exist until the actual delivery of Holmes to the Canadians, absent any evidence of a request from the Canadians.⁷⁷ Thus, the Court split evenly with regard to its jurisdiction, and the case was dismissed. The Supreme Court of Vermont subsequently concluded that "a majority of the Supreme Court of the United States was . . . adverse to the exercise of the power in question"⁷⁸ to extradite Holmes without statutory authority "either of congress or of the state legislature."⁷⁹ Thus, the Supreme Court of Vermont voided the accord with Canada, and set George Holmes loose.

In the *Holmes* case, the U.S. Supreme Court and the Supreme Court of Vermont both recognized that important long-term accords (so important that they are committed to writing and approved by the highest governmental authorities) are necessarily "treaties," and are to be distinguished from other accords of lesser permanence or importance. This is precisely the distinction which some scholars now seek to abandon by redefining treaties and agreements so that they are interchangeable.⁸⁰

In 1912, seventy-two years after *Holmes*, the Supreme Court de-

⁷⁶ *Holmes v. Jennison*, 39 U.S. (14 Pet.) at 571.

⁷⁷ *Id.* at 595.

⁷⁸ *Ex Parte Holmes*, 12 Vt. 631, 642 (1840).

⁷⁹ *Id.* at 641. The Supreme Court of Vermont also observed that, had the U.S. Supreme Court been aware of an application to Governor Jennison from the Governor General of Lower Canada soliciting the surrender of Holmes, then U.S. Supreme Court Justice Catron "would have concurred with the other justices, and the judgment of this court would have been reversed." *Id.* at 641. The Canadian application to Governor Jennison, which was accompanied by a copy of the indictment against Holmes, sought a one-time-only deal. *Id.* at 632, 633. This explains why the Supreme Court of Vermont classified this transaction as a compact that could have proceeded with authority from congress, instead of as a treaty. (In contrast, Taney had not been prepared to say that the compact was a treaty, absent any evidence of a written accord.)

⁸⁰ See RESTATEMENT, *supra* note 16, at § 303, Reporter's note 8.

cided the case of *B. Altman & Co. v. United States*.⁸¹ The *Altman* Court held that a commercial agreement with France⁸² "was not a treaty possessing the dignity of one requiring ratification by the Senate," thus implicitly reaffirming that some compacts do require Senate approval. Indeed, both opposing parties in *Altman* explicitly agreed that *Holmes* is proper authority for the meaning of the word "treaty" in the Constitution.⁸³

The *Altman* Court held that, although not an Article II treaty, the commercial agreement with France was nevertheless a "treaty" within the meaning of the Circuit Court of Appeals Act. That fact gave the Supreme Court jurisdiction to hear *Altman's* appeal. In addressing the merits, the Court upheld the lower court's decision that a bronze bust imported by *Altman* was not "statuary" dutiable at the low rate set by the commercial agreement.

The *Altman* case offers no support for the proposition that treaties and other agreements are wholly interchangeable.⁸⁴ The commercial agreement at issue in *Altman* never necessitated Senate approval because it was always revocable upon short notice. The agreement had been unilaterally revoked by the United States long before the Supreme Court issued its opinion, and the agreement did not pledge the United States to any long-term commitment. This commercial agreement thus fell squarely into the *Holmes* category of international compacts that are not necessarily treaties within the meaning of the Constitution.

The Supreme Court reaffirmed *Altman* in the case of *United States v. Belmont*.⁸⁵ The *Belmont* Court, in an opinion by Justice Sutherland,⁸⁶ held that an international compact "is not always a treaty which requires the participation of the Senate." Thus, *Belmont*, like

⁸¹ *B. Altman & Co. v. U.S.*, 224 U.S. 583 (1912).

⁸² Protocol Respecting Commerce, May 28, 1898, U.S.-Fr., T.S. No 98. This agreement stated that it was agreed upon "in accordance with the provisions of Section 3 of the United States Tariff Act of 1897." *Id.* at art. II. The agreement did not commit to any particular duration, and it was terminated by the United States in 1909 when a new tariff law took effect. 7 *Bevans* 857. The French Government objected to the termination because the agreement contained no termination provision, but the State Department replied that termination was implicit "in the absence of enabling legislation by Congress." V GREEN H. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 429 (1943). This position of the State Department (with regard to commercial accords) is entirely consistent with the *Restatement*, according to which "in the absence of provisions stating or implying the contrary, a right to withdraw may be implied." *RESTATEMENT*, *supra* note 16, § 332 com b.

⁸³ 224 U.S. at 601; *Id.* at 585 (argument of plaintiff); *Id.* at 591 (argument of the United States).

⁸⁴ *Contra HENKIN*, *supra* note 10, at 423.

⁸⁵ *U.S. v. Belmont*, 301 U.S. 324 (1937).

⁸⁶ Incidentally, Justice Sutherland also delivered the Court's opinion in *Curtiss-Wright*, *supra* note 41.

Altman, implies that some international pacts do require Senate participation while some do not. Justice Sutherland's opinion in *Belmont*, like his other writings,⁸⁷ is inconsistent with the complete interchangeability of treaties and executive agreements.

The compact at issue in *Belmont* involved an exchange of diplomatic correspondence between President Franklin Roosevelt and Soviet Ambassador Maxim Litvinoff, in which the Soviets assigned to the United States Government legal title to all amounts owed to the Soviets by American citizens.⁸⁸ The purpose of the Litvinov Assignment was to enable the Soviet Union to reach a "final settlement"⁸⁹ of its claims through diplomatic rather than legal channels, and this purpose was accomplished at the stroke of a pen. The *Belmont* Court held that the Litvinov Assignment provided a valid legal basis for the United States to recover Russian deposits in a New York bank, notwithstanding New York law.

The executive agreement at issue in *Belmont*, like that in *Altman*, did not pledge the United States to any long-term commitment, and therefore it was not required to be an Article II "treaty." *Belmont* was later cited approvingly in *United States v. Pink*,⁹⁰ which again involved the Litvinov Assignment.

The Supreme Court addressed another international accord in *Dames and Moore v. Regan*,⁹¹ in an opinion written by Justice Rehnquist, now the Chief Justice. This case involved the deal with Iran which freed American hostages, and which also set the stage for resolving claims between the citizens and governments of the two countries.⁹² *Dames and Moore* argued that the Treasury Secretary should not be allowed to enforce the U.S.-Iran agreement by tying up funds which the Atomic Energy Organization of Iran owed to *Dames and Moore*. The Court held that the U.S.-Iran agreement was legiti-

⁸⁷ With regard to the distinction between treaties and other international agreements, Justice Sutherland most definitely had a sense of which are which:

[I]nternational agreements which are not treaties in the full constitutional sense, are perhaps confined to such as affect administrative matters, as distinguished from policies, and those which are of only individual concern, or limited scope and duration, as distinguished from those of general consequence and permanent character.

GEORGE SUTHERLAND, *CONSTITUTIONAL POWER AND WORLD AFFAIRS* 120 (1919), *quoted in* Borchard, *supra* note 3, at 671. It is thus erroneous to assert that Justice Sutherland never differentiated between Article II treaties and other agreements. *Contra* HENKIN, *supra* note 10, at 179.

⁸⁸ Exchange of Notes Regarding General Relations, Nov. 16, 1933, U.S.-U.S.S.R., 11 *Bevans* 1248, 1256-58 [hereinafter the Litvinov Assignment].

⁸⁹ *Id.*

⁹⁰ *U.S. v. Pink*, 315 U.S. 203, 222-23 (1942).

⁹¹ *Dames & Moore v. Regan*, 453 U.S. 654, 682 (1981).

⁹² Settlement of the Hostage Crisis, Jan. 18, 1981, U.S.-Iran, 20 *I.L.M.* 223.

mate since "Congress acquiesced,"⁹³ and since "the President does have some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate."⁹⁴

Thus, the Supreme Court implied in *Dames and Moore*, as it had in *Altman and Belmont*, that the President does not have complete power to avoid the treaty process by negotiating executive agreements, even if Congress has "placed its stamp of approval on such agreements."⁹⁵ In holding that the claims settlement agreement with Iran did not require a two-thirds Senate vote, the Court in *Dames and Moore* cited the Litvinov assignment as precedent.⁹⁶ Like the Litvinov Assignment, the U.S.-Iran agreement was short-term, with respect to claims by private parties against the respective governments. As the Supreme Court observed, the agreement imposed a deadline of six months for transfer of assets frozen in U.S. banks.⁹⁷ The U.S.-Iran agreement would not have bothered the Founders, who consistently distinguished between treaties and other agreements.⁹⁸ The U.S.-Iran agreement was valid because of its short-term character, and because more than one-third of the Senate did not reject it.

E. Customary Practices Regarding Executive Agreements

Several times in the history of the United States Constitution, the meaning of the words "treaty" and "agreement" has been debated. All of those controversies were resolved in conformity with Vattel's definitions.

In 1817, the United States and Great Britain entered into the Rush-Bagot Agreement,⁹⁹ which led to the disarmament of the Great Lakes. This was not a long-term commitment, as is evident from the provision allowing each party to cancel the deal with six months' notice to the other.¹⁰⁰ The Rush-Bagot Agreement was therefore properly implemented by President Monroe without submission to the Senate for a two-thirds vote. Monroe did obtain Senate consent a year later, in

⁹³ *Dames & Moore*, 453 U.S. at 688.

⁹⁴ *Id.* at 682.

⁹⁵ *Id.* at 680.

⁹⁶ *Id.* at 682.

⁹⁷ *Id.* at 665.

⁹⁸ See, e.g., *supra* note 49 and accompanying text.

⁹⁹ Arrangement Respecting Naval Forces, Apr. 29, 1817, U.S.-Gr. Brit., 8 Stat. 231 [hereinafter Rush-Bagot Agreement].

¹⁰⁰ "If either party should hereafter be desirous of annulling this stipulation, and should give notice to that effect to the other party, it shall cease to be binding after the expiration of six months from the date of such notice." *Id.* President Monroe felt that this aspect of the arrangement was sufficiently important to mention in his first State of the Union Address. James Monroe, First Annual Message (Dec. 2, 1817), in 2 COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 580, 581 (James D. Richardson ed., 1897).

order to please the British Ambassador and appease disgruntled Senators, but he did not think it absolutely necessary that the compact be communicated to the Senate.¹⁰¹ That is, he did not think that the compact was blatantly "such an one as requires the advice and consent of the Senate."¹⁰² President Monroe served in the Federal Congress prior to 1789, and also participated in the Virginia Ratification Convention, so he might be expected to have had a good grasp of the word "treaty" in the Constitution.

Another major accord was the arrangement by which the Republic of Texas became part of the United States in 1845. President Tyler had negotiated a treaty for this purpose, but a majority of the Senate rejected it.¹⁰³ Later, when the electorate had become more favorable to annexation, President Tyler made an innovative suggestion to the House:

[W]hile I have regarded the annexation to be accomplished by treaty as the most suitable form in which it could be effected, should Congress deem it proper to resort to any other expedient compatible with the Constitution and likely to accomplish the same object I stand prepared to yield my most prompt and active cooperation.¹⁰⁴

The House subsequently deemed that a joint resolution, offering statehood to Texas, would suffice instead of a treaty. Congressmen reasoned that the transaction would be of brief duration, and so would not necessarily constitute a "treaty" within the meaning of the Constitution. For instance, Congressman Bayly observed that, from "the language of the Chief Justice of the United States in the case of *Holmes vs.*

¹⁰¹Secretary of State John Quincy Adams (Monroe's successor as President) recorded in his diary the following entry:

Met and spoke to Mr. Bagot this morning on my way to the President's. He asked me if it was the intention of the President to communicate to Congress the . . . arrangement concerning armaments on the Lakes, which he said was a sort of treaty. I spoke of it to the President, who did not think it necessary that they should be communicated. It has been usual heretofore with the message at the opening of the session of Congress to send a collection of documents with it relating to the principal subjects mentioned in it. This was not done at the present session, and some inconvenience has resulted from the omission.

Diary entry (Jan. 14, 1818), in 4 MEMOIRS OF JOHN QUINCY ADAMS 41-42 (Charles Francis Adams ed., 1969).

¹⁰² See James Monroe, Letter to the Senate (April 6, 1818), in 2 COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 602 (James D. Richardson ed., 1897). It is also noteworthy that Congress had authorized the President to lay up the warships on the Great Lakes. Ch. 62, Para. 4, 6, 3 Stat. 217, 218 (1815).

¹⁰³ CONG. GLOBE, 28th Cong., 1st Sess. 698 (1844) (only 16 Senators voted for the treaty, while 35 voted against it).

¹⁰⁴ John Tyler, Letter to the House of Representatives (June 10, 1844), in 5 COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 2176, 2180 (James D. Richardson ed., 1897). Incidentally, President Tyler was President Truman's greatgreat uncle.

Jennison . . . it seems that the gentleman from Massachusetts [Rep. Winthrop] is mistaken in supposing that all stipulations and agreements between nations are necessarily treaties."¹⁰⁵ Congress thus approved the joint resolution,¹⁰⁶ Texas accepted Tyler's offer, and Congress finished the entire international transaction by admitting Texas as a state.

The Texas Accord was not a long-term international compact. Texas quickly lost its national sovereignty and became a state subject to the control of the American people. The annexation of Texas in 1845 is no precedent for long-term pacts that are not "treaties." Likewise, the annexation of Hawaii in 1898 was perfectly constitutional.¹⁰⁷

In 1972, when President Nixon submitted the Antiballistic Missile Treaty to the Senate, he simultaneously submitted an Interim Agreement, regarding strategic arms limitation, to Congress.¹⁰⁸ The National Security Adviser at the time was Henry Kissinger, later to become Secretary of State. Kissinger explained the rationale for Nixon's

¹⁰⁵ CONG. GLOBE, 28th Cong., 2d Sess. app. 124 (1845). *Also see generally supra* note 46 and accompanying text (quoting the Chief Justice in the *Holmes* case). The theme of Congressman Bayly's remarks has been recurrent throughout U.S. history; for example, consider this statement of Congressman Dow with regard to the SALT I Interim Agreement:

Some days ago, I was curious as to why this particular agreement was not handled as a treaty, but instead, comes as an agreement to be accepted by both Houses of Congress. The Library of Congress has given me some good reasons, and I want to share them with my colleagues. This agreement . . . does not seem to have the permanence that would be expected in the treaty form.

118 CONG. REC. 29102 (1972) (statement of Rep. Dow). *See generally* note 51 *supra* (discussing the Interim Agreement).

¹⁰⁶ Far from being ignored, the constitutionality of the joint resolution was extensively debated. Senators on both sides of the issue concurred in the opinion that, as Senator Merrick put it:

[W]ere Texas a terrestrial paradise, its sands all gold, its streams ambrosial nectar, and its hills and rocks the bread of life - though it should promise us peace without end, and strength, prosperity, and glory such as the world has never seen - yet should this measure not be adopted *here*, if it be forbidden by the constitution. To support that constitution we have all registered our oath in Heaven's chancery. The obligations of that oath are paramount to all earthly considerations; and there cannot be a senator here who would not spurn Texas from him as a most loathsome, hideous thing . . . if she could be obtained only by our making such a sacrifice.

CONG. GLOBE, 28th Cong., 2d Sess. app. 229 (1845) (agreeing with Sen. Choate) (*original emphasis*). The Senate vote in favor of the joint resolution was 27 to 25. Cong. Globe, 28th, 2d Sess. 362-363 (1845).

¹⁰⁷ The joint resolution annexing the Hawaiian Islands was approved by a vote of 42 to 21, well over the two-thirds that would have been required for a treaty. 31 CONG. REC. 6712 (1898). Incidentally, not even a treaty could cede territory of an unwilling state. *De Geofroy v. Riggs*, 133 U.S. 258, 267 (1890).

¹⁰⁸ *See supra* note 51.

approach by pointing out that the Interim Agreement would last for only five years. As Kissinger put it, the foreign affairs of the United States raise an "important Constitutional question: At what point does an executive agreement achieve character of such permanence that it should really more properly be in the form of a treaty?"¹⁰⁹ Congress agreed with Kissinger that accords which last for only five years, less than a Senator's term of office, do not necessarily fall within the definition of the word "treaty" as used in the Constitution.¹¹⁰

The State Department has long maintained that executive agreements are impermissible when an accord should instead be dealt with by treaty. This policy is stated in a document known as *Circular 175*.¹¹¹ The current version of this document lists eight criteria which should be given "due consideration" in deciding whether a particular accord must be dealt with as a treaty, and whether a congressionalexecutive or a sole-executive agreement would be appropriate:

- a. The extent to which the agreement involves commitments or risks affecting the nation as a whole;
- b. Whether the agreement is intended to affect State laws;
- c. Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress;
- d. Past United States practice with respect to similar agree ments;
- e. The preference of the Congress with respect to a particular type of agreement;
- f. The degree of formality desired for an agreement;
- g. The proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and
- h. The general international practice with respect to similar agreements.¹¹²

¹⁰⁹Kissinger Briefing, *supra* note 51, at 407.

¹¹⁰*See, e.g., supra* note 105 (statement of Rep. Dow).

¹¹¹The State Department issued *Circular 175* in 1955, stating that:

Executive agreements shall not be used when the subject matter should be covered by treaty . . . Where there is any serious question as to whether an international agreement should be made in the form of a treaty . . . whenever circumstances permit, consultation shall be had with appropriate Congressional leaders . . .

U.S. DEP'T OF STATE, CIRCULAR NO. 175 (1955), *reprinted in* 50 AM. J. INT'L. L. & POLICY 784 (1956).

¹¹²U.S. DEP'T OF STATE, 11 FOREIGN AFFAIRS MAN. § 721.3, *reprinted in* 1975 *Senate Hearings, supra* note 48, at 285. From time to time, various scholars have listed similar criteria to differentiate executive agreements from treaties, and such lists almost invariably include "duration." *See, e.g.,* Letter from Professor Anne-Marie Slaughter, Harvard Law School, to Senator Ernest F. Hollings 5 (October 18, 1994) [hereinafter Slaughter Letter] *reprinted in* GATT *Implementing Legislation: Hearings on S. 2467 Before the Senate Comm. on Commerce, Science and Transportation*, 103d Cong., 2d Sess. 286-290 (1994). Duration is not a mere indicator of whether to submit an accord as "treaty." To the

Circular 175 does not say which of these criteria determine whether an executive agreement can be used instead of a treaty, nor does it say which of the criteria determine the type of executive agreement. From a constitutional point of view, criterion "g" is crucial in the first determination; accords which are neither "short-term" nor "routine" are outside the scope of executive agreements.

Circular 175 states that the Senate possesses constitutional powers which could be "invaded" or "compromised" if the *Circular 175* criteria are carelessly applied.¹¹³ Indeed, the Senate's Office of Legislative Counsel has taken the position that "strong support exists for the proposition that an agreement which . . . qualifies as a treaty under the 'Circular 175' criteria employed by the Department of State is in violation of the Constitution if entered into by the President without the advice and consent of the Senate."¹¹⁴ *Circular 175* contradicts, yet again, the view that treaties and executive agreements are entirely interchangeable under Article II of the Constitution.

V. THE U.S.-JAPAN PLUTONIUM PACT

When President Reagan submitted the U.S.-Japan Pact to Congress in 1987, the Senate rejected a joint resolution¹¹⁵ that would have defeated it.¹¹⁶ The Senate vote was 53 to 30, short of a two-thirds majority.¹¹⁷

The terms of this thirty-year nuclear cooperation accord say that it is ordinarily irrevocable, and that it is binding upon future Presidents who might otherwise oppose it. This accord is currently facilitating the worldwide proliferation of weapons usable plutonium, despite growing sentiment in favor of a proposal to ban plutonium production. President Clinton has, according to press reports, expressed the view that plutonium production

"is not justified on either economic or national security grounds,

contrary, Professor Slaughter agrees with Professor Tribe that some international accords "must . . . be submitted to the Senate for ratification by a two thirds majority of Senators present" (emphasis added). *Id.* at 6. See generally Tribe's Statement, *supra* note 19.

¹¹³ U.S. DEP'T OF STATE, 11 FOREIGN AFFAIRS MAN. § 721.3, reprinted in 1975 Senate Hearings, *supra* note 48, at 285.

¹¹⁴ 1975 Senate Hearings, *supra* note 48, at 373 (Senate Office of Legislative Counsel memorandum on certain Middle East agreements).

¹¹⁵ S.J. Res. 241, 100th Cong., 2d Sess. (1988).

¹¹⁶ Atomic Energy Act of 1954 § 123(d), 42 U.S.C. § 2153(d) (1988). (Section 123 specifies that any proposed nuclear cooperation agreement will not take effect if Congress promptly passes a concurrent resolution opposing the agreement, and of course the President would then be constitutionally entitled to veto the resolution).

¹¹⁷ See 134 CONG., REC. *supra* note 5 (the 17 Senators who did not vote were absent).

and its accumulation creates serious proliferation and security dangers" . . . but in an Oct. 20 letter to Rep. Fortney "Pete" Stark [he said the] "proposal would breach existing U.S. commitments," such as an agreement allowing Japan to extract plutonium from fuel that originated in the United States, and would "lead to confrontation with Russia and our allies."¹¹⁸

The U.S.-Japan Pact may thus be *the* crucial factor preventing the nations of the world from halting the production of the most dangerous material on Earth, or at least may be providing our leaders with an excuse to avoid taking responsibility. If this is indeed true, then the U.S.-Japan Pact may rank as the most consequential violation of the Constitution in the history of the United States.

North Korea used the U.S.-Japan Pact to justify its own plutonium program, citing the U.S. "double-standard" by which Japan can have tons of plutonium while North Korea cannot¹¹⁹, and there is every reason to expect that other countries will use this justification in the future. The security risks inherent in the U.S.-Japan Pact led to significant Senate opposition in 1988,¹²⁰ and Senators have also expressed grave concerns about the severe environmental and public health risks posed by the pact.¹²¹

¹¹⁸ Thomas W. Lippman, *Clinton Refuses to Ask Britain to Halt New Plutonium Plant*, WASH. POST, Nov. 12, 1993, at A10.

¹¹⁹ Jonathan Power, *Japan's Growing Nuclear Equivocation*, BALTIMORE SUN, Dec. 10, 1993, at 31A (quoting North Korea's official press agency). See also David E. Sanger, *Effort to Solve Energy Woes Clashes With Nuclear Safety*, N.Y. TIMES, August 20, 1994, at 1 (stating that North Korea has consistently made the straightforward argument that they should not be forbidden to do what Japan is allowed to do).

¹²⁰ For example, Senator Glenn said that "there is no parallel in the history of U.S. nuclear cooperation agreements that I am aware of for such a limitation on our right to suspend a consent for a foreign nuclear activity, especially with regard to activities involving ton quantities of nuclear weapons-usable material in a nonnuclear weapons state. Ton quantities of this plutonium, I am talking about, that will be transferred. Do you know how much it takes to make a nuclear weapon with plutonium if you know what you are doing? Somewhere under 5 kilograms." 134 CONG. REC. 4511 (1988) (a kilogram is equivalent to 2.2 pounds). Senator Cranston noted that, according to the Senate Foreign Relations Committee, the U.S.-Japan Pact poses "an extreme environmental hazard, a proliferation peril, and a would-be terrorist's dream come true." *Id.* at 4543. Senator Helms pointed out that, "while the proposed agreement could be suspended by the United States unilaterally, there is concern that the terms of this suspension right are such that it can never be exercised." *Id.* at 4506.

¹²¹ U.S. Energy Secretary Hazel O'Leary has stated that, "plutonium is potentially dangerous, even in very small amounts, whether it is ingested or inhaled. Plutonium from reactors can also be used to make nuclear weapons." Thomas W. Lippman, *Pluto Boy's Mission: Soften the Reaction*, WASH. POST, March 7, 1994, at A11. However, Japan's Power Reactor and Nuclear Fuel Development Corporation has distributed a video cartoon which falsely claims that bombs would be "extremely difficult" to make with reactor plutonium, and has also falsely asserted that no proof exists of plutonium's carcinogenic effects in humans. *Id.* Likewise, Japanese Energy Minister Satsuki Eda has asserted that reactor plutonium is "insufficient" for nuclear weapons. Richard Read, *Nuclear Work in Japan Raises Many Concerns*, OREGONIAN, Dec. 23, 1993, at A3. Although President Reagan agreed to the U.S.-Japan Pact for fear that the Japanese would take their business elsewhere, the United States has consistently discouraged Japan from using plutonium. David Holley, *Japan Pursues Plutonium Reactor*, OREGONIAN, Mar. 20, 1994, at A5.

Article 12 of the basic agreement establishes the grounds for either party to suspend cooperation if the other party violates the agreement.¹²² Article 3 of the implementing agreement also allows for unilateral suspension, but only "in the most extreme circumstances of exceptional concern," and provided that this concern is "from a nonproliferation or national security point of view," and if, furthermore, the suspension is "for the minimum period of time necessary."¹²³ According to the State Department, Japan has such "outstanding nonproliferation credentials" that "any instance of increased proliferation or national security risk in the case of Japan would inevitably arise out of "extreme circumstances of exceptional concern."¹²⁴ Even if one accepts the State Department's assurances to Congress, the U.S.-Japan Pact's suspension limitations make it impossible for the United States to suspend the pact on the grounds that: 1) the United States simply made a policy error in agreeing to the pact in the first place, or 2) because new environmental or public health risks warrant suspension, or 3) because Japanese authorities have consistently given false information to their people, or 4) because plutonium is lost or mysteriously turns up on the black market, or 5) for any number of other reasons.

The minutes to the implementing agreement allow for suspension of the U.S.-Japan Pact if actions of "governments of third countries" cause the U.S.-Japan activities to "clearly result in a significant increase in the risk of nuclear proliferation or in the threat to the national security of the suspending party."¹²⁵ However, suspension of the U.S.-Japan Agreement remains impermissible if: 1) the U.S. merely concludes that it ran a foolish risk when it entered into the U.S.-Japan Pact despite the threat of plutonium theft, or 2) the U.S. concludes that Japanese inattention to environmental or public health risks warrants suspension, or 3) the U.S. believes that assisting Japan's plutonium program makes it too difficult to oppose weapons-usable programs throughout the world, or 4) the prospects for developing safer energy sources become more promising.

The terms of the U.S.-Japan Pact state that the pact cannot be dropped at will by the United States for a considerable period of time. The Pact is not scheduled to expire until the year 2018. If this pact

¹²² H.R. Doc. No. 128, *supra* note 4, at 16.

¹²³ *Id.* at 44.

¹²⁴ *United States-Japan Nuclear Cooperation Agreement: Hearings Before the Committee on Foreign Affairs*, 100th Cong., 1st & 2d Sess. 528 (1987 & 1988) (State Department's analysis of suspension rights under the proposed agreement).

¹²⁵ H.R. Doc. No. 128, *supra* note 4, at 62.

now continues in force, it will continue to be manifestly unconstitutional, unless the President convinces two-thirds of the Senate to endorse the U.S.-Japan arrangements, or until the Pact is renegotiated so as to remove the long-term commitment.

VI. CONCLUSION

Important long-term accords, such as the U.S.-Japan Pact of 1988, require a two-thirds Senate concurrence. This was the unmistakable and overwhelming intent of the Framers of the Constitution, and has been the consistent practice throughout every phase of American history. In summary, Senate consent or acquiescence is requisite for any international covenant which is significant enough to warrant the scrutiny of the President and which, by its terms, may not be terminable at will by the United States for six years or more.

There is an urgent need for the three branches of government to reaffirm that a line of demarcation exists between executive agreements and Article II treaties, and for the courts to decide whether that line, whatever may be its precise contours, has been crossed. That is "the \$ 64 question."¹²⁶ The U.S.-Japan Pact proves that the line of demarcation has not been merely crossed; it has been steamrolled.

The U.S.-Japan Pact is manifestly a treaty within the meaning of the Constitution. Since it has not been legally ratified, the President has no authority to enforce it. Unlike other nuclear cooperation accords, the U.S.-Japan Pact was rejected by more than one-third of the Senators voting. Thus, the Pact is, and always has been, *ultra vires* and without legal force. Perhaps the President can persuade Japan to join him in treating the Pact as a nullity, or perhaps the matter will end up in court. An ongoing accord violative of the treaty-making procedure is no more immune from judicial scrutiny than would be an accord passed in violation of the Bill of Rights.¹²⁷ Even in the unfortu-

¹²⁶ This quote is from an interesting session of the Senate Foreign Relations Committee, excerpted below:

Senator Gillette: A few years ago I prepared what I thought was a good paper on this thing, and I wrote the State Department and asked them how they drew the line, how did they differentiate between what they considered a treaty and what they considered an executive agreement, and they answered me that a treaty was a document that you had to send to the Senate for confirmation, and an executive agreement was one that you did not.

Senator Smith of New Jersey: That was a very satisfactory reply; the \$ 64 question was still left.

Senator Gillette: That is actually the way they explained it.

Executive Sessions of the Senate Foreign Relations Committee, 82d Cong., 2d Sess. 463 (1952).

¹²⁷ See *United States v. Munoz-Flores*, 495 U.S. 385, 397 (1990). The Court in *Munoz-Flores* held that a "law passed in violation of the Origination Clause would . . . be no more immune from judicial scrutiny because it was passed by both Houses and signed by the President than would be a law passed in violation of the First Amendment." The Origination Clause, of course, says that "All Bills for raising Revenue shall originate in the House of Representatives." U.S. CONST. art. I, § 7, cl. 1. Similarly, Professor Tribe has pointed out that "it is not the prerogative of those who temporarily hold public

nate event that the President continues to enforce the U.S.-Japan Pact, it is no precedent for similar pacts such as the upcoming EURATOM accord, which may face opposition from one-third of the Senate.¹²⁸

The Supreme Court invalidated an executive agreement for the first time in 1957, in the case of *Reid v. Covert*.¹²⁹ The Court then declared that "the United States is entirely a creature of the Constitution."¹³⁰ To be sure, the American people have always aspired to have a "government of laws and not of men."¹³¹ It would be unfortunate if today we instead have a government which places international accords above the law, by allowing the sovereign prerogatives of future Presidents and electorates to be bargained away without the strong

office to abdicate structural constitutional protections -and, of course, it is not within their power thereby to bind the nation for all time by such abdication." Tribe's Statement, *supra* note 19, at 12.

¹²⁸ According to the Supreme Court, "That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date." *Powell v. McCormack*, 395 U.S. 486, 546-47 (1969). It should be emphasized that there is apparently nothing unconstitutional about those nuclear cooperation agreements which have been approved by two-thirds of the Senate (either by acquiescence or by vote). Furthermore, there is apparently nothing unconstitutional about the terms of section 123 of the Atomic Energy Act (42 U.S.C. § 2153), because those terms do not purport to authorize cooperation agreements that bind the United States for more than six years over the objections of one-third of the Senate (the Atomic Energy Act can and should be interpreted in a manner consistent with the Constitution).

¹²⁹ *Reid v. Covert*, 354 U.S. 1 (1957). This case involved agreements with Great Britain and Japan which authorized trial by court martial of American civilians in time of peace. The Court held these agreements violative of the Bill of Rights. This holding eased Senators' concerns that international accords should be kept in conformity with the Constitution (if not in pursuance of it). *See generally* S. Rep. No. 1716, *supra* note 1. The Court in *Reid* dramatically interposed itself in the domain of foreign relations, in order to rescue the Bill of Rights, and did so fourteen years after one of the unconstitutional accords had been signed. *Reid v. Covert*, 354 U.S. at 15. However, there need not be any such interposition with regard to the U.S.-Japan nuclear pact; the courts can simply put the onus with the President and the Senate, where it belongs. It is for the Senate and the President to decide whether to ratify the U.S.-Japan accord, and they are by no means obligated to do so. *See* RESTATEMENT, *supra* note 16, § 311(3) (opining that a nation may "invoke a violation of its internal law to vitiate its consent to be bound if the violation was manifest and concerned a rule of fundamental importance"). If there is one thing that has always been manifest to all nations of the world, it is this: that the one way to obtain an indisputably durable commitment from the United States is by getting two-thirds of the Senate to go along.

¹³⁰ 354 U.S. 1, 5-6 (1957).

¹³¹ MASS. CONST. part I, art. XXX (written by John Adams and associates in 1780, during the Revolutionary War, and adopted that year by freely elected delegates).

Senate approval required by the Constitution.

This is no plea for isolationism — a policy which has no place in this day and age.¹³² The United States must actively pursue a happy and healthy world by making significant short-term as well as long term international commitments. Long-term accords, however, still require the strong two-thirds Senate approval in adherence to the Constitution. Without such adherence, the United States risks incautious commitments which could spark renewed isolationism, or worse.

During recent decades, international accords have grown in both quantity and influence, so it is more important than ever for such accords to be formed using the proper procedures. The two-thirds Senate procedure is meant to restrain the United States from rashly entangling itself in lasting foreign commitments, and is not supposed to provide an appendant method of obligating future leaders, or of permanently compromising vital American resources.¹³³ The treaty safeguard remains crucial as we approach a new century, which promises rapid changes and which will require a flexible foreign policy to deal with those changes. Above all else, the future will require a decent

¹³² See generally *Roosevelt's Address at San Diego Touching on Home and Foreign Problems*, N. Y. TIMES, October 3, 1935, at A14 (in which President Franklin Roosevelt spoke of "our national determination to keep free of foreign wars and foreign entanglements . . ."). There is a big difference between opposing entanglements, as Roosevelt did in 1935, and favoring restrained and cautious entanglement, as the Constitution does. Indeed, it is not inconsistent to favor the Constitution's treaty process, while at the same time urging that the U.S. greatly expand its international role. American diplomacy has for many years followed an isolationist hands-off path regarding a wide range of touchy "internal affairs," including exploitation of child labor, insecure conditions for the elderly and disabled, unequal treatment of women, and rampant deforestation. These are all crucial international economic problems, and merely frowning upon them will not uplift our trade partners or prevent overpopulation. When we marginalize these problems (and others such as unsafe workplaces, pollution, and substandard wages) we make them worse, while sacrificing good American jobs to countries that can make products at unfairly low costs. We need not amend the treaty process; what we need are internationalist leaders who understand how to use it in concert with other nations.

¹³³ See, e.g., THOMAS JEFFERSON, *MANUAL OF PARLIAMENTARY PRACTICE*, § 594 (1801), reprinted in H.R. DOC NO. 256, 101st Cong., 2d Sess., at 115, 296 (1991) (unequivocally stating that the two-thirds provision was meant "to restrain the Executive and Senate from entangling and embroiling our affairs with those of Europe"). See also JAMES MADISON, *JOURNAL OF THE FEDERAL CONVENTION* 686 (E.H. Scott ed., 1893) (recounting that "it had been too easy in the present Congress to make treaties altho' nine States were required for the purpose"). As Madison's comment illustrates, the Framers of the Constitution purposely raised the treaty-making hurdle higher than it had been under the Articles of Confederation, by necessitating the cooperation of the President in addition to the two-thirds approval that had been needed under the Articles. See *supra* note 53. The strong consensus required by the Constitution has ensured that the United States does not lightly abrogate or undermine its treaty obligations, and in this sense the treaty process is not only a hurdle, but is also "a bulwark" which has made the United States a reliable international partner. Slaughter Letter, *supra* note 112, at 7.

respect for our Constitution.¹³⁴

¹³⁴ Professor Slaughter has written eloquently that:

[C]onstitutionalism is an international as well as a domestic value. The Constitution mandates special safeguards for the conclusion of international agreements with direct, significant, and *lasting* constraints on U.S. sovereignty. These safeguards cannot be circumvented by semantic sleight-of-hand. If . . . agreements qualify as a treaty, they must be passed as a treaty. The Senate should give its full attention to that question, in the best interests of both the domestic and the international rule of law.

Slaughter Letter, *supra* note 112, at 8 (emphasis added).

President Harry Truman, had this to say about the treaty process:

Paragraph 2 of Section 2 of the Constitution of the United States provides that: "He (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" If the powers of the President are further limited . . . the country may as well readopt the Articles of Confederation . . . The men who wrote the Constitution knew history, were familiar with government as practiced in their day and had become experienced in the shortcomings of the Articles of Confederation.

Letter from Harry S. Truman to Senator Thomas C. Hennings, Jr. (March 25, 1955), *reprinted in* OFF THE RECORD: THE PRIVATE PAPERS OF HARRY S TRUMAN 314 (Robert H. Ferrell ed., 1980) (commenting on a proposed constitutional amendment).

See generally supra note 12 (President Truman's views on the Senate's rejection of the Treaty of Versailles). Incidentally, it was on August 6 of 1945, fifty years ago, when, in accordance with the orders of President Truman, a bomb using highly enriched uranium decimated Hiroshima. A plutonium bomb hit Nagasaki less than 75 hours later. Whether or not dropping the bombs was appropriate, they showed an unknowing world what boundless horror can be unleashed upon innocent people; the bombings gave all free nations a chance to face the facts, and to pull back from the brink.