

2002

Did the ABM Treaty of 1972 Remain in Force After the USSR Ceased to Exist in December 1991 and Did it Become a Treaty Between the United States and the Russian Federation?

George Miron

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MEMORANDUM OF LAW

DID THE ABM TREATY OF 1972 REMAIN IN FORCE AFTER THE USSR CEASED TO EXIST IN DECEMBER 1991 AND DID IT BECOME A TREATY BETWEEN THE UNITED STATES AND THE RUSSIAN FEDERATION?*

GEORGE MIRON**

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* On December 13, 2001, President George W. Bush notified Russia that the United States is withdrawing from the ABM Treaty. President George W. Bush, Remarks on National Missile Defense (Dec. 13, 2001), *at* <http://www.whitehouse.gov/news/releases/2001/12/20011213-4.html>. That announcement does not moot the need to understand how the extinction of the USSR in 1991 affected the ABM Treaty. Members of Congress who supported the continuation of the ABM Treaty may decide to file a suit alleging that the Constitution requires a Congressional vote to authorize the United States to withdraw from a treaty. In 1979 the Supreme Court side-stepped that question, when presented in a suit by Senator Barry Goldwater seeking to nullify President Jimmy Carter's disavowal of the United States/Taiwan Mutual Defense Treaty. *Goldwater v. Carter*, 444 U.S. 996 (1979).

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I. QUESTIONS ADDRESSED BY THE MEMORANDUM

A. The question of international law: when the Union of Soviet Socialist Republics ("USSR") dissolved in 1991, did the Anti-Ballistic Missile ("ABM") Treaty of 1972 lapse, i.e., cease to have further legal effect?

B. The question of constitutional law: does a President have the authority, without a concurring vote of two-thirds of the Senate, to bring the ABM Treaty into effect between the United States and the Russian Federation?

II. BACKGROUND

This Memorandum concludes that, following the extinction of the USSR, the ABM Treaty of 1972¹ did not become a treaty between the United States and the Russian Federation. Rather, as a bilateral, non-dispositive treaty, the ABM Treaty of 1972 between the United States and the USSR lapsed when the USSR ceased to exist.

In December 1991, new states that emerged on what was USSR territory declared independence, announced the formation of the "Commonwealth of Independent States" ("CIS"), and proclaimed the USSR "as a subject of international law and a geopolitical reality no longer exists."² By December 21, 1991, the following states joined the CIS: Azerbaijan, Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, the Russian Federation, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan.³ These states reiterated the dissolution of the USSR, declaring that, with the CIS's establishment, "the Union of Soviet

1. See Treaty on the Limitation of Anti-Ballistic Systems, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3435 [hereinafter "ABM Treaty"] (providing generally for the limitation of anti-ballistic missile systems and their deployment).

2. Agreement Establishing the Commonwealth of Independent States, Dec. 8, 1991, pmbl., 31 I.L.M. 143.

3. See Protocol to the Agreement establishing the Commonwealth of Independent States, Dec. 21, 1991, 31 I.L.M. 147 (noting the addition of more States to the CIS).

Socialist Republics ceases to exist.”⁴ Soon thereafter, the United States acknowledged that the USSR “is no more.”⁵

In recent centuries, instances in which treaties ceased to exist are not numerous. The United States officially expressed its view that, upon the extinction of a state, such state’s bilateral political treaties automatically lapse. The United States acted in accordance with that view in connection with the extinction of the Kingdom of Hawaii in 1898, the dissolution of the Austro-Hungarian Empire at the end of World War I, and the dissolution of Yugoslavia in 1992. The U.S. view is consistent with the opinion of international legal scholars who addressed this issue. With consistency over more than two hundred years, scholarly writings acknowledge that when a state ceases to exist (and therefore becomes “extinct”), that State’s bilateral treaties have no further effect.⁶ Such treaties are said to lapse or “fall to the ground.”⁷ The lapsing occurs by operation of law—that is, automatically upon the state’s extinction. It does not require action by any other treaty party. No judicial decision or applicable treaty contradicts this principle, and the U.S. Supreme Court has established that “where there is no treaty and no controlling executive or legislative act or judicial decision,” works of international legal scholars are acceptable as evidence of the law.⁸

President William Jefferson Clinton took the view that the ABM Treaty of 1972 remains “in force.”⁹ Representative Benjamin Gilman, Chairman of the House Committee on International Affairs,

4. *Id.* at 149 (describing the dissolution of the USSR).

5. President’s Address to the Nation on the Commonwealth of Independent States, 27 WEEKLY COMP. PRES. DOC. 1883 (Dec. 25, 1991) (recounting the dissolution of the USSR).

6. See KRYSZYNA MAREK, *IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW* 6 (1968) (describing expired states as “extinct”); see also discussion *infra* part IV.D. (highlighting the notion that bilateral treaties do not survive a nation’s termination).

7. See Amos S. Hershey, *The Succession of States*, 5 AM. J. INT’L L. 285, 287 (1911) (describing the effect of a state’s extinction on treaties).

8. See *The Pacquette Habana*, 175 U.S. 677, 700 (1900) (noting the persuasive evidentiary value of works of legal “commentators”).

9. See Letter from President William J. Clinton, to Rep. Benjamin A. Gilman, Chairman, Comm. on International Relations, H. R., 2 (May 21, 1998) [hereinafter “May Clinton Letter”] (expressing his opinion on the ABM Treaty).

asked President Clinton, in a June 1997 letter, which state, if any, does the United States believe was its ABM Treaty partner.¹⁰ President Clinton, in November 1997, replied that the "succession" issue was "unsettled," adding:

Neither a simple recognition of Russia as the sole ABM successor (which would have ignored several former Soviet states with significant ABM interests) nor a simple recognition of all NIS [newly independent states] as full ABM successors would have preserved fully the original purpose and substance of the Treaty, as approved by the Senate in 1972.¹¹

Representative Gilman and Senator Jesse Helms, Chairman of the Senate Foreign Relations Committee, wrote President Clinton in March 1998 and noted that, if the Administration cannot identify any country in addition to the United States that is bound by the treaty, then Congress would have to conclude that the treaty was no longer in force.¹² In May 1998, President Clinton replied that the ABM Treaty was in force between the United States and the Russian Federation.¹³ He did not articulate the principle of law on which he based this conclusion. Nor did he explain how this conclusion could be squared with his November 1997 response to Representative Gilman.

10. See Letter from Rep. Benjamin A. Gilman, Chairman, Comm. on International Relations, H. R., to President William J. Clinton 2-3 (June 16, 1997) (on file with author) [hereinafter "June Gilman Letter"] (discussing the vitality of the ABM treaty).

11. Letter from President William J. Clinton, to Rep. Benjamin A. Gilman, Chairman, Comm. on International Relations, H. R. 2 (Nov. 21, 1997) (on file with author) [hereinafter "November Clinton Letter"] (explaining the U.S. objective to substantively preserve the original treaty after succession).

12. See Letter from Rep. Benjamin A. Gilman, Chairman, Comm. on International Relations, H. R., and Sen. Jesse Helms, Chairman, Comm. on Foreign Relations, S., to President William J. Clinton 2 (Mar. 3, 1998) (on file with author) [hereinafter "Gilman-Helms Letter"] (responding to the President's position concerning the ABM Treaty).

13. See May Clinton Letter, *supra* note 9, at 2 (reasserting the continued existence of the ABM treaty).

A. THE THESIS THAT UNDER INTERNATIONAL LAW THE ABM
TREATY OF 1972 WITH THE USSR BECAME A TREATY BETWEEN
THE UNITED STATES AND THE RUSSIAN FEDERATION

1. *The Position Stated by Assistant Attorney General Walter
Dellinger*

The most extensive publicly available discussion of the ABM Treaty's current legal status produced by a Clinton Administration official was in the June 29, 1996, memorandum from Walter Dellinger, Assistant Attorney General ("AAG"), Office of Legal Counsel, to Presidential Counsel Jack Quinn ("Dellinger Paper").¹⁴ The Dellinger Paper contends that as a matter of international law the ABM Treaty did not lapse, for these reasons: (i) the treaty imposed a permanent burden on the parties' respective territories, which would bring the ABM Treaty of 1972 within the international legal doctrine of dispositive treaties (a treaty is dispositive if it irrevocably fixes a right to particular territory, *e.g.* it delineates a border between two States);¹⁵ (ii) past U.S. diplomatic practice assumes that bilateral treaties "generally" survive a State's extinction; and (iii) Article 34 of the 1978 Vienna Convention on Succession of States in Respect of Treaties embodies a general principle of law that bilateral treaties survive a State's extinction.¹⁶ This Memorandum, concluding that the Dellinger Paper is incorrect regarding international law, refutes those three bases for the contention that the ABM Treaty of 1972 did not lapse.

AAG Dellinger separately argues that irrespective of international law, the President can bring a treaty into existence without Senate consent by exercise of "exclusive" Executive powers.¹⁷

14. See Memorandum from Walter Dellinger, Assistant Attorney General, to John M. Quinn, Counsel to the President (June 26, 1996) [hereinafter "Dellinger Paper"] (providing an in-depth analysis of the legal status of the ABM treaty).

15. See *infra* Part IV.K. and accompanying text (elaborating on the concept of dispositive treaties).

16. See Dellinger Paper, *supra* note 14 (basing the justifications for the survival of the ABM Treaty in international law).

17. See *id.* at 3-6 (arguing that the President's power to execute treaties is unconstitutionally infringed by section 233(a) of S. 1745, the Department of Defense Authorization Act for Fiscal Year 1997).

2. *The Positions of Other Commentators*

The thesis that the ABM Treaty of 1972 became a treaty with Russia is also propounded in *Ballistic Missiles: Threat and Response: Hearing Before the S. Comm. on Foreign Relations*, 106th Cong. 276 (1999) (statement of Michael J. Glennon, Professor at Law, University of California at Davis) (relating his views on the ABM Treaty); George Bunn and John B. Rhinelander, *The Arms Control Obligations of the Former Soviet Union*, 33 VA. J. INT'L L. 323, 339 (1993) (commenting that evidence of the applicability of the ABM treaty to Russia can be found in Russian statements concerning succession to Soviet treaties); *State Succession and the Legal Status of the ABM Treaty*, OCCASIONAL PAPER (Lawyers Alliance for World Security/Committee for National Security, Washington, D.C.) May 5, 2000 (noting the ABM treaty remains in effect); and in Council for a Livable World Education Fund, *Anti-Ballistic Missile Treaty's Legal Status, Talking Points on the Case Against the ABM Treaty* (providing talking points on the case against the ABM treaty) at <http://www.clw.org/nmd/abmlegal.html> (last visited Oct. 16, 2001).

On May 25, 1999, Professor Michael Glennon of the University of California at Davis Law School, testified that the ABM Treaty of 1972 became a legally binding agreement between the United States and Russia by the following process: (i) on or shortly before January 29, 1992, Russian President Boris Yeltsin stated Russia regarded itself as the "legal successor" to the USSR's bilateral treaties that were still in effect, including arms limitations and disarmament; see *Ballistic Missiles: Threat and Response: Hearing Before the S. Comm. on Foreign Relations*, 106th Cong. at 278 (noting affirmative Russian statements); (ii) Secretary of State James Baker expressed the U.S. response to President Yeltsin as follows: "I made the point to President Yeltsin that the United States remains committed to the ABM Treaty [W]e expect the States of the commonwealth to abide by all of the international treaties and obligations that were entered into by the former Soviet Union, including the ABM Treaty." *Id.* at 278-79; (iii) according to Professor Glennon, in 1994, the Congress concurred in Secretary Baker's statement, by way of the National Defense Authorization Act for Fiscal Year 1994 as follows: "[t]he United States shall not be bound by any international

agreement entered into by the President that would substantively modify the ABM treaty unless the agreement is entered pursuant to the treaty making power of the President under the Constitution.” *Id.* at 283 (citing National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-337 § 232(a), 108 Stat. 2700 (1994)).

Professor Glennon also stated that the Senate, in 1997, independently manifested its concurrence by way of Condition 9 to the ratification resolution for the CFE Flank Document. *Id.* at 283-84. Condition 9 provides that:

[T]he President shall certify to the Senate that he will submit for Senate advice and consent to ratification any international agreement: that would add one or more countries as State Parties to the ABM Treaty, or otherwise convert the ABM Treaty from a bilateral treaty to a multilateral treaty; or that would change the geographic scope or coverage of the ABM Treaty, or otherwise modify the meaning of the term “national territory” as used in Article VI and Article IX of the ABM Treaty.

Id. at 284 (quoting Flank Document Agreement to the CFE Treaty, 143 Cong. Rec. 54451-01, S4478 (1997)).

Finally, Professor Glennon contended, as a general proposition, that the concurrence of the Congress may be inferred from its silence, *i.e.* by its failing to make a “timely objection” to a President’s “determination” that a treaty exists between the United States and another state. Professor Glennon offered no rule to determine Congressional timeliness, and in any event did not contend that the time for Congressional objection to the making of an ABM treaty with Russia expired before the Congress in 1994 allegedly concurred by way of Section 232(a) of the National Defense Authorization Act for FY 1995.

The conclusion of this Memorandum is, contrary to the positions taken by Dellinger and the other commentators, that the President has no power to bring an agreement into existence without Senate consent if the breach of that agreement might create a significant risk to the security of the United States.

That the ABM Treaty is no longer in force is propounded also in Professor Robert F. Turner’s monograph, *THE ABM TREATY AND THE SENATE: ISSUES OF INTERNATIONAL AND CONSTITUTIONAL LAW* 183-205 (Center for National Security Law, Occasional Paper Series 1999) (concluding that the ABM Treaty likely expired with the

downfall of the USSR), by the law firm of Hunton and Williams in a Memorandum to the Heritage Foundation, David B. Rivkin Jr., ET AL., *The Collapse of the Soviet Union and the End of the 1972 Anti-Ballistic Treaty: A Memorandum of Law* (June 15, 1998) (on file with author) (concluding that the ABM Treaty is no longer binding as a result of the dissolution of the USSR), and by John Yoo, *Politics as Law? The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, (2001) 89 CAL. L. REV. 851, 903-07 (reviewing FRANCES FITZGERALD, *WAY OUT THERE IN THE BLUE: REAGAN, STAR WARS AND THE END OF THE COLD WAR* (2000)) (examining the consequences of the demise of the USSR).

B. THE THESIS THAT THE CONSTITUTION EMPOWERS THE
PRESIDENT TO MAKE A LEGALLY BINDING TREATY WITH RUSSIA
ON ABM MATTERS WITHOUT A CONCURRING VOTE OF TWO-
THIRDS OF THE SENATE

The Dellinger Paper argued the President's implied powers to interpret treaties, to implement treaties, and to recognize the existence of a foreign state constitute a further implied power, *i.e.*, without a concurring vote of two-thirds of the Senate, to make a legally binding treaty with a foreign state.¹⁸ Dellinger was wrong. The Constitutional granting of powers to the President by implication does not nullify the express specification of a limit on the powers granted. That rule includes implied "foreign policy" powers.

The Constitution expressly delegates to the President some foreign-policy making decisions, as well as the power to conduct some governmental activities that touch upon external relations. Article II, Section 3, requires the President to receive ambassadors from foreign states. Article II, Section 2, empowers the President (with concurrence of a vote of two-thirds of the Senate) to "make treaties," and to conduct the office of Commander-in-Chief of the Army of the United States and of the Militia of the several states, when called into the actual service of the United States. The Constitution's words, fairly read according to their apparent intended meanings, imply the President has the authority to make certain other

18. See Dellinger Paper, *supra* note 14 (arguing that such powers are powers that are exclusive to the President).

foreign-policy decisions and conduct certain other governmental activities that touch upon foreign relations. Some examples of these include: declaring that the United States “recognizes” the existence of a regime claiming to govern a state and declaring (“recognizing”) that a particular foreign state has come into existence.

The treaty-making power is unique among expressed foreign-policy powers. It is the only power to which there is an explicit formula as to how the President and the Congress share power, *i.e.*, the President, “shall have the Power by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur.” U.S. CONST. art. II § 2.

Concerning the other powers touching on external relations (expressed and implied), the sharing is inferred from the context. In some cases, the inference is manifest, *i.e.*, the President’s exercise of the office of Commander-in-Chief would be a nullity without armed forces. Article II, Section 7, delegates to the Congress the exclusive authority to raise and support Armies, to provide and maintain a Navy, and to provide for calling forth the Militia to execute the laws of the Union, and to suppress insurrections and repel invasions. Likewise, the Constitution delegates to Congress the power to declare War, grant Letters of Marque and Reprisal, and make rules concerning captures on land and water. Central to the sharing of the external relations power is the exclusive power of the Congress to craft laws (effective on Presidential signature or by veto-override) to raise revenue, (Article I, Section 7), coupled with the rule that “no money shall be drawn from the Treasury, but in consequence of Appropriations made by Law.” U.S. CONST. art. I, § 9.

None of the arguments put forth by AAG Dellinger support a conclusion that the President, by acting alone or with a simple majority of one or both Houses of Congress, can make a treaty without the concurrence of two-thirds of the Senate.

1. The President’s power to interpret treaties is not exclusive. Indeed, it is subordinate to judicial power to interpret treaties definitively. Hence, the President cannot make Treaty A into Treaty B simply by declaring that he is only interpreting Treaty A.

2. The President’s power to implement treaties is not exclusive, and is subordinate to Congressional power to make laws to implement the laws of the land. Hence, the President cannot make

Treaty A into Treaty B by declaring that he is only implementing Treaty A.

3. The President's power to declare that a state has come into existence (to "recognize" that state) does not allow the President to disregard the rule of international law that if a state possesses the attribute of statehood, then states must fulfill the obligations that each state owes to all other states irrespective of whether the former has diplomatic relations with the latter. Hence, "recognizing" a newly emerged state A does not establish that state B is a state, let alone a continuation of state A.

4. Senate concurrence in a treaty with one state cannot be construed as concurrence to the making of a treaty with another state because such a construction would alter or amend the treaty, a process that itself requires a two-third concurrence by the Senate.

5. The President's implied powers to make some agreements with States without consent of either House of the Congress ("sole-Executive Agreement"), and to make some agreements upon favorable majority votes in both Houses ("Congressional-Executive Agreements"), have not been transformed into a power to make any legally binding agreements with states, without a two-third concurrence by the Senate.

6. The few cases upholding agreements made without concurrence of two-thirds of the Senate do not arise from any agreement that legally binds the United States to a substantial national security course of action.

7. The record of the Constitutional Convention shows that the Framers did not intend the Senate's treaty concurrence power to be an option giving the President unlimited discretion to disregard the requirement. The two-thirds requirement was adopted in lieu of a simple majority of Senators to prevent the President and a minority of the population from pushing treaties down on the nation. The concern arose out of Southern states' fear that that President, with Northern states' support, would make a treaty with Spain to close the Mississippi River to navigation, plus a general concern expressed by George Washington, Thomas Jefferson, and James Madison that it was dangerous to enter into treaties (at least non-commercial treaties).

8. In 1992, President George Bush, acting through Secretary of

State James Baker, did not give Russian President Boris Yeltsin a legally binding commitment that the United States would observe the ABM treaty of 1972 as though it had been made between the United States and Russia.¹⁹ Secretary Baker's words of commitment were consonant with the diplomatic practice of "political" or "moral" commitments that do not legally bind the parties. Such a commitment made perfect sense because:

(a) the United States has a general practice of "presumptive continuity," *i.e.*, acting as though a treaty remained in effect while deliberating what to do when a state dissolves;²⁰

(b) the United States announced that it was approaching U.S.-USSR treaty issues from the point of view of presumptive continuity;

(c) the Baker-Yeltsin exchange was not treated by the Executive Branch as the creation of a legally binding commitment because it was oral and never reported to Congress as the Case-Zablocki Act requires for legally binding commitments;

(d) the Congress understands the difference between legally binding commitments on the one hand and moral or political commitments on the other; and

(e) to conclude that the Executive Branch intended to make a legally binding commitment would require an assumption that the Executive Branch committed the United States to a one-sided bargain to continue to abjure strategic missile defense while Belarus, Kazakhstan, and the Ukraine (which together had massive Inter-Continental Ballistic Missile ("ICBM") delivery capability and substantial ABM early warning radar on their western and southern

19. See *State Succession and the Legal Status of the ABM Treaty*, OCCASIONAL PAPER (Lawyers Alliance for World Security/Committee for National Security, Washington, D.C.) May 5, 2000 (quoting Secretary Baker's statement that "we expect the states of the Commonwealth to abide by all of the international treaties and agreements that were entered into by the former Soviet Union, including the ABM Treaty.").

20. See *Ballistic Missiles: Threat and Response: Hearing Before the S. Comm. on Foreign Relations*, 106th Cong. 276, 281-2 (1999) (statement of Michael J. Glennon, Professor at Law, University of California at Davis) (quoting Legal Advisor to the State Department, Edwin D. Williamson, that "[a]s an operating principle . . . agreements between the United States and the USSR that were in force at the time of the dissolution of Soviet Union have been presumed to continue in force with respect to the former republics.").

peripheries) were legally free to develop and deploy full ABM systems.

C. METHODOLOGY AND SCOPE OF THIS MEMORANDUM

This Memorandum examines the sources of international law bearing on the question of whether, upon the USSR's extinction, the ABM Treaty became a treaty between the United States and the Russian Federation. This analysis does not describe the principles of international law that govern the question of whether a party to a treaty in force has grounds to terminate that treaty.²¹ Nor does it describe the rules of international law for allocating the assets, the debt or the archives of a state that becomes extinct. Those rules, parts of the law of "state succession," do not resolve the question of how a state's extinction affects what had been that state's bilateral treaties. For example, although the United Nations and the European Community declared that no state is a continuation of the Socialist Federal Republic of Yugoslavia ("SFRY"), they nonetheless expect the successor states of the extinct SFRY to bear portions of the SFRY's debt (in proportions to be determined by a continuing conference of the successor states that is called the "Brussels Process").²²

21. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 331, 335-36 (1987) [hereinafter "RESTATEMENT"] (listing other party's breach, fraud, or a fundamental change of circumstances that defeat the treaty's object and purpose as grounds for treaty termination). Unilateral termination of a treaty is permitted for a material breach because of a fundamental change of circumstances that was not foreseen by the parties. See *id.* at § 336.

22. See Declaration of Christopher R. Hill, at 3, 5 (describing the succession process) *Federal Republic of Yugoslavia v. Park-71st Corp.*, 913 F. Supp. 191 (S.D.N.Y. 1995) (No. 95 Civ. 3659 (AGS)) (Sept. 21, 1995); see also *The Ottoman Debt Arbitration* 1 R.I.A.A. 529 (1925), noted in PARRY & GRANT, *ENCYCLOPEDIA OF INTERNATIONAL LAW* 279 (1986) (adjudicating debt of the dissolved Ottoman Empire); RESTATEMENT, *supra* note 21, at § 209 (reciting the rule for passage of title to the state property and responsibility for public debt between predecessor and successor states); Thomas Baty, *Division of States: Its Effect on Obligations*, in 9 *TRANSACTIONS OF THE GROTIUS SOCIETY, PROBLEMS OF WAR AND PEACE* 119, 121-26 (1923) (examining issues involved in state division); ARTHUR BERRIDALE KEITH, *THE THEORY OF STATE SUCCESSION WITH SPECIAL REFERENCE TO ENGLISH AND COLONIAL LAW* 99-100 (1907) (discussing debts of divided states); P. K. MENON, *THE SUCCESSION OF STATES IN RESPECT TO TREATIES, STATE, PROPERTY, ARCHIVES AND DEBT* 158-201 (1991) (discussing

This Memorandum describes international law as it would be understood by a disinterested judicial tribunal resolving a dispute between two states as to whether a particular treaty is in force *i.e.*, is legally binding between them. This analysis assumes that the tribunal would: (i) decide for itself the relevant questions of fact and law; and (ii) give the parties' contentions the weight they deserve but would not be bound by these contentions. This Memorandum uses the phrase "legally binding" in the sense that it is used in scholarly writings on international law, *i.e.*, a promise is legally binding if the parties intend it to be legally binding, irrespective of whether the promise can be enforced by third-party resolution without the parties' consent to such a resolution.

Also, this Memorandum addresses the Constitutional law assertions in the Dellinger Paper and in other works proffering similar arguments.

D. SUMMARY OF CONCLUSIONS

1. International Law

The pertinent sources of international law support the conclusion that, upon the USSR's extinction, the ABM Treaty lapsed, so it no longer has the force of international law. This conclusion is based on the following observations:

a. in December 1991, as accurately characterized by declarations of the CIS States and of the United States, the changes that had recently occurred on what had been the USSR's territory caused the USSR, by operation of law, to cease to exist as a state—that is, such changes brought to an end the international legal personality of the USSR;

b. the ABM Treaty of 1972 was a bilateral treaty;

c. the opinions of recognized scholars constitute evidence of customary international law in a case in which there is (i) no controlling judicial decision, (ii) no controlling State practice, and (iii) no otherwise controlling treaty;

d. scholars are nearly unanimous in concluding that, upon a

state's extinction, its bilateral treaties that are not "dispositive" do not by operation of law automatically become treaties between the extinct state's successor and the extinct state's treaty partner—that is, such bilateral treaties lapse;

e. no judicial decision contradicts the scholarly view that a non-dispositive bilateral treaty of an extinct state does not automatically become a treaty of its successor or successors. The U.S. practice is generally consistent with the scholars' view;

f. the United States has never before considered itself bound by international law to accept as its treaty partner the successor to an extinct state;

g. the 1978 Vienna Convention on Succession of States in Respect of Treaties does not bind the United States because the United States is not a party to the Convention;

h. the 1978 Vienna Convention on Succession of States in Respect of Treaties in any event would not impose the ABM Treaty on the United States because the imposition would be incompatible with the ABM Treaty's object and purpose;

i. Article 34.1 of the 1978 Vienna Convention on Succession of States in Respect of Treaties has not passed into customary international law;

j. the ABM Treaty did not become a treaty between the United States and the Russian Federation by devolution; and

k. the ABM Treaty was not a dispositive treaty.

2. *U.S. Constitutional Law*

The conclusions reached through an examination of U.S. constitutional law are based on the following findings:

a. the President does not have exclusive authority to interpret treaties;

b. the President does not have exclusive authority to implement treaties;

c. Presidential authority to recognize the existence of a foreign state does not imply authority to make treaties with that state without Senate concurrence;

d. the Senate's concurrence in the making of a treaty with one

state does not constitute consent to the making of a treaty with a successor-state;

e. except for cases of monetary-claims settlements, the Supreme Court has never ruled that a President acting without Senate concurrence can make an agreement with a foreign state that legally binds the United States;

f. the Supreme Court's decision in *United States v. Curtiss-Wright Export Corp.*, does not authorize a President, acting without Senate concurrence, to make an agreement with a foreign state that would legally bind the United States with respect to a significant national-security course of action;

g. the Record of the Constitutional Convention shows that the Framers of the Constitution did not intend the Senate's treaty-concurrence power to be an option giving a President unlimited discretion to disregard the requirement for a two-thirds concurrence: (i) the Framers' purpose was to prevent a minority of citizens from forcing a treaty on the majority, and (ii) the Framers saw grave consequences in the breach of a treaty;

h. assuming *arguendo* that the Constitution gave a President unlimited discretion without Senate concurrence to make an agreement with a foreign state that would legally bind the United States, President Bush (acting through Secretary Baker) did not exercise that option by way of a January 1992 exchange between Secretary Baker and Russia's President Boris Yeltsin. Secretary Baker's Press Statement on January 29, 1992, cannot reasonably be interpreted as accepting a Russian offer to make a legally binding agreement between the United States and Russia;

i. the non-publication of the Baker-Yeltsin exchange and the failure to send the documents to the Congress suggest that the State Department did not consider the Baker-Yeltsin exchange to be either a treaty requiring Senate concurrence, or otherwise a legally binding international agreement to which the United States was a party;

j. the distinction between legally binding commitments on the one hand, and moral and political commitments on the other, is understood by the Congress;

k. Secretary of State James Baker could not have intended to create a legally binding agreement;

l. Secretary of State Baker's remarks can be read as expressing a moral or political commitment;

m. the Executive Branch's conduct after January 1992 independently shows Secretary Baker's words were not understood to have created a legally binding ABM Treaty with Russia;

n. the United States is not required by international law to denounce a lapsed treaty;

o. neither Article 34 of the 1978 Vienna Convention on Succession of States in Respect of Treaties, nor the principle that it exemplifies, is legally binding on the United States;

p. the United States is not estopped to deny that it has a legally binding ABM treaty with Russia;

q. the *Nuclear Test Case* decision of the International Court of Justice does not support a conclusion that Secretary Baker intended to make a legally binding ABM treaty with Russia; and

r. the Baker-Yeltsin exchange does not qualify as the kind of binding international agreement that the President can make without the concurrence of two-thirds of the Senators voting.

III. FACTUAL BACKGROUND

As a predicate to the legal analysis below, it is useful to review facts pertaining to the USSR's extinction and the U.S. State Department's position thereon, President Clinton's position on the ABM Treaty of 1972, and the purpose of the ABM Treaty of 1972, as seen by the U.S. Government at the time of Senate approval of ratification.²³

23. See ABM Treaty, *supra* note 1 (noting the general intent of the Treaty). The Treaty was amended in 1974 to reduce the allowed number of ABM deployment areas of each party from two to one. See Protocol to the Treaty on the Limitation of Anti-Ballistic Systems, July 3, 1974, U.S.-U.S.S.R., 27 U.S.T. 1645, art. I [hereinafter "Protocol"] (amending the original Treaty in regards to deployment areas). Each party was given a single option to shift its defense area upon advance notice at the time of a scheduled five-year Treaty review. See Protocol, *supra*, at art. II (outlining provisions concerning ABM dismantling in conjunction with Treaty review). Scholars offer a variety of interpretations on the scope of the ABM Treaty. See generally David Edward Grogan, *Power Play: Theater Ballistic Missile Defense, National Ballistic Missile Defense and the ABM Treaty*, 39 VA. J. INT'L L. 799 (1999) (noting that Article I of the ABM Treaty

A. THE UNITED STATES' 1972 VIEW OF HOW IT WOULD BENEFIT FROM AN ABM TREATY

In 1972, Gerard Smith, Director of the Arms Control and Disarmament Agency in the Nixon Administration, told the Congress the following:

The treaty contains a general commitment not to build a nationwide ABM defense nor to provide a base for such defense. This general undertaking is supplemented by certain specific provisions. By this general undertaking and the specific commitments, both countries in effect agree not to challenge the effectiveness of each other's missile deterrent capabilities by deploying widespread defenses against them. This means that the penetration capability of our surviving deterrent missile forces can be assured. This, to my mind, bears directly on concerns about a first strike against the United States. As long as we maintain sufficient and survivable retaliatory forces, this new assurance of their penetration capability makes "first strike" as a rational act inconceivable, in my judgment. I believe this is a development of prime significance for U.S. security.²⁴

Hence, according to that view, a party without ABM defenses would be less likely to launch first strikes, and therefore would be

expressly prohibits U.S. deployment of a certain nationwide ballistic missile defense system); see also David A. Koplow, *Arms Control Treaty Reinterpretation: Article: Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties*, 137 U. PA. L. REV. 1353 (1989) (arguing that the ABM Treaty is among treaties that has been entangled in an attempt by the Executive to reserve the right unilaterally to reinterpret the treaty); see also Abraham D. Sofaer, *Arms Control Treaty Reinterpretation: Commentary: Treaty Interpretation: A Comment*, 137 U. PA. L. REV. 1437 (1989) (citing that the Senate's power to change the meaning of an international treaty is to "exclude, limit or modify" treaty obligations through a formal reservation, or to give "its advice and consent to a treaty on the basis of a particular understanding of its meaning."); see also Eugene V. Rostow, *Arms Control Treaty Reinterpretation: Commentary: The Reinterpretation Debate and Constitutional Law*, 137 U. PA. L. REV. 1451 (1989) (responding to Prof. Koplow's article, *Arms Control Treaty Reinterpretation: Article: Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties*).

24. *Strategic Arms Limitations Agreements: Before the S. Armed Serv. Comm.*, (1972) (statement of Gerard C. Smith, Director, United States Arms Control and Disarmament Agency, reprinted in U.S. Arms Control and Disarmament Agency, Documents on Disarmament, 423) (1972) (commenting on the benefits of the ABM Treaty).

less likely to start a nuclear war.²⁵

B. EXTINCTION OF THE USSR

On December 8, 1991, in Minsk, the Republic of Belarus, the Russian Federation ("RSFSR"), and Ukraine, as the USSR's founders and as signatories to the Union Treaty of 1922 that created the USSR, declared that the USSR, "as a subject of international law and a geopolitical reality no longer exists."²⁶ Also, they signed the Agreement Establishing the Commonwealth of Independent States.²⁷ The Agreement invited other states to join. On December 21, 1991, at Alma Ata, eight other states joined.²⁸ The Agreement included a provision supporting the Russian Federation's assumption of the USSR's permanent seat on the United Nations ("U.N.") Security Council.²⁹

President George H. W. Bush, in his December 25, 1991, address to the nation on the CIS, said that "[t]he Soviet Union itself is no more."³⁰ On January 22, 1992, President Bush, in addressing the International Conference on Humanitarian Assistance to the former USSR, referred to "the dramatic revolution that swept away Soviet communism and left in its place 12 new nations"³¹ He also

25. See U.S. SENATE FOREIGN RELATIONS COMM., TREATY ON LIMITATION OF ANTI-BALLISTIC-MISSILE SYSTEMS, S. EXEC. REP. NO. 92-28, at 6 (1972) (quoting former Assistant Secretary of Defense for International Security Affairs Paul Warnke, that "[a]ccordingly, both sides have accepted the principle that safety resides not in physical defense but in the certainty that the attacker would be destroyed by the retaliatory strike that the other side would be able to mount.").

26. See Agreement Establishing the Commonwealth of Independent States, *supra* note 2 (recognizing the demise of the USSR).

27. See *id.* at 146 (noting the signatories of the Agreement Establishing the Commonwealth of Independent States).

28. See Protocol to the Agreement Establishing the Commonwealth of Independent States, *supra* note 3, at 147 (noting the addition of Azerbaijan, Armenia, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, and Uzbekistan to the Commonwealth of Independent States).

29. See *id.* at 151 (noting Russia's assumption of the USSR's seat on the U.N. Security Council).

30. See President's Address to the Nation on the Commonwealth of Independent States, *supra* note 5 (acknowledging the end of the USSR).

31. See President's Remarks at the International Conference of Humanitarian

referred to the “dissolution of the Soviet Union”³² On April 1, 1992, he referred to “Russia, Ukraine and the other new states that have replaced the Soviet Union.”³³ President Bush stated that he was “seeking to conclude trade, bilateral investment and tax treaties with each of the new Commonwealth States.”³⁴

According to the State Department, “[o]n December 29, 1991, the U.S.S.R. was formerly dissolved.” U.S. Dep’t of State, Off. of Russian Affairs, *Background Notes: Russia, October 1998*, at http://www.state.gov/www/background_notes/russia_9810_bgn.html (last visited Oct. 15, 2001). Russia obtained its independence on August 24, 1991. *See id.* (providing information on the Russian government).

Cases stating that the USSR had ceased to exist include *Bickel v. Korean Air Lines Co., Ltd.*, 83 F.3d 127, 130-31 (6th Cir. 1996) (stating that the court took “judicial notice of the fact that by the time the respective actions involved in this appeal came to trial, the USSR ceased to exist.”); *Kuibyshevnefteorgsynthez v. Lev Model*, 1995 U.S. Dist. LEXIS 1896, at *19 (D.N.J. Feb. 6, 1995) (noting that “[t]he Court takes judicial notice of the fact that the USSR, the country whose laws defendant argues were originally chosen by the parties, ceased to exist a few months after the contract was signed.”); *Fin. Matters, Inc. v. Pepsico*, 806 F. Supp. 480, 482 (S.D.N.Y. 1992) (noting the “dissolution of the USSR”); and *Techsnabexport, Ltd. v. United States*, 802 F. Supp. 469 (Ct. Int’l Trade 1992) (recognizing the dissolution of the USSR).

Assistance to the Former U.S.S.R., 1 PUB. PAPERS 127 (Jan. 22, 1992) (commenting further on the downfall of the USSR).

32. *See id.* (noting the end of the “mortal threat” of the cold war and dawn of an new era of “peace and prosperity”).

33. *See* The President’s News Conference on Aid to the States of the Former Soviet Union, 1 PUB. PAPERS 522 (Apr. 1, 1992) (expressing optimism for the future of the former USSR).

34. *See* President’s Remarks to the American Society of Newspaper Editors, 1 PUB. PAPERS 564, 566 (Apr. 9, 1992) (citing a recently signed agreement with Armenia as an example).

C. STATE DEPARTMENT STUDY OF THE EFFECT OF THE USSR'S EXTINCTION

In early 1992, State Department Legal Advisor Edwin D. Williamson announced that the State Department expected to engage each republic in discussions to determine whether each bilateral agreement should continue in force or should be modified or terminated.³⁵ In 1997, President Clinton described the process as follows:

When the USSR dissolved at the end of 1991, it became necessary to reach agreement as to which former Soviet states would collectively assume its rights and obligations under the [ABM] Treaty (which clearly continued in force by its own terms). The United States took the view that, as a general principle, agreements between the United States and the USSR that were in force at the time of the dissolution of the Soviet Union would be presumed to continue in force as to the former Republics. It became clear, however, particularly in the area of arms control, that a case-by-case review of each agreement was necessary.³⁶

Assistant Legal Adviser Charles I. Bevans described the State Department's practice of studying the status of treaties between the United States and extinct states in 1965:

The practice is to negotiate with a new State "as soon as possible." If a new State has a "devolution" agreement with or otherwise announces it would be bound by its predecessor's treaties, the fact is "noted" in Treaties in Force, but the United States does not consider itself bound by

35. See Edwin D. Williamson, Remarks at the American Society of International Law Proceedings in Panel Discussion, *State Succession and Relations with Federal States*, 86 AM. SOC'Y INT'L L. PROC. 1, 13 (1992) [hereinafter Williamson Remarks] (stating that in the interim, they would continue to assume that bilateral agreements remained until they make a clearly contrary determination); compare U.S. DEP'T OF STATE, TREATIES IN FORCE, A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1996, 275 (1996) (stating that the U.S. is reviewing the continued applicability of several treaties, one of which is the ABM Treaty), with U.S. DEP'T OF STATE, TREATIES IN FORCE, A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1992, 247 (1992) (listing the ABM Treaty as one whose status is under review as a result of the 1991 developments in the USSR).

36. See November Clinton Letter, *supra* note 11, at 1 (providing background information before dealing with ABM Treaty succession).

the devolution agreement to accept such a treaty as being in force between the United States and the successor State.³⁷

State Department practice regarding devolution agreements and proclamations is consistent with the view expressed in scholarly writings. For example, in 1969 a Committee of the United Nations' International Law Commission stated:

Conversely, on the date of the succession, the territory passes into the treaty régime of the newly emerged state; and, since the devolution agreement is incapable by itself of effecting an assignment of the predecessor's treaty obligations to the successor state, the agreement does not *of itself* establish any treaty nexus between the successor state and third states parties to the treaties of the predecessor state. Thus, even if a newly emerged state has concluded a devolution agreement, the only treaty obligations of the predecessor state which can immediately become obligations also of the successor state vis-à-vis the other contracting parties are such obligations, if any, as would in any event pass to the successor state by operation of the general rules of the international law independently of the devolution agreement.³⁸

State Department Legal Adviser Edwin D. Williamson stated that while the study of the ABM treaty was pending, the State Department would use a presumptive continuity model in its dealings with the USSR's successor states.³⁹ "Continuity," as applied to

37. See Letter from Charles I. Bevans, Assistant Legal Adviser, United States Department of State, to Professor William W. Bishop, Jr., Editor-in-Chief; *American Journal of International Law* (July 27, 1964), reprinted in INTERNATIONAL LAW ASSOCIATION, COMMITTEE ON STATE SUCCESSION TO TREATIES AND OTHER GOVERNMENTAL OBLIGATIONS, THE EFFECT OF INDEPENDENCE ON TREATIES: A HANDBOOK 382, 385-86 (1965) (explaining U.S. practice with regard to treaty agreements with newly independent states); see also Sari T. Korman, *The 1978 Vienna Convention on Succession of States in Respect of Treaties: An Inadequate Response to the Issue of State Succession*, 16 SUFFOLK TRANSNAT'L L. REV. 174, 180 (1992) (discussing general issues concerning treaty succession).

38. Sir Humphrey Waldock, *Second Report on Succession in Respect of Treaties*, [1969] 2 Y.B. Int'l L. Comm'n 45, 57, U.N. Doc. A/CN.4/214 AND ADD.1 AND 2 (discussing that upon independence, treaty obligations of a predecessor state cease to be binding upon that newly independent territory).

39. See Williamson Remarks, *supra* note 35, at 12 (recognizing it as an unsettled area of law but deciding to presume continuity of treaties between the United States and the former Soviet Union).

treaties, is a term used by scholars to describe the fact that a treaty between two particular states (the "treaty partners") has become a treaty between one of the partners and another state. For example, when a State dissolves and a successor state (or states) emerges on what had been the territory of the dissolved state, a successor State may agree with the dissolved state's treaty partner that the dissolved state's treaties should "continue" in effect as between the successor state and the dissolved state's treaty partner. In that event, the treaty in question is said to have come into effect with the successor state by a process of "continuity." Thus, when Norway and the Russian Federation agreed that they would consider as treaties between them certain designated treaties that had been in effect between Norway and the USSR, those treaties are said to have come into effect between Norway and the Russian Federation by the process of continuity.⁴⁰

The United States, various European states, and the successor states have not all dealt in the same manner in all cases with treaties since the respective dissolutions of the USSR, the former Yugoslavia (the "SFRY"), and Czechoslovakia. A few examples: Armenia and Azerbaijan chose not to enter continuation agreements with any state as to any USSR treaty.⁴¹ Austria, regarding the treaties with the dissolved SFRY, described its practice as a "principle of pragmatic application" of the continuation process—that is, Austria denied that the Federal Republic of Yugoslavia ("FRY") (Serbia and Montenegro) was a continuity of the SFRY, and yet, in practice, treated the FRY as though it were the continuity of the SFRY.⁴²

The U.S. State Department, though expressing a general desire

40. See Martti Koskenniemi, *The Present State of Research Carried Out by the English-Speaking Section of the Centre for Studies and Research*, in STATE SUCCESSION: CODIFICATION TESTED AGAINST THE FACTS 98-118 (Hague Academy of International Law 1996) (exploring the issue of treaty continuity); see also Paul R. Williams, *The Treaty Obligations of the Successor States of the Former Soviet Union, Yugoslavia, and Czechoslovakia: Do They Continue in Force?*, 23 DENV. J. INT'L L. & POL'Y 1, 31-35 (1994) (examining continuity by examining the deficiency of the U.S. approach to securing continuation of bilateral treaties with successor states).

41. See Koskenniemi, *supra* note 40, at 112 (noting that some states reject succession to treaties by the former Soviet Union).

42. See *id.* at 115 (describing Austria's dealings with SFRY treaties).

that the USSR's successor states (a term that does not include Estonia, Latvia, and Lithuania) be bound by the same treaty obligations vis-à-vis the United States as was the USSR, "abandoned any assertions of automatic continuation of treaty obligations and relied entirely on assurances provided by the successor states."⁴³ Also, in seeking assurances of treaty continuation from the successor states, the State Department accepted non-specific (what one commentator has called "feigned") assurances,⁴⁴ and unilateral commitments that the successor states may rescind, and that gave the United States the effective right to discontinue the treaties at its option.⁴⁵ Similarly, the State Department, by accepting assurances of treaty continuity that were linked by context to non-justiciable political commitments—such as promises to develop market economies—rendered the treaties unenforceable as a practical matter and thereby made "continuity" illusory.⁴⁶ Moreover, "Treaties in Force," the annual State Department publication of the U.S. treaties that are in force, shows as "in force" only those treaties concluded between the United States and the Russian Federation after the USSR's dissolution.⁴⁷ A similar treatment is provided by listings of treaties in force involving other successors of the USSR and other successors of the SFRY.⁴⁸

Likewise, the Russian Federation advised the United States that it does not deem itself bound by any USSR treaty obligation to the United States that conflicts with Russian law, a position that is consistent with the pre-dissolution view of the USSR that a new state is not bound by the treaties of its predecessor.⁴⁹

43. Williams, *supra* note 40, at 32 (arguing that the State Department erred in its objective).

44. *See id.* ("[F]eigning the receipt of commitments is not sufficient under international law or international diplomacy to require a state to be bound by those commitments.").

45. *See id.* at 32-33 (discussing the problems raised by the unilateral commitments).

46. *See id.* at 33 (noting that such commitments are political rather than legal).

47. *See id.* at 34-35 (indicating a lack of clarity with many countries, with the exception of Russia, regarding treaties that remain in force).

48. *See id.* (examining the issue of succession with respect to the successor states of Yugoslavia).

49. *See Williams, supra* note 40, at 35-36 (stating that Russia regards itself as

Regarding Ukraine, in May, 1996, the Executive Branch and a representative of Ukraine agreed that the United States and Ukraine would regard as in effect as between the two states thirty-five designated agreements that were in effect between the United States and the USSR.⁵⁰ Of the thirty-five U.S.-USSR agreements in question, thirty-two never received Senate consent, perhaps because they were among the kinds of binding agreements with foreign nations that the President "may enter into . . . without complying with the formalities required by the Treaty Clause of the Constitution"⁵¹ The three U.S.-USSR treaties that had received Senate consent were a consular convention of 1968, a tax convention of 1976, and a convention of 1854 relating to the rights of neutrals at sea.

The wide variety of recent State practice has been summed up as follows:

the continuation of the former Soviet Union and will fulfill treaty obligations unless falling under this one exception); *see also* Gannady M. Danilenko, *The Russian Law of Treaties: by William E. Butler*, 92 AM. J. INT'L. L. 356, 357 (1998) (book review) (emphasizing that the Russian Constitution always takes precedence over a contrary treaty).

50. *See* 143 CONG. REC. S4451-01, S4462-63 (1997) (describing and including the agreement between the U.S. and Ukraine).

51. *See* *Weinberger v. Rossi*, 456 U.S. 25, 30 n.6 (1982) (citations omitted) (holding that agreements to protect U.S. nationals on military bases abroad did not require Senate approval, but limiting its holding to construing a statute); *see also* *Dames & Moore v. Regan*, 453 U.S. 654, 679-82 nn.8-10 (1981) (discussing the President's ability to settle claims by executive agreement without congressional approval); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937). An "Executive Agreement" or a "Sole-Executive Agreement" is made between the United States and another state without the concurrence of two-thirds of the Senate, and without the consent of a majority of both Houses of the Congress. If the Agreement has received the consent of a majority of both Houses of Congress, it is called a "Congressional-Executive Agreement." The Court has explained that an agreement of that nature, though sometimes called a "treaty," is not a treaty "possessing the dignity of one requiring ratification by the Senate of the United States. . ." *See* *B. Altman & Co. v. United States*, 224 U.S. 583, 601 (1912) (examining the constitutionality of import duties as resulting from a reciprocal trade agreement concluded between the President and France); *see also* *Weinberger*, 456 U.S. at 29 ("[t]he word 'treaty' has more than one meaning."); *Regan*, 453 U.S. at 679-84 (1981); *Pink*, 315 U.S. at 225; *Belmont*, 301 U.S. 324. No case has been presented to a court, however, to decide whether an arms-control treaty can constitutionally be made by the President acting alone or with the consent only of a majority of both Houses.

[P]arties have normally negotiated and negotiations have led to the adoption and publication of lists of treaties that are to be continued or allowed to lapse. The more weight is given to such lists, and the agreements they embody, the less practical significance the "presumption of continuity" enjoys—until the presumption must altogether yield to the *a contrario* argument that a treaty absent from a list must be deemed to have lapsed.⁵²

"Continuity" (or "continuation") is also used to identify a state that, notwithstanding a loss of territory, continues to exist because it has not lost its international legal personality.⁵³ In that usage, "continuity" (or "continuation") is the antonym of "dismemberment" or "*disembratio*," terms that are used interchangeably to identify states that have ceased to exist.⁵⁴ For example, the United States stated that it is the position of the "international community generally" that, as a result of the SFRY's "dissolution" in 1992, "[t]he SFRY has ceased to exist and no . . . [s]tate represents the continuation of the SFRY"⁵⁵

In June 1996, U.S. AAG Walter Dellinger advised Counsel to the President John Quinn that the presumption of "continuity" employed in the State Department during the Bush Administration remained in effect in the Clinton Administration. Dellinger stated that the notion

52. Koskeniemi, *supra* note 40, at 116.

53. See Republic of Croatia v. Girocredit Bank A.G. Der Sparkassen, 4 Ob. 2304 96V (Supreme Court 1996) (Austria), *reprinted at* 36 I.L.M. 1523 (1997) (holding that the Federal Republic of Yugoslavia did not continue the legal personality of the Socialist Federal Republic of Yugoslavia but is a successor State to the former Yugoslavia); see also Konrad G. Buhler, *Casenote: Two Recent Austrian Supreme Court Decisions on State Succession from an International Law Perspective*, 2 AUS. REV. INT'L & EUR. L. 213, 224-26 (1997) (examining whether the Federal Republic of Yugoslavia continued the international legal personality of the Socialist Federal Republic of Yugoslavia).

54. See *Girocredit Bank A.G. Der Sparkassen*, at 1524 (using the term "disembratio" to describe a state that ceases to exist); see also Buhler, *supra* note 53, at 224 (using the terms dismemberment and "disembratio").

55. Declaration of Christopher R. Hill, at paras. 5, 6, *Federal Republic of Yugoslavia v. Park-7st Corp.*, 913 F. Supp. 191 (S.D.N.Y. 1995) (No. 95 Civ. 3659 (AGS)) (Sept. 21, 1995) (expressing the view of Christopher R. Hill, Director of the Office of South Central European Affairs in the United States Department of State, in a case where the Federal Republic of Yugoslavia sought a declaratory judgment that would recognize its ownership of certain property within the United States that had been owned by the SFRY).

of continuity was “rooted” in U.S. “past diplomatic practice” and in the U.S. Executive Branch’s understanding of international law.⁵⁶ As to past diplomatic practice, Dellinger is in error. The practice is to presume continuity temporarily while deliberating a course of conduct, until continuity questions are resolved. Dellinger’s disregard for U.S. practice as regards treaties of extinct states is described later in section IV.F.

D. PRESIDENT CLINTON’S STATEMENT OF POSITION

On June 16, 1997, Representative Benjamin A. Gilman, Chairman of the House Committee on International Relations, asked President Clinton: if the Senate were to reject the President’s proposal regarding ABM Treaty succession, “[w]hat countries in addition to the United States will, in the view of the Administration, be parties to the ABM Treaty?”⁵⁷ The President did not reply until November 21, 1997, by which time the Secretary of State had signed (in September, 1997) a Memorandum of Understanding (“MOU”) with Russia, Ukraine, Belarus, and Kazakhstan to “multi-lateralize” the ABM Treaty.⁵⁸ The MOU would create an arrangement embodying features that were in effect between the United States and the USSR.⁵⁹

56. See Dellinger Paper, *supra* note 14, at 3 (noting the presumption that successor states remain subject to bilateral treaties); see also Letter from William C. Danvers, Special Assistant to the President and Senior Director for Legislative Affairs, to Rep. Newt Gingrich, Speaker, H.R. (Nov. 29, 1996) (on file with author) (transmitting Report on the Livingston ABM Amendment (Nov. 25, 1996) and noting the executive authority concerning succession agreements); Letter from Sen. Bob Livingston, Chairman, Comm. on Appropriations, S., Rep. Benjamin A. Gilman, Chairman, Comm. on International Relations, H.R., and Rep. Floyd Spence, Chairman, Comm. on National Security, H.R., to President William J. Clinton 3 (Dec. 11, 1996) (on file with author) (noting the President’s notion that his powers included the ability to enter in agreements without the consent of Congress).

57. See June Gilman Letter, *supra* note 10, at 3 (asking the President for information regarding the ABM Treaty in preparation for a conference on the European Security Act).

58. See November Clinton Letter, *supra* note 11, at 1-4 (addressing Rep. Gilman’s inquiries regarding the ABM treaty succession and explaining the details of the MOU reached with Russia, Ukraine, Belarus, and Kazakhstan).

59. Memorandum of Understanding Relating to the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems of May 26, 1972, Sept. 26, 1997, U.S.-Belr.-Kaz.-

President Clinton's November 21, 1997, letter stated that he would provide the MOU to the Senate for its advice and consent.⁶⁰ The November 21, 1997 letter also stated:

[N]either a simple recognition of Russia as the sole ABM successor (which would have ignored several former Soviet states with significant ABM interests) nor a simple recognition of all CIS states as full ABM successors would have preserved fully the original purpose and substance of the Treaty, as approved by the Senate in 1972).⁶¹

In addition, the letter stated that if the Senate did not consent to the MOU as a Treaty, succession arrangements would "simply remain unsettled," and that in any event the ABM Treaty that was in force between the United States and USSR "would clearly remain in force."⁶² On March 3, 1998, Representative Gilman and Senator Jesse Helms observed that if none of the four USSR successor states that signed the MOU were bound by the ABM Treaty, it followed that the Treaty was no longer in force.⁶³

On May 21, 1998, President Clinton reasserted the Executive Branch's position that "there is no question that the ABM Treaty has continued in force and will continue in force . . ."⁶⁴ President Clinton also stated "[t]he United States and Russia clearly are Parties to the Treaty. . . ."⁶⁵ The President explained neither the basis for this

Russ.-Ukr., art. II [hereinafter "MOU"] (formalizing the recognition of four former Soviet Republics as new parties to the ABM Treaty) *available at* <http://www.state.gov/www/global/arms/factsheets/missdef/abm,uscore.mou.html> (last visited Oct. 17, 2000).

60. See November Clinton Letter, *supra* note 11, at 1 (noting that the MOU would be provided to the Senate).

61. *Id.* at 2. (explaining the rationale behind the signing of the MOU with the four former Soviet Republics).

62. See *id.* at 3 (explaining what would happen if the Senate were to disapprove the MOU).

63. See Gilman-Helms Letter, *supra* note 12, at 3 (suggesting if the U.S. were the only country bound by the ABM Treaty then it ceased to remain in force).

64. See May Clinton Letter, *supra* note 9, at 1-2 (responding to Sen. Helms Mar. 3, 1998, letter, and reaffirming that the four former Soviet Republics are bound by the ABM Treaty).

65. See *id.* at 2 (explaining the relationship between the U.S., Russia, and the ABM Treaty). *But see* Letter from Senators Trent Lott, Don Nickles, Larry E. Craig, Jon Kyl, Jesse Helms, Connie Mack, Paul Coverdell, and Bob Smith to

conclusion, nor how the conclusion could be reconciled with his November 1997 response to Representative Gilman.

IV. INTERNATIONAL LAW: LONG ACCEPTED PRINCIPLES OF INTERNATIONAL LAW SUPPORT THE CONCLUSION THAT THE ABM TREATY BETWEEN THE UNITED STATES AND THE USSR DID NOT, UPON THE USSR'S EXTINCTION, BECOME A TREATY BETWEEN THE UNITED STATES AND THE RUSSIAN FEDERATION

A. THE DECEMBER 1991 DECLARATION THAT THE USSR HAD CEASED TO EXIST CORRECTLY CHARACTERIZED THE CHANGES THAT OCCURRED ON WHAT HAD BEEN THE USSR'S TERRITORY

It is not necessary to resolve any dispute as to whether the USSR became extinct in December 1991, for there has been no dispute between the United States and the USSR's successor states on this point. It bears noting, however, that had the parties put the question to a disinterested tribunal, the tribunal would have had ample grounds for concluding that the USSR did become extinct in December 1991. Therefore, after December 1991, the USSR lacked the attributes of "statehood" that are essential elements of a state's existence, *i.e.*, sovereignty over defined territory inhabited by a permanent population, and the power to conduct foreign relations.⁶⁶

President William J. Clinton 4 (Oct. 5, 1998) (on file with author) [hereinafter "October Lott Letter"] (maintaining that "the ABM Treaty lapsed and is of no force and effect unless the Senate approves the MOU, or some similar agreement, to revive the treaty."). President Clinton's response was that he would provide the MOU to the Senate for its advice and consent, but that the ABM Treaty would remain in force even if the Senate would not approve the MOU. *See* Letter from President William J. Clinton to Rep. Benjamin Gilman, Chairman, Comm. on Int'l Relations, H.R. (Dec. 17, 1998) (on file with author).

66. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1986) [hereinafter "RESTATEMENT FOREIGN RELATIONS"] (holding that a state must have a defined territory, a permanent population, a government, and capacity to engage in formal relations with other states); *see also* *Societe Nationale Industrielle Aerospatiale v. United States*, 482 U.S. 522, 557 (noting that under territorial sovereignty, "no state may perform an act in the

By the end of December 1991, Gorbachev resigned and the USSR dissolved. Each of its former fifteen states had sovereignty over a part of what had been the USSR's territory, and no state claimed that even one *pyt* of territory remained as USSR territory.⁶⁷

Moreover, the USSR's dissolution was marked by other consequential changes: (1) it occurred abruptly, out of strong secessionist pressures that created the risk of widespread civil strife, rather than by a deliberate and peaceful evolution; (2) the USSR government was not a party to any of the declarations of dissolution or independence or to the organizational agreements of the CIS or to any other agreements among the newly independent states; (3) within the several years immediately before dissolution was declared formally, the USSR government had yielded its political and military control over the other Warsaw Pact states; (4) in that period before formal dissolution, the USSR government abolished the Communist Party's monopoly on domestic political power, thereby facilitating the USSR's constituent "republics'" control over their territories and economies, and removing an obstacle to the emergence of the new states; (5) the demography of the new states was markedly different from that of the USSR, the former being far more ethnically homogeneous than the latter was; and (6) none of the newly independent states separately has military/strategic resources (including agricultural and mining assets and geographical assets such as access to various ports and contiguity with certain regions on

territory of a foreign state without consent."); *Hoyt v. Sprague*, 103 U.S. 613, 630 (1880) (holding that a state has territorial sovereignty if it has a monopoly on the exercise of governmental power within its borders); *Cherokee Nation v. Southern Kan. R. Co.*, 33 Fed. 900, 906 (W.D. Ark. 1888) (describing sovereignty as the "supreme, absolute, uncontrollable power; the *jus summi imperii*; the absolute right to govern."). The fifteen former Soviet States included the Baltics, i.e., Latvia, Lithuania, and Estonia, which the United States and Western Europe did not regard as having been absorbed into the USSR. *See generally* Lawrence S. Eastwood, Jr., *Secession, State Practice and International Law after the Dissolution of the Soviet Union and Yugoslavia*, 3 DUKE J. COMP. & INT'L L. 299, 316-22 (1983) (noting that governments declined to recognize their incorporation into the USSR); *see also* Ruta M. Kalvaitis, *Citizenship and National Identity in the Baltic States*, 16 B.U. INT'L L.J. 231, 234-39 (1998) (narrating the Baltic states' struggle for independence).

67. *See* KENNETH KATZNER, *RUSSIAN-ENGLISH DICTIONARY* 925 (1984) (defining "pyt" as a small measure of area).

land) comparable to those possessed by the former USSR.⁶⁸

International law does not consider a state extinct solely because it has lost some territory or population. But no USSR successor state embodies the USSR's international legal personality; indeed, none even claimed to do so. Given the abruptness of the loss of territory, population, empire, central control over the inhabitants of the fifteen sub-states, and the changes in ethnic concentrations and military and strategic resources, it is not hard to understand why the United States agreed that the USSR's identity disappeared. Hence, the successor states and the United States aptly concluded that the USSR "ceased to exist," *i.e.*, "was no more."⁶⁹

B. THE ABM TREATY WAS A BILATERAL TREATY

A bilateral treaty is a treaty between two "sides," which usually are two States.⁷⁰ Only the United States and the USSR were parties to the ABM Treaty and the Treaty specified no means for adding parties.⁷¹

68. See generally *THE DECLINE AND FALL OF THE SOVIET EMPIRE* (Bernard Gwertzman & Michael Kaufman, eds. 1992) (detailing the events leading to, and the aftermath of, the Soviet Union's collapse); see also RICHARD PIPES, *RUSSIA UNDER THE BOLSHEVIK REGIME* (1993) (discussing the role of Russia in the former USSR).

69. See Protocol to the Agreement Establishing the Commonwealth of Independent States, *supra* note 3, at 149 (expressing the recognition by the new members of the CIS of the demise of the USSR); see also President's Address to the Nation on the Commonwealth of Independent States, *supra* note 5 (noting the United States recognition of the fall of the USSR); see also AMOS S. HERSHEY, *THE ESSENTIALS OF INTERNATIONAL PUBLIC LAW AND ORGANIZATION* 215 (rev. ed. 1935) (stating that "states fully extinguished lose all international personality.").

70. See ARNOLD DUNCAN MCNAIR, *THE LAW OF TREATIES: BRITISH PRACTICE AND OPINIONS* 5 (1938) (defining the arrangement to which the term "bilateral treaty" applies).

71. Although this Memorandum's main thrust is bilateral treaties, that does not imply that a state's extinction has no effect on the multilateral treaties of which it was a party. See Hubert Beemelmans, *State Succession in International Law: Remarks on Recent Theory and State Praxis*, 15 B.U. INT'L L.J. 71, 85 (1997) (discussing State succession to multilateral treaties); see generally Yehuda Z. Blum, *U.N. Membership of the "New" Yugoslavia: Continuity or Break?*, 86 AM. J. INT'L L. 830 (1992) (discussing the consequences to a multilateral treaty resulting from the extinction, break-up, or territorial modification of a member

C. IF JUDICIAL DECISION, DIPLOMATIC PRACTICE, OR TREATIES DO NOT PROVIDE TRUSTWORTHY EVIDENCE ON A DISPUTED POINT OF CUSTOMARY INTERNATIONAL LAW, A COURT WILL CONSULT THE WORKS OF SCHOLARS TO DETERMINE THE LAW

International law, like common law in Anglo-American jurisprudence, can grow out of long-practiced custom that becomes accepted as law.⁷² In ascertaining custom, courts often consult the works of scholars. As the Supreme Court explained in the landmark 1898 case, *The Paquete Habana*,⁷³

[W]here there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subject of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their author concerning what the law ought to be, but for trustworthy evidence of what the law really is.⁷⁴

Courts continue to look to distinguished commentators for aid in ascertaining customary international law.⁷⁵

D. THE WORKS OF SCHOLARS SUPPORT THE CONCLUSION THAT A BILATERAL TREATY OTHER THAN A DISPOSITIVE TREATY DOES

country).

72. See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *69-80 (arguing that customs arose and became part of the common law by serving as the basis for early judicial decisions); see also ARTHUR REED HOGUE, ORIGINS OF THE COMMON LAW 190-200 (1966) (discussing the role of custom in the development of the common law); see also 1 D.P. O'CONNELL, INTERNATIONAL LAW 15-20, 35-36 (1965) (exploring the role of custom in international law); see also David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375, 1451 (1996) (discussing what makes custom binding international law).

73. 175 U.S. 677 (1900) (involving the disposition of fishing vessels seized in a blockade of Cuba).

74. *Id.* at 700 (citing *Hilton v. Guyot*, 159 U.S. 113, 163, 164, 214, 215 (1895)) (highlighting the value of works by jurists and commentators in ascertaining international law).

75. See *Hilton v. Guyot*, 159 U.S. 113, 163 (1895) (suggesting that where there is no written law upon the subject, it is the judiciary's duty to obtain aid from the works of jurists, commentators, or the acts and usage of civilized nations).

NOT SURVIVE THE EXTINCTION OF ONE OF THE TREATY PARTNERS

In very general terms, a dispositive treaty creates a disposition—as of a political boundary, for example—that is intended to be perpetually respected. That the ABM Treaty is not a dispositive treaty is shown at Part IV.K. below. A treaty that is not dispositive is called a “personal,” a “real,” or a “political” treaty. An example of a dispositive treaty is the Treaty of 1970 between the United States and the United Mexican States ending boundary disputes between the two nations.⁷⁶

A widely-quoted author on the law of State succession is D.P. O’Connell, who stated:

There has been, at least since the late nineteenth century, almost unanimous agreement that personal treaties of a totally extinguished State expire with it because they are contracted with a view to some immediate advantage, and their operation is conditional on the nice adjustment of the political and economic relations which they presuppose. When this adjustment is upset, the rationale of the treaty is destroyed.⁷⁷

The principle that bilateral treaties of a state lapse on the state’s extinction became a part of the scholarly tradition of international law even before the United States was founded, and European scholarly works on international law were well known in the United States in the early Nineteenth Century. The most prominent work was by Emmerich de Vattel, a Swiss scholar in the second half of the

76. See Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as the International Boundary, Apr. 18, 1972, U.S.-Mex., 23 U.S.T. 371 (ending the pending boundary differences and maintaining the boundary between the two nations).

77. See D.P. O’CONNELL, *THE LAW OF STATE SUCCESSION* 16 (1956) (noting the common view that personal treaties of an extinguished State expire with the State); see also David B. Rivkin Jr., et. al., *The Collapse of the Soviet Union and the End of the 1972 Anti-Ballistic Missile Treaty: A Memorandum of Law*, to the Heritage Foundation 4-10 (June 15, 1998) (arguing that a treaty lapses because of “impossibility of performance,” i.e., it is impossible for an extinct State to do anything; ergo, it is impossible for an extinct State to perform its predecessor’s treaty obligations) available at <http://www.nationalsecurity.org/legalbrief/legalbrief.html> (last visited Oct. 24, 2001); see generally *United States v. Steinmetz*, 973 F.2d 212, 220 (3d Cir. 1992) (quoting *United States v. Huckabee*, 83 U.S. 414, 434 (1872)) (implying that a state becomes extinct when its government ceases to exist).

Eighteenth Century. Vattel wrote:

In the same manner as a personal treaty expires at the death of the king who has contracted it, a real treaty is dissolved, if one of the allied nations is destroyed—that is to say, not only if the men who compose it happen all to perish, but, also if, from any cause whatsoever, it loses its national quality, or that of a political and independent society.⁷⁸

Another of the prominent early works was Frederic de Martens' *THE LAW OF NATIONS*, published in 1788. Martens' career included professorships of law at the Imperial School in St. Petersburg and at the University of Gottingen. He was a representative of Russia at many official conferences, and an arbiter in international disputes, for which he became known as "Chief Justice of Christendom."⁷⁹ An English translation of Martens' work, dedicated to President George Washington, was published in Philadelphia in 1795. Martens wrote: "TREATIES, properly so called, cease to be obligatory when the foreign power with whom they were concluded ceases to exist, and when the state passes under the dominion of another power."⁸⁰

Henry Wheaton made the same point in his *ELEMENTS OF INTERNATIONAL LAW* in 1836, perhaps the first treatise exclusively on international law written in the United States. Wheaton was Justice of the Marine Court of New York. Later, as the official reporter of the U.S. Supreme Court, he edited twelve volumes of the Supreme Court's reports. He then became, in succession, Chargé d'Affaires of the United States to Denmark, U.S. Minister to Prussia, and Lecturer on International Law at Harvard University.⁸¹ Professor

78. EMMERICH DE VATTTEL, *THE LAW OF NATIONS* 312 (Joseph Chitty ed., T & J.W. Johnson & Co. 1883) (arguing that a treaty is void by the destruction of one of the contracting powers). Vattel's work was first published in French, *LE DROIT DE GENS* (1758). The U.S. Supreme Court has a long history of looking to Vattel's work for guidance, from *Miller v. The Resolution*, 2 U.S. 1, 15 (1781) (inquiring as to whether "the articles of capitulation bind" the U.S. with respect to seizures of cargo), to *New Jersey v. New York*, 523 U.S. 767, 788-89 (1998) (resolving a boundary dispute between New Jersey and New York).

79. See GEORGE A. FINCH, *THE SOURCES OF MODERN INTERNATIONAL LAW* 40-41 (1937) (providing a brief biography of Frederic de Martens).

80. GEORG FREDERICK VON MARTENS, *THE LAW OF NATIONS* 56 (William Cobbett trans., Thomas Bradford, 1795) (discussing the duration of treaties).

81. See FINCH, *supra* note 79, at 35-36 (providing a brief biography of Henry

Wheaton wrote: “[t]reaties, properly so called, or *fodera*, are those of friendship and alliance, commerce and navigation, which even if perpetual in terms, expire of course . . . in case either of the contracting parties loses its existence as an independent State.”⁸²

In 1889, the State Department stated as a “principle of public law” that a treaty expires when one of the parties “loses its existence.”⁸³ In support, the State Department quoted from General Henry W. Halleck’s *INTERNATIONAL LAW*, written in 1861:

The principle of public law which causes Treaties under such circumstance [*i.e.*, the cessation of a state’s existence as an independent state] to be regarded as abrogated is thus stated: “[t]he obligations of Treaties, even where some of their stipulations are in their terms perpetual, expire in case either of the contracting parties loses its existence as an independent state”⁸⁴

In 1897, U.S. Secretary of State John Sherman invoked scholarly works⁸⁵ to explain to the Government of Japan why the treaties made by the Kingdom of Hawaii would not survive the U.S. annexation of the Kingdom’s territory, *i.e.*, “[t]he treaty of annexation does not

Wheaton).

82. HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 191 (8th ed. 1866) (discussing the cases in which treaties cease); *see also* BLACK’S LAW DICTIONARY 770 (4th ed. 1968) (defining “foedus,” from which “foedera” is derived, as a treaty, a league, or compact).

83. *See* UNITED STATES DEPARTMENT OF STATE, *TREATIES AND CONVENTIONS CONCLUDED BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS SINCE JULY 4, 1776*, 1236 (1899) (quoting HENRY W. HALLECK, *HALLECK’S INTERNATIONAL LAW* 899) (discussing the status of treaties in instances where the contracting parties cease to exist).

84. *Id.* Halleck, the adopted son of Baron Frederic von Steuben, was a career soldier and lawyer. *See* Scott R. Morris, *The Laws of War: Rules by Warriors for Warriors*, 1997 *ARMY LAW.* 4 (1997). He was General-in-Chief of the U.S. Army in the Civil War until his replacement by General Ulysses S. Grant. *See id.* at 10 (providing background information on Halleck). In 1861 Halleck wrote his first book on international law, which was later updated and republished. *See id.* (discussing Halleck’s early foray into legal writing and scholarship).

85. *See* JOHN BASSET MOORE, *V DIGEST OF INTERNATIONAL LAW* 349 (1906) (quoting HENRY W. HALLECK, *HALLECK’S, INTERNATIONAL LAW*, ch. 18, sec. 35) (discussing the impact of expired states on the survival of treaties); *see also id.* (citing HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* sec. 275) (offering a similar position).

abrogate [the Kingdom's treaties], it is the fact of Hawaii's ceasing to exist as an independent contractant that extinguishes those contracts."⁸⁶

Likewise, in 1902 Charles E. Magoon, Law Officer in the Office of the Secretary of the War Department, submitted a report to Secretary of War Elihu Root, which Secretary Root ordered to be published. On the subject of the treaty obligations of extinct states, the report states: "[b]ut where there is a complete change, not only of sovereigns but of sovereignty, of necessity the agreement ends, for each sovereignty must exercise its grace in accordance with its own constitution, laws, and customs."⁸⁷

In addition, in 1895 Captain Edwin F. Glenn, Acting Judge Advocate General of the United States Army wrote:

When some of the stipulations of a treaty imply perpetuity, even though the act mentioned to be performed has been accomplished according to the letter of the agreement—as, for instance, in the recognition of a new state—the act of recognition is complete when accorded; but the state of things contemplated implies permanency, and a state is not authorized to disregard the obligation imposed. If, however, one of the contracting parties loses its existence, or its interior constitution undergoes a change of such a nature as to render the treaty inapplicable to the new state of things, the contract expires.⁸⁸

William Edward Hall (1895) and Max Huber (1899) also published treatises expressing the view that upon a State's extinction, its personal treaties lapse.⁸⁹ Furthermore, British scholar Arthur

86. See MOORE, *supra* note 85, at 350 (quoting U.S. Secretary of State John Sherman's missive to Mr. Toru Hoshi, Japanese Minister, on June 25, 1897, regarding the U.S. annexation of Hawaii).

87. CHARLES E. MAGOON, REPORT ON THE LAW OF CIVIL GOVERNMENT IN TERRITORY SUBJECT TO MILITARY OCCUPATION BY THE MILITARY FORCES OF THE UNITED STATES 304 (2d ed. 1902) (discussing the effects on treaties held by a sovereign who ceases to exist).

88. EDWIN F. GLENN, HAND-BOOK OF INTERNATIONAL LAW 152 (1895) (noting the events that would cause the extinction of treaties).

89. See WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 97 (4th ed. 1909) (noting that new states do not share in the obligations of old states); see also MAX HUBER, THE SUCCESSION OF THE STATES, INTERNATIONAL AND NATIONAL PRACTICE IN THE NINETEENTH CENTURY 191-92 (W. Clayton Carpenter trans., 1899) (discussing dismemberment and treaty succession).

Berridale Keith assessed the evidence of State practice in 1907. Soon after the dissolution of the Dual Monarchy of Norway and Sweden, he stated: "[t]he evidence, from the practice of nations, is all in favour of the lack of continuity in treaty obligations."⁹⁰

Similar observations include the following: "there is no legal resurrection in international law. Once a State has become extinct, it cannot resume a continued existence." Professor Krystyna Marek, Graduate Institute of International Studies, Geneva, 1968.⁹¹

When a state is dismembered into new independent states, its *treaties* as a rule become null and void without descending to the new states. Treaties are generally personal in so far as they presuppose, in addition to the territory, also the existence of a certain sovereign over the territory. To the succeeding states the treaties concluded by the former state are *res inter allos acta*.⁹²

"It is clear that political (including personal and dynastic) treaties of the extinguished state fall to the ground." Professor Amos H. Hershey, University of Indiana, 1911.⁹³

"The extinction of the personality of a state results traditionally in an abrogation of all political and military treaties concluded between the now extinct entity and other states." Professor Gerhard von Glahn, University of Minnesota — Duluth, 1962.⁹⁴

Many other scholars have expressed the similar opinions.⁹⁵

90. KEITH, *supra* note 22, at 19 (exploring state succession regarding treaties).

91. MAREK, *supra* note 6, at 6 (addressing the inseparability of the notions of identity and continuity).

92. Erik Castren, *Obligations of States Arising from the Dismemberment of Another State*, XIII ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 753, 754 (1951) (describing the obligations of states arising from the dismemberment of another state); *see also* BLACK'S LAW DICTIONARY, *supra* note 82, at 1470 (defining *Res inter alios acta* as "a thing done between others"); *see also* EUGENE EHRLICH, AMO, AMAS, AMAT AND MORE 249 (1987) (noting that the phrase is used figuratively to mean "it's no concern of ours").

93. Hershey, *supra* note 7, at 287 (explaining the right and obligations of successor states).

94. GERHARD VON GLAHN, *LAW AMONG NATIONS; AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW* 117 (7th ed. 1992) (discussing the rights and obligations of successor states).

95. *See, e.g.*, UN GAOR, 1st Comm., 2d Sess., Annex 14g at 582-83, U.N.

E. NO CONTROLLING DECISION OF AN INTERNATIONAL JUDICIAL TRIBUNAL, QUASIJUDICIAL TRIBUNAL, OR A COURT OF THE UNITED STATES HOLDS THAT AN EXTINCT STATE'S TREATY AUTOMATICALLY BECOMES A TREATY BETWEEN THE EXTINCT STATE'S SUCCESSOR AND THE EXTINCT STATE'S TREATY PARTNER

1. *Courts of the United States*

In *Terlinden v. Ames*,⁹⁶ the Supreme Court had to decide whether the extradition treaty of 1853 between the United States and the Kingdom of Prussia remained in force after 1871, when a number of Germanic States, including Prussia, formed the German Empire. The Court held that the treaty remained in force because the German

Doc. A/C.1/212 (1947) (Letter of October 11, 1947 from the Chairman of Sixth Comm. to the Chairman of the First Comm.); RESTATEMENT FOREIGN RELATIONS, *supra* note 66, at § 210(3); J.L. BRIERLY, *THE LAW OF NATIONS* 153 (6th ed. 1963); JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 408 (1979); Albert J. Esgain, *Military Servitudes and the New Nations*, in *THE NEW NATIONS IN INTERNATIONAL LAW AND DIPLOMACY* 71, 77 (William V. O'Brien ed. 1965); I GREEN HAYWOOD HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 297 (1940); HANS Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 382-87 (2d ed. 1966); NOYES E. LEECH ET. AL., *CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM* 980 (1973); WERNER LEVI, *CONTEMPORARY INTERNATIONAL LAW: A CONCISE INTRODUCTION* 125 (1979); JOHN BASSETT MOORE, I *DIGEST OF INTERNATIONAL LAW* 248 (1906); I L. OPPENHIEM, *INTERNATIONAL LAW A TREATISE* 553 (1905); PAUL REUTER, *INTRODUCTION TO THE LAW OF TREATIES* 186 (Jose Mico & Peter Haggenmacher trans., 1995); GEORGI SCHWARZENBERGER & E. D. BROWN, *A MANUAL OF INTERNATIONAL LAW* 169 (6th ed. 1976); MALCOLM N. SHAW, *INTERNATIONAL LAW* 694 (4th ed. 1997); OSCAR SVARLIEN, *AN INTRODUCTION TO THE LAW OF NATIONS* 111-112 (1955); OKON UDOKANG, *SUCCESSION OF NEW STATES TO INTERNATIONAL TREATIES* 404 (1972); Blum, *supra* note 71, at 833; P. J. Fitzgerald, *State Succession and Personal Treaties*, 11 INT'L & COMP. L.Q. 843 (1962); Charles Cheney Hyde, *The Termination of the Treaties of a State in Consequence of its Absorption by Another - The Position of the United States*, 26 AM. J. INT'L L. 133 (1932); J. Mervyn Jones, *State Succession in the Matter of Treaties*, 24 BRIT. Y.B. INT'L L. 360, 373 (1947); Dieter Papenfu, *The Fate of the International Treaties of the GDR Within the Framework of German Unification*, 92 AM. J. INT'L L. 469, 470-71 n.16 (1998); Edwin Williamson & John Osborn, *A U.S. Perspective on Treaty Succession and Related Issues in the Wake of the Breakup of the USSR and Yugoslavia*, 33 VA. J. INT'L L. 261, 270-71 (1993); Richard Young, *The State of Syria: Old or New?*, 56 AM. J. INT'L L. 482, 487 (1962).

96. 184 U.S. 270 (1902) (involving the extradition of an individual accused of forgery).

Empire's Constitution did not extinguish Prussia's sovereignty.⁹⁷ The Court described the adoption of the Empire's Constitution, as follows: "[t]hen came the adoption of the Constitution of the German Empire. It found the King of Prussia, the chief executive of the North German Union, endowed with power to carry into effect its international obligations, and those of the Kingdom, and it perpetuated and confirmed that situation."⁹⁸

The Court carefully distinguished cases in which a State loses its international identity upon joining a union of States: "Undoubtedly treaties may be terminated by the absorption of powers into other nationalities and the loss of separate existence, as in the case of Hanover and Nassau, which became by conquest incorporated into the Kingdom of Prussia in 1866. Cessation of independent existence rendered the execution of treaties impossible."⁹⁹

The Court cited as a source an 1889 State Department study of treaty succession, *i.e.*, "[w]here a state has lost its separate existence, as in the case of Hanover and Nassau, no questions [of treaty succession] can arise."¹⁰⁰

In 1954 the Ninth Circuit Court of Appeals addressed the question of whether a state becomes extinct in *Ivancevic v. Artukovic*.¹⁰¹ The court held that the Kingdom of Serbia did not become extinct when the inhabitants of adjacent and smaller south Slavic states joined with Serbia to form what was successively called the Kingdom of the Serbs, Croats, and Slovenes; the Kingdom of Yugoslavia; and the

97. *See id.* at 285 (stating that nothing in the Constitution of the German Empire removed the Kingdom of Prussia's identity or prevented performance of treaties entered into by the Kingdom of Prussia).

98. *Id.* at 284 (describing the constitutional powers granted to the King of Prussia).

99. *Id.* at 283 (noting the difference between a State in which independent existence no longer exists and a State in which sovereignty has not been extinguished).

100. *See id.* at 287 (quoting U.S. Dep't of State, *Treaties and Conventions Concluded Between the United States of America and Other Powers Since July 4, 1776*, S. Exec. Doc. No. 47, at 1234) (addressing the issue of treaty succession).

101. 211 F.2d. 565 (9th Cir. 1954) (addressing the survival of an extradition treaty between the U.S. and the Kingdom of Serbia, following a change in government structure by the Kingdom of Serbia, to the Federal Peoples' Republic of Yugoslavia).

Socialist Federal People's Republic of Yugoslavia.¹⁰² *Ivancevic*, therefore does not address the consequences of extinction.

Therefore, to the extent that U.S. courts addressed the question of State extinction, the Supreme Court's *dictum* in *Terlinden v. Ames* is consistent with the scholarly reasonings that a State's treaties lapse upon the State's extinction.

2. International Judicial Tribunals

Neither the International Court of Justice ("ICJ"), nor its predecessor, the Permanent Court of International Justice, handed down a decision that turned on the status of personal bilateral treaties of an extinct state. In 1996, in the case *Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*,¹⁰³ the ICJ Separate Opinion of Judge Weeramantry observed that the Genocide Convention survived the dismemberment of Yugoslavia, because the Convention, in embodying universal principles of civilized behavior, transcended the concept of state sovereignty.¹⁰⁴ Judge Weeramantry distinguished the Genocide Convention from treaties that are "confined within the ambit of a state's sovereignty."¹⁰⁵ As to such treaties, "[a]n important conceptual basis denying continuity . . . is that the recognition of the continuity of the predecessor state's treaties would be an intrusion upon the sovereignty of the successor state."¹⁰⁶ Hence, Judge Weeramantry appears to have concluded that treaties, other than those of universal humanitarian concern, do not as a matter of law remain in existence upon a state's dissolution.

102. *See id.* at 573-75 (upholding the validity of the extradition treaty originally entered into by the Kingdom of Serbia).

103. 1996 I.C.J. 595 (July 11) (concerning allegations that Yugoslavia violated the Convention on the Prevention and Punishment of the Crime of Genocide).

104. *See id.* at 646-47 (separate opinion of Judge Weeramantry) (stating that continuation of a treaty governing human rights and humanitarian interests is beyond the scope of state sovereignty).

105. *See id.* (noting the different treatment afforded to human rights and humanitarian treaties); *see also* Thomas D. Grant, *Territorial Status, Recognition, and Statehood: Some Aspects of the Genocide Case (Bosnia and Herzegovina v. Yugoslavia)*, 33 *Stan. J. Int'l L.* 305, 307-08 (1997) (addressing, briefly, Judge Weeramantry's analysis).

106. *See id.* at 646 (noting the effect of continuity upon sovereignty).

3. *International Arbitration Panel*

A Tripartite Claims Commission between the United States, Austria, and Hungary was created in 1927 to fix the amounts of financial obligations due Americans that were assumed by Austria in its World War I Peace Treaty (Vienna, 1921) with the United States, and the amount assumed by Hungary in its World War I Peace Treaty (Budapest, 1921) with the United States.¹⁰⁷ The Panel found it unnecessary to resolve any question of obligations imposed by customary international law.¹⁰⁸ In passing, however, the Panel compared the U.S.-Austria and U.S.-Hungary Peace Treaties to the U.S.-Germany Peace Treaty (Berlin, 1921) as follows: “[u]nlike the Treaty of Berlin ‘restoring friendly relations’ between the United States and Germany, these Treaties in terms ‘establish’ for the first time such relations between Austria and the United States and between Hungary and the United States.”¹⁰⁹

Thus, the Tripartite Claims Commission believed that the treaties of the Austro-Hungarian Empire did not, upon its extinction at or near the end of World War I, automatically pass to Austria and Hungary, which were two of the states that succeeded to parts of the Empire’s territory.

F. THE UNITED STATES’ CONDUCT DESCRIBED BY ASSISTANT ATTORNEY GENERAL DELLINGER DOES NOT CONSTITUTE STATE PRACTICE FOR PURPOSES OF ESTABLISHING CUSTOMARY INTERNATIONAL LAW

1. *Background*

A state’s loss of sovereignty over all its territory was relatively common in the Nineteenth Century and in the early Twentieth Century. France annexed Madagascar and Algiers; Great Britain annexed the Southern African Republic; Japan annexed Korea; Italy

107. See Tripartite Claims Commission (U.S.-Aus.-Hung.), Admin. Decision No. I, 5 (May 25, 1927) (defining the purpose of the Commission).

108. See *id.* at 6 (explaining that the Commission was only concerned with determining whether Austria and Hungary had assumed the obligations and accepted financial responsibility for the damages).

109. *Id.* at 11 (noting the emergence of the new nations of Austria and Hungary).

annexed various Italian States; Prussia annexed Hanover, Frankfurt, and Nassau; the United States annexed the Republic of Texas and the Kingdom of Hawaii. In all of those annexations, the United States expressed a view that the treaties of the annexed states ended automatically with respect to the territory annexed.¹¹⁰

A state's loss of sovereignty over all its territory from a cause other than annexation was less common. A vast number of states combined to form "composite" states or "confederations" or "unions," but the combining states in many cases retained substantial powers to conduct their own foreign relations, including the power to make treaties. An example was the Dual Monarchy of Norway and Sweden, which ultimately dissolved in 1905. When such a hybrid state dissolved and its members resumed full sovereignty, each was expected to continue in effect the treaties it had made when it was part of a union.¹¹¹ The USSR was different. Before dissolution, its sub-states did not make bilateral treaties with nation-states.¹¹²

AAG Dellinger cited four examples of state dissolution to support his contention that the ABM Treaty of 1972 survived the USSR's extinction: (a) the breakup of the Greater Columbian Union in 1829-1831 into what became Columbia, Venezuela, and Ecuador; (b) the dissolution of the Dual Monarchy of Norway and Sweden in 1905; (c) the dissolution of the Austro-Hungarian Empire at or near the end of World War I; and (d) the dissolution of the United Arab Republic in 1961.¹¹³ According to Dellinger, those events support the

110. See Jones, *supra* note 95, at 362-63 (noting the view to be customary, and one that "raise[s] an irresistible presumption of law").

111. See SAMUEL B. CRANDALL, *TREATIES, THEIR MAKING AND ENFORCEMENT* 438 (2d ed. 1916) (stating that both Norway and Sweden considered joint treaties to be binding on each country separately); see also R. W. G. DE MURALT, *THE PROBLEM OF STATE SUCCESSION WITH REGARD TO TREATIES* 87-88 (1954) (describing the communication between Norway, Sweden, and the United States concerning what responsibilities each country retained regarding joint treaties); see also HERBERT A. WILKINSON, *THE AMERICAN DOCTRINE OF STATE SUCCESSION* 108-109 (1934) (discussing the continued recognition of the treaties by Sweden and the U.S.).

112. Before dissolution, Ukraine was a member, in its own name, of the U.N. by special arrangement to induce the USSR to join. It may be said to have entered into a "multilateral" treaty on its own, but it did so by an irregularity of U.N. conduct, not out of a principle of international law.

113. See Dellinger Paper, *supra* note 14, at 5 n.5 (citing examples listed in

proposition that "where a state divides into its constituent parts, the [diplomatic] practice supports the continuity of existing treaty rights and obligations."¹¹⁴

Dellinger did not mention Yugoslavia's 1992 dissolution, a curious omission inasmuch as it is a more recent example of a state that dissolved, leaving no sovereignty in the extinct predecessor state. The Yugoslavian dissolution, therefore is more closely analogous to the USSR case than the foregoing four examples of State dissolution. Regarding Yugoslavia's dissolution, the United States took the position in U.S. courts and in the U.S. State Department's publication *Treaties in Force* that none of the Yugoslav successor states is a continuation of Yugoslavia.¹¹⁵ Additionally, in dealing with the successors of extinct Yugoslavia, the United States "abandoned any assertions of automatic treaty obligations and relied entirely on . . . assurances provided by the successor states."¹¹⁶

As recently as June 23, 2000, Richard Holbrooke, United States

Williamson & Osborn, *supra* note 95, at 263).

114. See *id.* (quoting Williamson & Osborn, *supra* note 95, at 263).

115. See Declaration of Christopher R. Hill, Director, Office of South Central European Affairs, United States Department of State at paras. 3, 5, *Federal Republic of Yugoslavia v. Park-71st Corp.*, 913 F. Supp. 191 (S.D.N.Y. 1995) (No. 95 Civ. 3659 (AGS)) (discussing the U.S. position that at the dissolution of SFRY, it ceased to exist and left no successor state). The United Nations also concluded that no State is the continuation of the SFRY. S.C. Res. 777, U.N. SCOR, 47th Sess., 3113 mtg. at 1, U.N. Doc. S/RES/777 (1992) (reaffirming U.N. Security Council Resolution 713 that discussed the status of the SFRY). The Security Council noted that "the State formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist," and consequently urged that the Federal Republic of Yugoslavia [hereinafter "FRY"] "cannot continue automatically [the SFRY's U.N.] membership." See *id.* The Security Council thereupon asked the General Assembly to rule that the FRY "apply for membership in the United Nations and . . . not participate in the work of the General Assembly." See *id.*; see also Blum, *supra* note 71, at 833 (describing the events of the U.N. Security Council with respect to Resolution 777, and the subsequent endorsement by the General Assembly); see also *USIA: U.S. Statement on Yugoslav State Succession*, M2 PRESSWIRE, Sept. 30, 1997, available at 1997 WL 14464578 (noting the remarks of James B. Foley, Deputy State Department Spokesman, reiterating the U.S. position that there is no successor State to the SFRY).

116. See Williams, *supra* note 40, at 31-32 (discussing the United States' treatment of the treaty obligations of several states, including Yugoslavia, following their dissolutions).

Permanent Representative to the United Nations, made a statement to the Security Council reminding “everyone” that the Security Council decided in 1992 that the SFRY “had ceased to exist” and that the FRY (one of its successors) should apply for membership as the four other Yugoslav successor-states did. He also stated: “[t]herefore, I don’t understand . . . how this situation exists. Tito’s old flag is still flying on First Avenue I consider that a travesty of the United Nations spirit. A flag that represents a nation that the U.N. itself decided didn’t exist.” See U.S.U.N. Press Release # 79 (00), Ambassador Richard C. Holbrooke, United States Permanent Representative to the United Nations Statement in the Security Council on the Situation in the Balkans I (June 26, 2000) (discussing the state of the FRY and its relationship with the U.N.) *at* http://www.un.int/usa/00_079.htm (visited Oct. 19, 2001).

Also, Dellinger did not mention the U.S. practice of regarding as lapsed the treaties of states made extinct by the annexation of their entire territories. Dellinger gave no reason why those extinctions should be treated differently from extinctions caused by dismemberment. Indeed, with respect to the question of treaty survival, the scholarly literature treats all extinctions in the same way. For example, Professor Amos S. Hershey, after explaining that “[s]tates are extinguished through voluntary incorporation, forcible annexation, *division into several states*, or union with other states,”¹¹⁷ says: “[i]t is clear that political (including personal and dynastic) treaties and alliances of the extinguished state fall to the ground.”¹¹⁸

2. A State Practice Does Not Contribute to the Development of Customary International Law Unless the Practice is Conducted Out of a Sense of Necessity to Comply with International Law

International law, like the common law in Anglo-American jurisprudence, can grow out of long-practiced conduct.¹¹⁹ In

117. See HERSHEY, *supra* note 69, at 215 (emphasis added) (defining when the total extinction of a state occurs).

118. See *id.* at 218 (distinguishing between the continuation of the obligations of successor and absorbing states and the obligations of extinguished states).

119. See BLACKSTONE, *supra* note 72, at *73-74 (noting that custom is the cornerstone of the common law of England); see also O’CONNELL, *supra* note 72, at 2-37 (detailing what must be done to create international law out of custom and

international law, it is the conduct of states that is relevant. But not all conduct of states contributes to the growth of international law because states, like other persons, sometimes engage in lawful conduct for reasons that have nothing to do with their legal obligations. For example, states admit aliens for residence, borrow money from other states, make treaties with other States, assert claims to property located in other states, grant diplomatic asylum, settle disputes they have with other states, and do other things "merely for reasons of political expediency."¹²⁰ Indeed, in dealing with questions of treaty survival, states appear to act in the way they act when dealing with questions as to whether they should enter new treaties, *i.e.*, they identify their political, economic, security, and other interests and seek the greatest benefits they might achieve, using any arguments they can muster, while giving up as little as they have to.¹²¹ Therefore, to separate state conduct that can contribute to the growth of international law from state conduct that does not contribute, courts have established a rule that is called *opinio juris sive necessitatis*, which loosely translates as "a conviction that a rule is obligatory."¹²² For short, it is *opinio juris*. According to this rule, only state conduct done out of a sense that the act is required by international law can contribute to the growth of international law.¹²³

the tendency to reduce the customary law to codes to increase precision and definition); *see also* MARK E. VILLIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES* 3-62 (rev. 2d ed. 1997) (describing what constitutes a state's practice and the requirements for customary law); *see also* Bederman, *supra* note 72, at 1451 (noting that custom, done out of moral duty, creates law).

120. *See* Asylum Case (Colum. v. Peru), 150 I.C.J. 266, 277 (Nov. 20) (stating that because the practice of granting diplomatic asylum is heavily influenced by concerns for political expediency, it is not possible to determine a customary law); *see generally* Jo Lynn Slama, *Opinio Juris in Customary International Law*, 15 OKLA. CITY U. L. REV. 603, 608-16 (1990) (discussing the distinction between a social usage, which is practiced without a feeling of compulsion, and legal custom, which requires a perception that the practice is required by a rule of law).

121. *See* VILLIGER, *supra* note 119, at 48 (noting that *opinio juris* seems to exclude state conduct engaged in solely for convenience).

122. *See* Slama, *supra* note 120, at 605 n.13 (citing H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 290 (3d ed. 1986) for the definition of *opinio juris sive necessitatis*).

123. *See generally*, J. L. BRIERLY, *THE LAW OF NATIONS, AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE*, 60-61 (5th ed. 1955) (exploring the creation

Moreover, a promise in a treaty "would not count toward the practice element necessary to establish the existence of a customary rule because . . . usage not informed by *opinio juris* is not relevant to a demonstration of state practice," Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1, 25 (1988).

According to Sir Hersch Lauterpacht, to cite state practice as evidence of "binding customary international law," one must establish "the [state's] conviction that the conduct in question is followed as a matter of legal obligation" ¹²⁴

of international law and discussing the value of obligations and the fear of sanctions); see also MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 69 n.197 (1990) (describing *opinio juris* and stating that it is a requirement for customary international law); O'CONNELL, *supra* note 72, at 16 (expressing that it is general "deference to a common conscience, by which the state admits its subjection to a rule not exclusively of its own manufacture."); CLIVE PARRY, THE SOURCES AND EVIDENCE OF INTERNATIONAL LAW 61-62 (1965) (setting forth the elements necessary for an act to become international customary law); VILLIGER, *supra* note 119, at 52 (noting that the concept of instant customary law, developed through acts of international bodies, lacks the requirement that states feel bound to the action outside of the international body's resolution); Herbert W. Briggs, *The Columbian-Peruvian Asylum Case and Proof of Customary International Law*, 45 AM. J. INT'L L. 728, 730 (1951) (noting that the requirement of *opinio juris* appears circular, but merely requires that a pattern of behavior that was previously discretionary has become obligatory because it has gained acceptance); Bin Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law*, 5 INDIAN J. INT'L L. 23, 36 (1965) (clarifying that the psychological element of *opinio juris* is the state's acceptance or recognition of the act, not the mental process of the act); John A. Perkins, *The Changing Foundations of International Law: From State Consent to State Responsibility*, 15 B.U. INT'L L.J. 433, 440 (1997) (reiterating that a state must feel bound to conform to the international legal obligation); Helen Silving, "Customary Law: Continuity in Municipal and International Law", 31 IOWA L. REV. 615, 622 (1946) (examining the two essential elements of customary law, the second of which is *opinio juris*); The Scotia, 81 U.S. 170, 187-188 (1871) (discussing the process by which the laws of the sea of individual nations became generally accepted obligations by other states, transforming the laws into international maritime obligations by other states, in turn transforming the laws into international maritime law); Buell v. Mitchell, 2001 U.S. App., LEXIS 25916, at *87-*106 (6th Cir. 2001) (holding that many states' practice of renouncing the imposition of capital punishment has not passed the test of *opinio juris sive necessitatis* so as to become part of the common law of the United States).

124. See SIR HERSC LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 368 (1958) (discussing the difficulty of balancing between customary international law and state sovereignty).

The American Law Institute states the rule of *opinio juris* as follows:

For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation (*opinio juris sive necessitatis*); a practice that is generally followed but which states feel legally free to disregard does not contribute to customary law.¹²⁵

In three leading cases, the *North Sea Continental Shelf Cases* (1969),¹²⁶ the *Anglo-Norwegian Fisheries Case* (1951),¹²⁷ and the *Columbian-Peruvian Asylum Case* (1950),¹²⁸ all involving claims based on state practice, the International Court of Justice ruled that a failure to establish that the state practice at issue met the *opinio juris* test, required a conclusion that the practice had not passed into customary international law.¹²⁹ Also, in the 1927 *Lotus Case*,¹³⁰ the Permanent Court of International Justice likewise rejected a claim because of a failure to meet the *opinio juris* test.¹³¹

The *Anglo-Norwegian Fisheries Case* typifies the application of the *opinio juris* rule. The ICJ held that the evidence did not establish

125. RESTATEMENT, *supra* note 21, § 102(1)(c)(3) cmt. c (discussing the sources of international law).

126. *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 4 (Feb. 20) (involving issues of continental shelf delineation).

127. *Fisheries* (U.K. v. Nor.), 1951 I.C.J. 4 (Dec. 18) (concerning the definition of Norwegian fishing areas).

128. 1950 I.C.J. 4 (Nov. 20) (pertaining to issues of diplomatic asylum following a rebellion in Peru).

129. *See* 1969 I.C.J. 4, 43-45 (finding that the principle of equidistance for shelf was not followed because of a sense of legal obligation, but because the countries were motivated by other factors, such as the Geneva Convention); *see also* 1951 I.C.J. 116, 131 (rejecting the United Kingdom assertion of the ten-mile rule regarding territorial waters because the rule had only been adopted by a few States and therefore had not become a general rule of international law); 1950 I.C.J. 266, 276 (rejecting Colombia's assertion that a modification in the law of any signatory state to an agreement would be binding on other signatory states because Colombia failed to prove that international customary law requires such a rule).

130. *S.S. Lotus*, (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) (involving competing claims of criminal jurisdiction over a boat collision).

131. *See id.* at 358 (finding that France had failed to prove any principal of international law prohibiting Turkey from the institution of criminal action).

the existence of a purported customary rule of international law limiting the base line of territorial waters to ten miles in the case of a bay. The evidence was to the effect that some states adopted the ten-mile limit by statute or by treaty, and some arbitral proceedings had adhered to the ten-mile limit. Nonetheless, the ICJ ruled that, however broadly the limit was respected, the state practice failed as evidence of the existence of customary international law because it was not a practice that responded to a command of law.¹³²

Hence, if the acts of diplomacy cited by AAG Dellinger are to serve as evidence of customary international law, they must pass the *opinio juris* test.

3. The Record Does Not Show That, in Any of the Four Episodes Cited by Dellinger, the United States Accepted a Treaty as Binding on It Out of a Sense That International Law So Required

a. The Dissolution of the Greater Colombian Union, 1829-1831

In 1819, the Spanish Kingdom of New Granada, the Captain-Generalship of Venezuela and Quito (also called Ecuador) formed the Greater Colombian Union. The Union dissolved in 1829-1831. The extent to which the three states submerged their separate identities in the Union is a matter of dispute. According to one scholar, the Union consisted of three states. Hence, the dissolution did not manifest a unitary state's loss of sovereignty over territory.¹³³ Later, Colombia and the United States signed a new treaty, which contained language that can be read to imply each party considered the pre-dissolution treaties to have continued in effect in the period between the Union's dissolution and the making of the new treaty.¹³⁴

The episode was described by the U.S. Secretary of State in 1832,

132. See 1951 I.C.J. at 131 (rejecting the ten-mile rule advocated by the United Kingdom).

133. See MCNAIR, *supra* note 70, at 412-18 (describing the discussions that followed the dissolution of the Greater Colombian Union among the three separated states and Great Britain concerning the continuation of a Treaty formed between Great Britain and Colombia).

134. See DE MURALT, *supra* note 111, at 86-87 (relating the formation and meaning of treaties signed after the dissolution of the Greater Colombian Union).

and more recently in books, articles, and reports on State succession, including a report by a Committee of the U.N.'s International Law Commission.¹³⁵ If the United States manifested an understanding that it acted out of a compulsion of international law, that would have been a noteworthy event to students of the law of state succession as well as to AAG Dellinger, *i.e.*, a bona fide manifestation of action *opinio juris* in a field of few, if any, such manifestations. Yet, neither Dellinger nor any other scholar, identifies any such manifestation. There is, in short, nothing to suggest that the United States acted out of *opinio juris* in conducting treaty relations with the successors of the Greater Colombian Union.

b. The Dissolution of the Dual Monarchy of Norway and Sweden, 1905

In 1814, the Kingdom of Norway and the Kingdom of Sweden formed a "Dual Monarchy" by which one person became King of both states.¹³⁶ In a 1910 letter to the Minister of Japan in Washington, the U.S. Secretary of State described the treaty operations of the Dual Monarchy from the time it was formed until it dissolved in 1905: "[i]n point of fact the Government of Norway and the Government of Sweden have hitherto acted independently in execution of their treaty engagements, each within its sovereign jurisdiction. In the matter of extradition the United States has

135. See PRESIDENT ANDREW JACKSON, MESSAGE TO THE HOUSE OF REPRESENTATIVES, TRANSMITTING REPORT OF SECRETARY OF STATE EDWARD LIVINGSTON, ON GOVERNMENT OF COLOMBIA, H.R. DOC. NO. 33-173 (1832) (containing the correspondence between the United States and Colombia); *see also* United Nations Conference on Succession of States in Respect of Treaties, U.N. GAOR, 1977 Sess. & 1978 Res. Sess., Vol. III, at 89 U.N. Doc. A/CONF.80/16/Add.2 (1979) [hereinafter "United Nations Conference on Succession"] (discussing the relations between Colombia and other countries with regard to their treaties following Colombia's dissolution); DE MURALT, *supra* note 111, at 86-87 (discussing the dissolution and subsequent treaties); Jones, *supra* note 95, at 367-68 (stating Great Britain's position on the dissolution of Greater Colombia and its impact on the continuation of Greater Colombia's obligations); D. P. O'CONNELL, V THE LAW OF STATE SUCCESSION, 43-44 (1956) (detailing Great Britain's view that treaties formed prior to the dissolution of Greater Colombia were still binding).

136. See FRIDTJOF NANSEN, NORWAY AND THE UNION WITH SWEDEN 26 (1905) (stating that although the two countries claimed to have separate sovereignty, they were united).

concluded separate treaties with the Governments of Norway and Sweden."¹³⁷

The U.S. practice of concluding separate extradition treaties with Norway and Sweden has been interpreted by the U.N.'s International Law Commission as recognition that the two states had "separate international personalities."¹³⁸ In 1905, when Sweden and Norway separated from their Union, each notified the United States and other states of its position on treaties made during the period of the Union, *i.e.*, a treaty that had been made specifically with reference to one member of the Union would continue in effect between that member and its treaty partner, and would not continue in effect otherwise; a treaty made for the Union as a whole would continue in effect to the extent that it related to one of the members of the Union, and would not otherwise continue in effect. The United States and France acquiesced. Great Britain did not acquiesce as to the continuance of any treaty with Norway, and as to Sweden, reserved the right to examine the treaties one-by-one.¹³⁹

Like the episode of the Greater Colombian Union, no public account of that episode states or implies that the U.S. acquiescence was driven by a sense of necessity to comply with international law. In one respect, however, the episodes differ, in that in the period between the dissolution of the Greater Colombian Union (1829-31) and the dissolution of the Dual Monarchy of Norway and Sweden (1905), additional government officials and scholarly writers expressed opinions on the status of treaties of extinct States. None of them suggested that the dissolution of Greater Columbia was a precedent relevant to the dissolution of the Norway/Sweden Dual Monarchy.

137. Letter from Elihu Root, Secretary of State, to Minister of Japan Takahira (Nov. 10, 1905), *reprinted in* HACKWORTH, *supra* note 95, at 362 (responding to the Japanese minister's inquiries about the dissolution and its effect on the continuation of treaties).

138. *See* United Nations Conference on Succession, *supra* note 135, at 89 (discussing the status of Norway and Sweden during their Union).

139. *See* KEITH, *supra* note 22, at 101 (noting the intentions of Norway and Sweden, though recognizing that both countries and the United Kingdom reserved the right to reconsider the treaties); *see also* Baty, *supra* note 22, at 123-24 (discussing the dissolution and the perspective of the United Kingdom).

Thus, to the extent that views of law had been expressed after the Greater Colombian Union's dissolution, those views suggested that the United States was not bound by law to acquiesce in Norway's and Sweden's proposal that any of their treaties with the United States remained in effect after their Dual Monarchy's dissolution. Indeed, to the scholars, the law appeared to be to the contrary. Hence, there is no evidence to support Dellinger's implied claim that the U.S. practice *vis-à-vis* the dissolved Dual Monarchy of Norway and Sweden was arrived at by *opinio juris*. Therefore, that episode does not support the existence of a rule of customary international law.

c. The Dissolution of the Austro-Hungarian Empire, 1918

The Austro-Hungarian Empire dissolved at or about the end of World War I. The Empire had fought as an ally of the German and Ottoman Empires, against a group of States (the "Allies"), the principals of which were Britain, France, Italy, Japan, Russia (until its withdrawal in 1917), and the United States (which entered in 1917 against the German and Austro-Hungarian Empires).

After the War, the Allies jointly negotiated with Germany the Peace Treaty of Versailles (1919),¹⁴⁰ to which the U.S. Senate denied consent. Therefore, the Treaty was not ratified by the United States.¹⁴¹ Consequently, the Allies jointly negotiated other peace treaties, which the United States did not ratify, including treaties with Hungary (Trianon, 1920),¹⁴² and with Austria (St. Germain-en-Laye, 1919).¹⁴³ Instead, the United States made peace by separate treaties,

140. Treaty of Versailles, June 28, 1919, 225 Consol. T.S. 188, *reprinted in* 11 MAJOR PEACE TREATIES OF MODERN HISTORY 1265 (F. L. Israel, ed., 1967) (negotiating peace between Germany and the Allies following World War I).

141. See Edwin Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664, 665-66 (1943-1944) (discussing Congress' failure to ratify the Treaty of Versailles).

142. See Treaty of Trianon, June 4, 1920, 6 UNPERFECTED TREATIES OF THE UNITED STATES OF AMERICA 171 (terminating World War I and establishing official relations amongst the adversaries).

143. See Treaty of St. Germain-en-Laye, Sept. 10, 1919, 5 UNPERFECTED TREATIES OF THE UNITED STATES OF AMERICA 237 (terminating the war with Austria).

i.e., with Germany (Berlin, 1921),¹⁴⁴ Austria (Vienna, 1921),¹⁴⁵ and Hungary (Budapest, 1921).¹⁴⁶

In the recitals at the beginning of the treaty with Germany, the parties state, "[b]eing desirous of *restoring* the friendly relations existing between the two nations prior to the outbreak of war: [h]ave for that purpose appointed their plenipotentiaries"¹⁴⁷ The recitals introducing the Treaty with Austria are different in that the language states: "Considering that the former Austro-Hungarian Monarchy ceased to exist and was replaced in Austria by a republican Government . . . [and] [b]eing desirous of *establishing securely* friendly relations between the two Nations: [h]ave for that purpose appointed their plenipotentiaries"¹⁴⁸ The recitals in the treaty with Hungary are substantially the same as in the treaty with Austria, *i.e.*, "[c]onsidering that the former Austro-Hungarian Monarchy ceased to exist and was replaced in Hungary by a national Hungarian Government . . . [and] [b]eing desirous of *establishing securely* friendly relations between the two Nations: [h]ave for that purpose appointed their plenipotentiaries"¹⁴⁹

Austria insisted that it was not the continuation of the Empire.¹⁵⁰

144. See Treaty of Peace with Germany, Aug. 25, 1921, U.S.-F.R.G., 42 Stat. 1939 (restoring friendly relations between the U.S. and Germany).

145. See Treaty of Peace with Austria, Aug. 24, 1921, U.S.-Aus., 42 Stat. 1946 (ending the war with Austria).

146. See Treaty of Peace with Hungary, Aug. 29, 1921, U.S.-Hung., 42 Stat. 1951 (establishing relations with the government of Hungary).

147. See Treaty of Peace with Germany, *supra* note 144, at 1942 (emphasis added) (noting the intention to resume relations between the two countries).

148. See Treaty of Peace with Austria, *supra* note 145, at 1946-47 (emphasis added) (indicating the intention to establish relations).

149. See Treaty of Peace with Hungary, *supra* note 146, at 1951-52 (emphasis added) (indicating the establishment of a new government in Hungary and the desire to formally establish relations between the two nations).

150. See KELSEN, *supra* note 95, at 384-85 n.85 (citing to Austria Pensions, [11925-1926] Ann Dig. 3 (No. 25) (holding at the behest of the Austrian Supreme Court that the "Austrian Republic was not the same state as the Austrian Empire")); see also MAREK, *supra* note 6, at 230-32 (noting that the government of the Republic of Austria, as well as the courts, considered the Austrian Republic and the Austrian Empire to be separate states); Thomas Baty, *The Obligations of Extinct States*, 35 YALE L.J. 434, 435-37 (1925-1926) (stating that a new state is not bound by the obligations of its predecessor); Oskar Lehner, *The Identity of*

Austria's position was supported by its national courts and by a tripartite commission that included the United States.¹⁵¹ The commission cited the above-described differences in the wording of the U.S. treaties with Germany, Austria, and Hungary as evidence that neither Austria nor Hungary was a continuation of the Empire.

Moreover, in Article II (1) of the 1921 U.S.-Austria Peace Treaty, Austria confers on the United States "the rights, benefits and advantages" conferred by Austria on the other Allied and Associated Powers by designated Parts of the Treaty of St. Germain-en-Laye (1919), including Part X.¹⁵² Part X of the Treaty of St. Germain-en-Laye, Section II, Articles 234-247, provides a regimen for dealing with the treaties of the dissolved Austro-Hungarian Empire.¹⁵³ Article 234 designates particular treaties of the dissolved Austro-Hungarian Empire, and provides that these treaties alone "shall . . . be applied as between Austria and those of the Allied and Associated powers party thereto . . ."¹⁵⁴ Some examples are the Convention of October 11, 1909, regarding the international circulation of motor-cars, and the Convention of June 12, 1902, regarding the guardianship of minors.¹⁵⁵ Article 241 provides that each of the Allied or Associate Powers "shall notify to Austria the bilateral agreements of all kinds which were in force between her and the former Austro-Hungarian Monarchy, and which she wishes should be in force as between her and Austria."¹⁵⁶ Article 241 further

Austria 1918/19 as a Problem of State Succession, 44 *AUS. J. PUB. INT'L L.* 63 (1992). For a history of the dissolution of the Austro-Hungarian Empire, see RENÉ ALBRECHT-CARRIE, *A DIPLOMATIC HISTORY OF EUROPE SINCE THE CONGRESS OF VIENNA* 360-371 (1958); see also ROBERT A. KANN, *A HISTORY OF THE HABSBURG EMPIRE* 468-520 (1974).

151. See Tripartite Claims Commission (U.S.-Aus.-Hung.), Admin. Decision No. 1, 4-6, 11-14 (May 25, 1927).

152. See Treaty of Peace with Austria, *supra* note 145, at art. (II)(1), 42 Stat. 1946, at 1948 (incorporating various articles of the Treaty of St. Germain-en-Laye).

153. See Treaty of St. Germain-en-Laye, *supra* note 143, at 319-24 (concerning the question of agreements signed by the former Austro-Hungarian Monarchy).

154. See *id.* at 319 (citing specific agreements signed by the Austro-Hungarian Monarchy that still applied to the Allied and Associated Powers).

155. See *id.* at 319-20 (enumerating conventions still in force).

156. See *id.* at 322 (establishing a notification system by which the Allied and Associated Powers communicated to Austria which bilateral agreements they

provides that "[t]he date of the coming into force shall be that of the notification."¹⁵⁷ In addition, "[o]nly those bilateral agreements which have been the subject of such a notification shall be put into force between the Allied and Associated Powers and Austria."¹⁵⁸

Article II (1) of the 1921 U.S.-Hungary Peace Treaty, by reference to the Treaty of Trianon (1920), adopts Article X of the Treaty of Trianon,¹⁵⁹ which is, in material respects, identical to Article X of the Treaty of St. Germain-en-Laye.¹⁶⁰ The treaties between the United States and Hungary, and the United States and Austria were submitted to and approved by a two-thirds vote in the U.S. Senate.¹⁶¹

In 1923, the State Department Solicitor explained that Article II (1) of the 1921 treaty with Austria, by incorporating section 241 of the Treaty of St. Germain-en-Laye, had the effect of terminating the U.S.-Austria Naturalization Treaty of 1870.¹⁶² In 1927, the State Department Solicitor explained that Article 241 gave the United States a "right . . . to revive, by giving notice to Austria within a specified period, any treaty or convention which it may be desired to continue in effect." The Solicitor explained further that the United States did not, within the period specified in Article 241, give notice of "its intention to revive the Consular Convention concluded between this country and Austria-Hungary on July 11, 1870," adding that the State Department "therefore does not consider that this Consular Convention is now in force."¹⁶³

wished to remain in force).

157. *See id.* (formulating procedures for treaty notification).

158. *See id.* (reinforcing the seriousness of the treaty notification process).

159. *See* Treaty of Peace with Hungary, *supra* note 146, at 1953 (adopting relevant portions of the Treaty of Trianon).

160. *Compare* Treaty of Trianon, *supra* note 144, at 177 (containing language that called for the preservation of "territorial integrity" and existing political independence" from aggression), *with* Treaty of St. Germain-en-Laye, *supra* note 143, at 242 (containing similar language to the same effect).

161. *See* Treaty of Peace with Hungary, *supra* note 146, at 1954 (noting ratification by two-thirds of the Senate); *see also* Treaty of Peace with Austria, *supra* note 145, at 1949 (noting ratification by two-thirds of the Senate).

162. *See* Memorandum from the Solicitor, United States Dep't of State, to Mr. Vallance, 1-2 (Apr. 6, 1923) (on file with author) (explaining the effect of the Treaty of Peace with Austria, on the Naturalization Treaty of 1870).

163. *See* Letter from Green H. Hackworth, Solicitor, United States Department

Given that the United States and Austria agreed to an elaborate regimen by which the United States would select the U.S.-Austro-Hungarian Empire treaties that it wanted to remain in force with Austria, and the Senate consented to this regimen, there is no support for Dellinger's implied claim that the U.S.-Austro-Hungarian treaties continued automatically by operation of law,¹⁶⁴ or Dellinger's implied claim that the Executive Branch revived those treaties without the Senate's consent.¹⁶⁵

In short, the United States did not regard itself as bound by international law to the treaties of the extinct Austro-Hungarian Empire.

d. The Secession of Syria from the United Arab Republic, 1961

In 1958, Syria and Egypt formed a union called the United Arab Republic (the "UAR"). In 1961, Syria seceded and was once again recognized as a separate state. In the view of the United States, the UAR continued to exist, notwithstanding Syria's secession, a view shared by the UAR itself. Under the circumstances, as a matter of international law, treaties would remain in place absent some reason why a particular treaty could no longer fulfill its object and purpose. Moreover, a scholarly work expresses the opinion that Syria's treaties that were in force when it joined the UAR never went out of force.¹⁶⁶ Therefore, in 1961, when Syria seceded, its pre-UAR treaties were in force. The United States did not object to continuing with Syria the treaties that the United States had made with the UAR, but the United States did not maintain that it continued those treaties out of a legal duty.

of State, to Jean Dube, 1-2 (May 25, 1927) (on file with author) (reasserting the implications of the Treaty of Peace with Austria).

164. See Dellinger Paper, *supra* note 14, at 3 n.5 (noting that treaty obligations were not affected by dissolution).

165. See *id.* at 2-5 (expressing concern about Congress overstepping its powers with respect to the ABM treaty and usurping the role of the Executive Branch).

166. See L. C. Green, *The Dissolution of States and Membership of the United Nations*, in LAW, JUSTICE AND EQUITY 162-166 (R. H. Code Holland & G. Schwarzenberger, eds., 1967) (discussing the consequences of the establishment of the UAR); see also J. H. W. VERZIJL, INTERNATIONAL LAW IN HISTORIC PERSPECTIVE 126 (1969) (noting that the Syrian decision to leave the UAR left the UAR no juridical reality).

4. *United States' Practice Regarding Yugoslavia's 1992 Dissolution Shows That the United States Does Not Consider Itself Bound by International Law to Maintain in Force the Non-Dispositive Treaties of Extinct States*

In 1992, SFRY dissolved and five states emerged on its territory: Slovenia, Croatia, Bosnia and Herzegovina, Macedonia, and the FRY. When the dissolution occurred, FRY claimed it was not a new state, rather merely a reduced-in-size SFRY, and therefore was a continuation of SFRY.

The United States rejected the FRY claim. In a Declaration filed with a Statement of Interest of the United States in U.S. District Court in New York in 1995, Christopher R. Hill, Director of the State Department Office of South European Affairs, stated:

In the early part of this decade, the SFRY suffered increasing political crisis that ultimately led to dissolution. Since 1992 the United States has taken the position that the SFRY has ceased to exist and that no state represents the continuation of the SFRY. . . . The United States' position that the SFRY has ceased to exist and that no state represents the continuation of the SFRY is consistent with the position of the international community generally.¹⁶⁷

5. *AAG Dellinger's Account of the Practice of the United States Omits the Many Occasions in Which the United States Took the Position that Treaties Did Not Survive the Dissolution of a State.*

The practice of the United States, and some other states, was put into context and summarized by Arthur Berriedale Keith:

The evidence, from the practice of nations, is all in favour of the lack of continuity in treaty obligations. The exceptions are mostly of a special nature On the other hand, the evidence against the succession to treaties is copious and distinct. The United States never regarded themselves as in any way bound by, or entitled to, the benefits of the treaties of the United Kingdom. . . . Thus also, the United States

167. Declaration of Christopher R. Hill, Director, Office of South Central European Affairs, U.S. Dep't of State, at paras. 3, 5, *Federal Republic of Yugoslavia v. Park-71st Corp.*, 913 F. Supp. 191 (S.D.N.Y. 1995) (No. 95 Civ. 3659 (AGS)) (stating the United States' position that no state represents the continuation of the SFRY).

considered its treaties with Algiers as abrogated by the French conquest of 1831; its treaties with Central America as abrogated by the dissolution of the Federation in 1839; its treaties with Hanover by its conquest by Prussia in 1867; its treaties with Nassau by the same event . . . ; with the Two Sicilies: by their absorption in Italy in 1860. Similarly, Lord Clarendon, on behalf of Great Britain, in the dispute with the United States over the Mosquito Protectorate, maintained that Mexico did not succeed to the Conventions of Spain with Great Britain, *ipso jure*, but only by express agreement So in 1860, Sardinia issued a declaration to the effect that the treaties of the annexed States were, *ipso jure*, dissolved. The Netherlands formally declared, in unison with Prussia in a treaty of 14th October, 1867, that the extradition treaty with Hanover had passed away through the conquest, and had been superseded by the treaties of the Netherlands and Prussia In the case of the annexation of Madagascar by the French in 1896, although the British Government vehemently protested that the annexation was an act of bad faith, and that their Customs Treaty with the Madagascar Government should be maintained, a view abandoned only in the treaty with France of April 1904, yet they never denied and the United States also admitted, that they could not claim that the Customs Treaty remained in force despite the annexation. *Similarly, on the separation of Cuba from Spain, and the annexation of Puerto Rico and the Philippines by the United States, the Spanish treaties ceased to bind either territory, and the United States framed a tariff for Puerto Rico and the Philippines, while the Government of Cuba has negotiated commercial treaties between itself and the great powers.* As Sardinia in 1860, as Prussia in 1866, so Great Britain in the case of the Orange River Colony in 1900.

All the treaties of the Transvaal and of the Orange River Colony were regarded as having fallen to the ground so far as they remained executory. Of course, treaties that have had their effect remained in force in so far as their results were concerned. Thus the boundary delimitations made under the Portuguese-Transvaal Treaty of 1869 were accepted, so far as they had been carried out, but all treaties which remained contracts fell to the ground. For example, the arrangement with Mozambique for railway traffic and recruiting of native labor passed away at once, and had to be replaced by a formal convention in 1901. Similarly the customs and railway treaties with the Cape of Good Hope and Natal fell to the ground, and required renewal between the parties. Of course, in these cases the fact that the places concerned were all colonies of one power rendered the renewal possible with very little friction, the principle was exactly the same as in the case of the Portuguese *modus vivendi*.¹⁶⁸

168. KEITH, *supra* note 22, at 19-20 (emphasis added) (citations omitted)

6. *The U.N. Security Council Decision Not to Oppose Giving the Russian Federation Veto Power Does Not Evidence Customary International Law Because the Decision Was Not Required by International Law*

Within days after the USSR dissolution in December, 1991, the Russian Federation asked the United Nations Security Council for the USSR's Permanent Seat, with veto power, on the Security Council. The United States could have exercised its veto to preclude a Security Council decision to grant the Russian Federation's request. Instead, the United States, at a non-public meeting with other members of the Security Council, granted the Russian Federation's request. The Security Council made no official announcement at the time, other than removing the USSR's nameplate and replacing it with a Russian Federation nameplate in the Security Council chamber.¹⁶⁹ The Russian Federation's request was handled quietly and quickly to avoid precipitating consideration of proposals to restructure the Security Council to abolish the veto power, to merge the veto powers of France and Great Britain, and to give veto powers to Germany or Japan, or both.¹⁷⁰ According to one news account, "[w]estern diplomats are said to be lobbying hard to avoid a messy debate on the reform of the Security Council."¹⁷¹

(providing evidence supporting the theory that succession to treaties is a distinct, not automatic process).

169. Yehuda Z. Blum, *Russia Takes Over the Soviet Union's Seat at the United Nations*, 3 EUR. J. INT'L L. 354, 354-59 (1992) (asserting that Russia should have been admitted as a U.N. member by the same process as the other newly-independent republics); see also Michael P. Scharf, *Musical Chairs: The Dissolution of States and Membership in the United Nations*, 28 CORNELL INT'L L.J. 29, 46-52 (1995) (describing the circumstances surrounding Russia's entrance into the United Nations); Carolyn L. Willson, *Current Development: Changing the Charter: The United Nations Prepares for the Twenty-First Century*, 90 AM. J. INT'L L. 115, 117-19 (1996) (discussing Russia's assumption of the USSR seat).

170. See Sam Jameson, *Japan to Seek Seat on U.N. Security Council*, L.A. TIMES, Jan. 29, 1992, at A9 (discussing Japanese interest in obtaining veto power in the U.N.); see also Paul Lewis, *West Acts to Defer Issue of New U.N. Council Seats*, N.Y. TIMES, Jan. 3, 1992, at A6 (discussing the pressure to alter the veto power); Paul Lewis, *3 Western Powers for Russian Takeover of Soviet U.N. Seat*, N.Y. TIMES, Dec. 24, 1991, at A8 (discussing the issue of changing the veto power in the U.N.).

171. See Trevor Rowe, *Switch of Soviet Security Council Seat Could Spur Reform Ideas*, WASH. POST., Dec. 26, 1991, at A25 (reporting on Russia's

Similarly, former U.S. Ambassador to Italy Richard N. Gardner explained: "[t]he one thing the United States, Britain and France wanted to avoid at all costs is anything that would open up the Pandora's box of a Charter amendment altering the present membership of the Security Council and possibly ending the right of a veto."¹⁷²

Carolyn L. Willson, U.S. Department of State, called the decision to give the USSR seat to the Russian Federation a "de facto amendment" of the U.N. Charter, a locution that implies that without amendment the U.N. Charter would not have permitted the Russian Federation to take the USSR's seat, an implicit statement that the Russian Federation was not the same state as the USSR.¹⁷³ An amendment to the U.N. Charter requires a vote of two-thirds of the members of the United Nations, and ratification by two-thirds of the General Assembly (including all permanent members of the Security Council), in accordance with their respective constitutional process.¹⁷⁴

Professor Michael P. Scharf, who at the time served as the State Department lawyer with responsibility for legal issues concerning succession to membership at the United Nations, goes no further than to say, "what is significant is that the members of the United Nations have found it in their interests to act (or at least to depict their actions) concerning membership succession in conformity with legal principles and precedent."¹⁷⁵ The precedent to which Professor Scharf refers is a 1947 U.N. decision when British Colonial India (a member of the U.N. even before Indian independence) became independent, automatically acquiring U.N. membership, while Pakistan, which concurrently emerged as a new State, was required

assumption of the USSR's seat on the Security Council and worries over its effect on other countries' interests).

172. See Lewis, *West Acts to Defer Issue of New U.N. Council Seats*, *supra* note 170, at A8 (discussing the Russian assumption of the U.N. seat and quoting Columbia University professor Richard N. Gardner).

173. See Wilson, *supra* note 169, at 117 (discussing the amendment practice in the United Nations).

174. See U.N. CHARTER art. 108 (specifying the amendment process).

175. See Scharf, *supra* note 169, at 67-69 (explaining the process by which Russia was allowed to take over the Soviet seat as the "continuation" of the Soviet Union).

to apply for membership.¹⁷⁶

The USSR episode and the India-Pakistan episode, however, differ in a material respect. Treating India as though it were an incumbent U.N. member, rather than as a new applicant, could not change the regimen for governing the U.N., whereas allowing the Russian Federation to occupy (as an incumbent) the USSR's seat on the Security Council would vastly change the governing regimen. As an incumbent, the Russian Federation would have veto power. As just another U.N. member, it would not. Therefore, when the Security Council gave the Russian Federation a veto power, it was not bound to do so on the basis of the 1947 decision on India and Pakistan. The Security Council, and the U.N. generally, acted on the basis of expediency, not a legal requirement. Indeed, one commentator, concluding that the India/Pakistan episode of 1947 was not analogous to the dissolution of the USSR, stated that, "with the demise of the Soviet Union itself its membership in the U.N. should have automatically lapsed and Russia should have been admitted to membership in the same way as the other newly-independent republics."¹⁷⁷

Therefore, the USSR-Russian Federation decision does not constitute *opinio juris* as to the survival of treaties of the USSR, let alone the survival of bilateral treaties of the USSR, or the survival of bilateral treaties generally. In sum, U.S. diplomatic practice has not contributed to the development of a rule of law that a non-dispositive treaty of an extinct state automatically becomes a treaty between a successor state and the extinct state's treaty partner.

176. See *id.* at 40-43, 68-69 (outlining the legal and political reasons behind the U.N.'s decision to accept India but not Pakistan, as a successor to British India for the purposes of U.N. membership).

177. See Blum, *supra* note 169, at 359 (arguing that from a legal standpoint, the USSR's rights and obligations of membership ceased to exist with its extinction, and that Russia was not its automatic successor for membership purposes).

G. THE 1978 VIENNA CONVENTION ON SUCCESSION OF STATES IN RESPECT OF TREATIES DOES NOT RESOLVE ANY ABM TREATY QUESTION BECAUSE THE UNITED STATES IS NOT A PARTY TO THE VIENNA CONVENTION AND CONVENTIONS DO NOT BIND NON-PARTIES

The United States did not sign the 1978 Vienna Convention at the time it was opened for signature in 1978, or thereafter. A convention or does not bind a state that is not a party.¹⁷⁸

H. ARTICLE 34 (1) OF THE 1978 VIENNA CONVENTION DOES NOT REFLECT A RULE THAT HAS PASSED INTO CUSTOMARY INTERNATIONAL LAW

Article 34 (1) of the 1978 Vienna Convention provides:

Succession of the States in cases of separation of parts of a State

1. When a part or parts of the territory of a State separate to form one or more States, *whether or not the predecessor State continues to exist*:

(a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed;

(b) any treaty in force at the date of the succession of States in respect only of that part of the territory of the predecessor State which has become a successor State continues in force in respect of that successor State alone.¹⁷⁹

178. See *Jet Traders Inv. Corp. v. Tekair*, 89 F.R.D. 560, 567 (D. Del. 1981) (stating that a treaty only applies to the states that ratified the agreement); see also RESTATEMENT, *supra* note 21, at § 324(3) (noting that treaty obligations and rights arise to non-parties if the parties intend it to bind non-parties and the non-party acknowledges its rights and obligations); see also GEORG SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 160-61 (5th ed. 1967) (noting that treaties are not binding on third parties); see also UDOKANG, *supra* note 95, at 403 (discussing the sources of the rule that only contracting parties are bound by treaties).

179. See *Vienna Convention on Succession of States in Respect of Treaties*, U. N. GAOR, 33rd Sess., Res. Sess., United Nations Conference on Succession of States in Respect of the Vienna Convention on Succession of States in Respect of Treaties, at 26 U.N. Doc. A/Conf.80/31 (1978) (emphasis added) (codifying a framework to deal with treaties in cases of State succession).

In *Filartiga v. Pena-Irala*,¹⁸⁰ a U.S. Court of Appeals held that an act of torture committed by a foreign state official against a person held in detention in that state's territory violated a customary rule of international law.¹⁸¹ The court inferred the existence of the rule from evidence that states universally condemned the use of torture. According to the court, foreign states manifested their "universal abhorrence" by way of treaties on human, political, and civil rights, by declarations of the United Nations General Assembly, and by domestic laws.¹⁸² The court, however, issued this caution: "[t]he requirement that a rule command the 'general assent of civilized nations' to become binding upon them all is a stringent one. Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law."¹⁸³

In counseling caution, the court could have cited the *North Sea Continental Shelf Cases*,¹⁸⁴ decided by the ICJ in 1969. The ICJ rejected the contention of Denmark and the Netherlands (in a dispute with Germany) that, by reason of the adoption of the Convention on the Continental Shelf ("the Shelf Convention") (a principle for determining continental-shelf boundaries between adjacent coastal States), the principle of "equidistance" became a rule of customary international law.¹⁸⁵ The Shelf Convention was opened for signature in 1958. Between 1958 and 1969, thirty-nine states became parties.¹⁸⁶ By 1969, approximately seventy states were exploring or exploiting

180. 630 F.2d 876 (2d Cir. 1980) (determining the viability of jurisdiction of torture claims in federal court arising from actions in Paraguay between parties of Paraguayan citizenship).

181. *See id.* at 883-84 (noting that torture is a universally condemned practice).

182. *See id.* at 884 (accepting the argument that torture is universally renounced).

183. *See id.* at 881 (recognizing the high threshold for a norm to be accepted as binding on all nations).

184. *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 4 (Feb. 20) (discussing the formulation of accepted principles of international law).

185. *See id.* at 44-45 (stating that the principles fell short of customary international law).

186. *See id.* at 25 (citing the number of parties to the relevant provisions of the Shelf Convention that Denmark and the Netherlands claimed represented a general rule of international law).

continental shelf areas.¹⁸⁷

Denmark and the Netherlands argued that the participation of thirty-nine states in the Convention was sufficient to establish the equidistance principle as a rule of customary international law binding on every coastal state, not just the thirty-nine states that were parties to the Convention.¹⁸⁸ The ICJ rejected this argument, holding that the participation of thirty-nine states was not sufficiently "widespread and representative" to show that the equidistance principle had passed into a rule binding on states that were not parties to the Convention.¹⁸⁹ That number of participants "though respectable," was "hardly sufficient," even when compared to the total number of states "whose interests were specially affected," *i.e.*, were eligible to join and had continental shelves.¹⁹⁰

The evidence as to states' acceptance of the 1978 Vienna Convention does not approach the level of proportional participation that the ICJ found insufficiently widespread in the *North Sea Continental Shelf* case, *i.e.*, thirty-nine out of seventy interested States in the *Continental Shelf* case, as compared with twenty out of at least one hundred eighty-five states in the case of the 1978 Vienna Convention. All states have an interest in the making of treaties. Moreover, the 1978 Vienna Convention's participants do not include any developed state other than the Holy See, or any Western European state, or any North American State, or any of the five states that has a Permanent Seat (and veto power) on the U.N. Security Council (France, Great Britain, the Russian Federation, and the United States). The line is pushed even farther from the regimen of customary international law if weight is given to proportion of population, because the 1978 Vienna Convention's participants

187. *See id.* at 227 (Lachs, J., dissenting) (noting the correlation between the number of states who were parties to the Shelf Convention and the number of States actually effected by its provisions).

188. *See id.* at 25, 41 (noting that thirty-nine countries ratified the Shelf Convention, and the court's consideration as to whether this resulted in the creation of international law).

189. *See id.* at 42 (rejecting the argument of the Netherlands and Denmark).

190. *See* 1969 I.C.J. at 42 (cautioning that states who are not party to the Shelf Convention may not wish to be bound by it or have no need to be party to it due, in part, to their geographic location).

collectively represent about fifteen percent of the World's population.¹⁹¹ Moreover, in the *North Sea Continental Shelf Case*, the ICJ ruled the passage of eleven years between the Convention's signing and the Court's decision was adequate to judge how well the Convention was becoming accepted by states.¹⁹² One commentator explained:

However, when time passes and states neglect to become parties to a multilateral instrument, the abstention constitutes a silent rejection of the treaty. Early in the history of the treaty, it is impossible to determine what position states will ultimately take, but 20 years after the treaty was drafted, one can gain a fairly clear idea of how much acceptance the treaty will probably ever secure.¹⁹³

If time available for participation is given weight, there is even less to commend the 1978 Vienna Convention as a maker of customary international law, because nineteen years have elapsed since the 1978 Convention was signed.¹⁹⁴

191. See UNITED NATIONS CONFERENCE ON THE SUCCESSION OF STATES IN RESPECT OF TREATIES U.N. Sales No. F.79.V.10 (1978) (listing participants in the 1978 Vienna Convention as Angola, Bosnia and Herzegovina, Brazil, Chile, Cote d'Ivoire, Croatia, Czech Republic, Democratic Republic of the Congo, Dominica, Egypt, Estonia, Ethiopia, Holy See, Iraq, Madagascar, Morocco, Niger, Pakistan, Paraguay, Peru, Poland, Senegal, Seychelles, Slovakia, Slovenia, Sudan, the former Yugoslav Republic of Macedonia, Tunisia, Ukraine, and Uruguay); see also POPULATION REFERENCE BUREAU, 1998 WORLD POPULATION DATA SHEET (1998) (listing the population figures of countries). Each of the parties other than the Holy See is a "developing" State according to the classification used by the International Bank for Reconstruction and Development. See The World Bank Group, *The World Bank's Role* (explaining the classifications of States as developing) at <http://www.worldbank.org/html> (last visited Dec. 29, 1998); see also The World Bank, *Countries and Regions Listings*, at <http://www.worldbank.org/html> (last visited Dec. 29, 1998).

192. See 1969 I.C.J. at 43 (examining the element of time with relation to acceptance as a rule of law).

193. See R. R. Baxter, *Treaties and Custom*, in RECUIL DES COURS 99-101 (1970) (citations omitted) (illustrating the influence of reliance on treaties as evidence of international law); see also Briggs, *supra* note 123, at 728 (explaining the basis for a rule of customary international law).

194. See Koskenniemi, *supra* note 40, at 93-94 (noting "[i]t took nineteen years for the 1978 Vienna Convention on the Succession of States in Respect of Treaties to enter into force with the deposit of the fifteenth instrument of ratification by the Former Yugoslav Republic of Macedonia (FYROM) on 7 October, 1996.")

Moreover, Article 34 (1) of the 1978 Vienna Convention does not meet the “stringent” requirement suggested by *Filartiga* or the “widespread and representative” requirement of the *North Sea Continental Shelf Case*. “Certainly, Article 34 is not consistent with State practice.” SHARON A. WILLIAMS, *INTERNATIONAL LEGAL EFFECTS OF SUCCESSION BY QUEBEC* 3 (1992). Hence, Quebec [should it secede] “would not be bound under customary international law by the treaty obligations entered into by Canada.” *Id.* at 34. To like effect is Diba B. Majzub, *Does Secession Mean Succession? The International Law of Treaty Succession and an Independent Quebec*, 24 QUEEN’S L. J. 411, 428-30 (1999) (arguing that Article 34 did not codify customary international law). When the International Law Commission proposed the adoption of the Convention on Succession of States in Respect of Treaties, it explained with elaborate supporting documentation that existing practice “does not seem to support the existence of a unilateral right in a newly-independent state to consider a bilateral treaty as continuing in force with respect to its territory after independence, *regardless of the wishes of the other party to the treaty*. . . .” III United Nations Conference on Succession of States in Respect of Treaties, Official Records, at 67 U.N. Doc. A/Conf/16/Add.2, U.N. Sales No. E.79.V10 (1979). Similarly:

[T]he Commission concludes that succession in respect of bilateral treaties has an essentially voluntary character. Voluntary, that is, on the part not only of the newly independent state but also of the other interested state. On this basis, the fundamental rule to be laid down for bilateral treaties appears to be that their continuance in force after independence is a matter of agreement, express or tacit, between the newly independent state and the other state party to the predecessor state’s treaty.¹⁹⁵

The USSR also knew that:

[U]niversal succession is out of the question . . . when a new State appears as the result of separation from another . . . when a State emerges from the status of dependency by secession from a metropolitan country . . .

(footnotes omitted).

195. *Id.* at 68 (expressing the view that the fundamental rule for bilateral treaties should be that their continuance following independence should be a matter of bilateral agreement between the new state and the other state party).

and . . . when a new type of State appears as the result of social revolution. I mean of course, not a political coup, but such a deep revolution as change the very foundation of the State its social, economic and political foundations.¹⁹⁶

The 1978 Vienna Convention has not passed into customary international law and therefore binds no state other than a party to that Convention.

I. THE CONTINUATION PRINCIPLE OF THE 1978 VIENNA CONVENTION WOULD NOT APPLY TO THE ABM TREATY VIS-À-VIS THE RUSSIAN FEDERATION BECAUSE THE CONTINUATION OF THE TREATY WOULD CONFLICT WITH THE TREATY'S OBJECT AND PURPOSE

The clause in the 1978 Vienna Convention that would require the continuation in force *vis-à-vis* successor states of the treaties of their extinct predecessors does not apply if continuation would be incompatible with the treaty's object and purpose, or would radically change the conditions for its operation.

Article 34(2) of the 1978 Vienna Convention provides:

Paragraph 1¹⁹⁷ does not apply if:

(a) the States concerned otherwise agree; or

(b) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor [s]tate would be incompatible with the object and purpose of the treaty or would radically change the condition for its operation.¹⁹⁸

In the November 1997 letter to Representative Gilman, President Clinton stated that the ABM Treaty of 1972 cannot fully achieve its purpose with the Russian Federation as the only partner of the United

196. INTERNATIONAL LAW ASS'N, REPORT OF THE FIFTY-SECOND CONFERENCE HELD AT HELSINKI, 562 (1967) (quoting I. I. Lukashuk asserting that a newly formed state is not obligated to assume its predecessor's treaty obligation).

197. See *Vienna Convention*, *supra* note 179 (providing the Convention language for Paragraph 1).

198. See *id.* (excepting the application of particular cases of State succession which would frustrate the aim of the treaty).

States because the Treaty refers specifically to territory outside the boundaries of the Russian Federation and within the boundaries of Belarus, Kazakhstan, and Ukraine:

Neither a simple recognition of Russia as the sole ABM successor (which would have ignored several former Soviet states with significant ABM interests) nor a simple recognition of all NIS states as full ABM successors would have preserved fully the original purpose and substance of the Treaty, as approved by the Senate in 1972.¹⁹⁹

Therefore, according to President Clinton, to achieve the Treaty's purposes, the area of its application must include the territories of Belarus, Kazakhstan, and Ukraine, in addition to the Russian Federation. To include those territories, they would have to be made parties. This would require a substantial amendment to the Treaty's provisions on decision-making. Moreover, the alteration in the ABM Treaty's territorial scope would have a material affect on the ability of parties to defend their national territories by means of the one permitted ABM site.

Were Belarus, Kazakhstan, and Ukraine simply added as parties (assuming President Clinton's view that the Treaty remains in force between the United States and the Russian Federation), the veto power that the United States had in regard to the ABM Treaty of 1972 in treaty governance would be destroyed. Also, the other three states together could outvote the United States and the Russian Federation. Such a critical change in the powers of governance would not be compatible with the ABM Treaty as adopted by the United States and the USSR.

Likewise, the dynamics of amending the Treaty would change drastically. It would no longer be sufficient for the United States to convince the other major party to agree to an amendment. The other three could block an amendment, requiring the major parties to withdraw and start anew if they desired an amended treaty.

199. See November Clinton Letter, *supra* note 11, at 2 (discussing the question of ABM Treaty succession).

J. THE ABM TREATY DID NOT BECOME A TREATY BETWEEN THE UNITED STATES AND THE RUSSIAN FEDERATION BY DEVOLUTION

In anticipation of dissolving, a state may want to impose its treaties on both its treaty partners and its successors. To that end, it may proclaim that a treaty will become a treaty between its successor and its (the dissolving state's) treaty partner. That proclamation is called a "devolution proclamation." Similarly, the dissolving State and its about-to-become successor may agree to such a devolution. In either case, the devolution does not bind a treaty partner.²⁰⁰ It follows that neither a devolution proclamation by the USSR, nor a devolution agreement between the USSR and any one or more of its to-be-successor states, could bind the United States to accept one or more of the successor states as a party to the ABM Treaty.

K. THE ABM TREATY WAS NOT A DISPOSITIVE TREATY

1. *The ABM Treaty Did Not Create a Legally Recognizable Interest in Any State Other Than the Treaty Partners*

Some treaties, like some contracts, are thought to create permanent rights in third parties. Thus:

It is equally clear that transitory or dispositive treaties remain in force. Of such a character are stipulations respecting boundary lines, servitudes or easements resting on the land relating to the use and repair of roads (including railways) or the navigation of rivers, etc. In these cases the rights of third parties, which it would be illegal to ignore or destroy, are

200. See United Nations Conference on Succession, *supra* note 135, at 18-25 (noting that unilateral treaty declarations by the predecessor states do not generally bind the successor state); see also RESTATEMENT, *supra* note 21, at § 210 cmt. f ([S]ubsection (3) adopts the 'clean slate' theory Under that theory, a new state starts afresh, with neither rights nor obligations under the agreements of its predecessor state, unless the new state indicates a desire to adopt a particular agreement and the other party or parties agree. Even a devolution agreement between the predecessor state and the successor state, whereby the latter assumes all or some of the agreements of the predecessor state, is binding only as between those states; the other party (or parties) to an agreement must agree to the substitution of the new state. This principle applies both to newly independent states and to a state separated from another by secession or other circumstances.").

involved.²⁰¹

The ABM Treaty did not purport to transfer any legally enforceable right to any third party, and that alone raises a strong presumption that no third party had such right.²⁰² In addition, Article XV.2 of the ABM Treaty allows each party to withdraw on specified grounds, without the consent of anyone else, upon six months' advance notice.²⁰³ Finally, a party is allowed to withdraw "if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests."²⁰⁴ Hence, the decision as to whether to withdraw is vested exclusively in each party. Therefore, the ABM Treaty cannot reasonably be read as having transferred a legally recognizable interest to any third party.

2. The ABM Treaty Did Not Evidence an Intent to Restrict Either Treaty Party's Use of Particular Territory Beyond the Time That the Treaty Was to Be in Force

Some scholars suggest that a treaty may create a "servitude," that is, a restriction on a particular use of territory for the benefit of the other party that survives the first party's extinction, even if no third-party right is created. Such obligations "are said to be in the nature of covenants running with the land."²⁰⁵ Whether, in international law,

201. See HERSHEY, *supra* note 93, at 287 (noting an exception to the rule that treaties with third parties are absorbed by the incorporating state).

202. See A. P. Lester, *State Succession to Treaties in the Commonwealth*, 12 INT'L & COMP. L.Q. 475, 501 (1963) (citation omitted) (stating that "[t]he standard of proof of the existence of rights *in rem* in customary international law is strict, and it is believed, although it cannot be demonstrated here, that there is no general rule accepted *ex opinio juris sive necessitatis* that 'real' or 'localized' treaties automatically bind successor [s]tates.").

203. See ABM Treaty, *supra* note 1, at art. XV.2 (stating requirements for withdrawal).

204. See *id.* (emphasis added) (noting that the availability of withdrawal is a question for that specific party).

205. See James Wilford Garner, *Questions of State Succession Raised by the German Annexation of Austria*, 32 AM. J. INT'L L. 421, 432 (1938) (noting the belief that certain treaties are thought to be "connected" to the territories); see also DE MURALT, *supra* note 111, at 86-88 (discussing instances that affirm the doctrine that after the dismemberment of a State, all resulting States are bound by the treaties concluded prior to dismemberment); see also Malcolm N. Shaw, *State*

such a device as a servitude actually exists, is hotly contested.

According to F.A. Váli:

The "servitude" of international law is the traditional scapegoat of international jurisprudence. There is hardly any other concept or doctrine of international law which has suffered such contemptuous criticism and blunt rejection, and at the same time enjoyed such unsubstantiated approval and wanton praise. It has been accused of being the obsolete vestige of medieval, patrimonial, feudal and—last, but not least—Roman law. It has been attacked as being the hybrid product of a servile adaptation of private law concepts, it has been indicted as being a superfluous and artificial construction, apt to deform international law and to introduce the utmost confusion therein. It has been dealt even the deadliest blow which can be given to any scientific conception . . . its existence has been denied.²⁰⁶

But assuming, for the sake of argument, that some restraints on land use can survive extinction even though they do not vest rights in third parties, there is good reason to assume that the rule would be limited to restraints on particularly-described territory. The servitude is based on the presumption that a state that granted the restriction intended to transfer a permanent property right to another state, just as any landowner might transfer to another person a permanent right in designated property. This view was expressed by Vattel:

But it is here to be observed, that treaties or alliances which impose a mutual obligation to perform certain acts, and whose existence consequently depends on that of the contracting powers, *are not to be confounded with those contracts by which a perfect right is once for all acquired, independent of any mutual performance of subsequent acts.* If, for instance, a nation has *forever ceded* to a neighboring prince the right of fishing in a certain river, or that of keeping a garrison in a particular

Succession Revisited, 1994 FINNISH Y.B. INT'L L. 34, 77 (noting that following the termination of a state and its replacement by several new states, "it is accepted that political treaties will not continue but that territorially grounded treaties will continue.").

206. F. A. VALI, *SERVITUDES OF INTERNATIONAL LAW* 42 (2d. ed. 1958) (citation omitted) (arguing that the concept of international servitudes represents a "rather undefined and unshapely mass" as a result of scholars' tendency to "indiscriminately throw almost every obligation imposed upon a State into the limbo of something which they call international servitudes."); *see also* Esgain, *supra* note 95, at 43-44 (providing arguments for and against the existence of international servitudes, and the identities of the advocates of each position).

fortress, that prince does not lose his rights, even though the nation from whom he has received them happens to be subdued, or in any other manner subjected to a foreign dominion. His rights do not depend on the preservation of that nation; she had alienated them; and the conqueror by whom she has been subjected can only take what belonged to her.²⁰⁷

Similarly, Samuel B. Crandall stated:

Rights in or over the territory, or real rights, which have been created or transferred by treaty, do not expire with the extinguishment of the state conveying such rights, but survive as against the succeeding territorial sovereign. The instruments under which such rights have passed out of the one state into the other remain unchanged as documents of title.²⁰⁸

Likewise, "there is an incapacity in the successor [s]tate to assert rights of sovereignty greater than those which inhere in respect of the territory."²⁰⁹

Also, D. P. O'Connell writes:

A distinction is drawn in traditional international law between "personal" and "impersonal" or "dispositive" treaties. The former are those which are essentially contractual and presuppose reciprocity between the parties with a view to an agreed end. The latter are those which impress upon a territory with some special legal status, and so limit the incidence of sovereignty upon it.²¹⁰

The ABM Treaty fell within D. P. O'Connell's description of a

207. Vattel, *supra* note 78, at 312, *quoted in* Crandall, *supra* note 111, at 430-31 (emphasis added) (explaining Vattel's argument that rights in territories are not void by the destruction of one of the contracting powers); *see also* Jones, *supra* note 95, at 375 (noting Vattel's argument regarding obligations created by treaties).

208. *See* CRANDALL, *supra* note 111, at 430 (analyzing the relationship between treaty termination and changes in state entities).

209. *See* INTERNATIONAL LAW ASSOCIATION, COMMITTEE ON STATE SUCCESSION TO TREATIES AND OTHER GOVERNMENTAL OBLIGATIONS, THE EFFECT OF INDEPENDENCE ON TREATIES 352 (1965) (discussing "dispositive" treaties which "survive changes of sovereignty because they are less contractual than in the nature of territorial settlements.").

210. *See* O'CONNELL, *supra* note 72, at 368 (drawing distinctions between types of treaties and noting the effect changes of sovereignty have on dispositive treaties).

“personal treaty,” *i.e.*, it presupposed “reciprocity between the parties with a view to an agreed end.”²¹¹ If the ABM Treaty had ended by a party’s withdrawal under Article XV(2), neither party would have been further obliged to forego deploying ABM systems anywhere on its territory. The end of the Treaty as a result of the USSR’s extinction could not give the Treaty any greater power to burden particular territory. The ABM Treaty therefore was the antithesis of what O’Connell describes as treaties that “impress” upon a territory a “special legal status” that “limit[s] the incidence of sovereignty” on that territory.²¹² Similarly, the ABM Treaty was the opposite of Vattel’s example of a right acquired by contract that is “once for all acquired, independent of any mutual performance of subsequent acts.”²¹³ Finally, it cannot be assumed that the United States has, outside any treaty, granted any third state a legal right to require the United States to forego deployment of a national missile defense. Accordingly, the ABM Treaty was not a dispositive treaty.

V. U.S. CONSTITUTIONAL LAW: THE
PRESIDENT’S IMPLIED POWER TO MAKE SOME
KINDS OF INTERNATIONAL AGREEMENTS
WITHOUT A CONSENTING VOTE OF TWO-
THIRDS OF THE SENATE DOES NOT EXTEND TO
THE MAKING OF A LEGALLY BINDING ANTI-
BALLISTIC MISSILE TREATY.

The Dellinger Paper asserted that, regardless of whether under international law the ABM Treaty of 1972 became a treaty with the Russian Federation, an ABM treaty was brought into existence by agreement of the Russian Federation and the President of the United States, notwithstanding the absence of U.S. Senate advice and consent. Dellinger contended that the terms of what he argued is an ABM treaty between the United States and the Russian Federation

211. *See id.* (defining personal treaties and noting that personal treaties bind successor States only in limited instances where sovereignty changes by evolution do).

212. *See id.* (defining “impersonal” or “dispositive” treaties).

213. *See supra* note 207 and accompanying text (outlining Vattel’s view on servitudes)

are not so different from those of the ABM Treaty of 1972 as to constitute a substantive amendment of the latter. Dellinger did not argue that an amendment to the ABM Treaty could have been Constitutionally accomplished by an "Executive Agreement"—that is, by an agreement that would not require Senate action. Rather, he cited powers—to interpret treaties, to implement treaties, and to recognize the existence of foreign States—that he asserted rest "exclusively" with the President. Dellinger also seemed to argue that the Senate is imputed with knowledge of the breadth (as Dellinger understands it) of Presidential power vis-à-vis treaty-making, and therefore, when the Senate consents to a treaty, it implicitly authorizes later Presidents to decide without further Senate consent whether the treaty should become a treaty with a successor to the extinct state with which the treaty had been made.²¹⁴

The Dellinger interpretation of the Constitution is flawed, as are the interpretations of the other works taking similar positions. The following discusses the principle errors of the interpretation.

A. THE PRESIDENT DOES NOT HAVE EXCLUSIVE AUTHORITY TO INTERPRET TREATIES, BUT MUST YIELD TO INTERPRETATIONS BY THE COURTS, WHICH ARE DEFINITIVE

Treaties, like statutes, are the supreme law of the land—under the United States Constitution²¹⁵—and, as a consequence, "the courts

214. See Dellinger Paper, *supra* note 14 (outlining Dellinger's view on the viability of the ABM Treaty and the scope of the President's power). Dellinger does not espouse the thesis stated in Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995) (contending that in the 1940s, Congress and the President, without following a process for amendment specified in Article V, in effect expunged from the Constitution the requirement of Article II that treaties require the concurrence of two-thirds of the Senators present). For a skeptical view of the Ackerman/Golove thesis, see Lawrence H. Tribe, *Taking Text Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995) (questioning Ackerman and Golove's thesis and arguing instead for a more textual approach to the Constitution).

215. See U.S. CONST. art. VI, cl. 2, (stating "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and Thing in the Constitution or Laws of any State to Contrary notwithstanding."); see also *Foster v. Neilson*, 27 U.S. 253 (1829) (echoing the Constitution, noting

have authority to construe treaties.”²¹⁶ Accordingly, the Constitution vests in U.S. courts the authority to interpret treaties definitively. In exercising that authority, courts give great weight to interpretations suggested by the Executive Branch,²¹⁷ but the courts are not bound by those suggestions and have on occasion rejected them.²¹⁸

that treaties are considered to be the “law of the land”); *United States v. Schooner Peggy*, 5 U.S. 103 (1801); *see also* Kenneth C. Randall, *The Treaty Power*, 51 OHIO ST. L.J. 1089, 1110-12 (1990) (discussing the executive and legislative arguments concerning the meaning of the supremacy clause). The Supreme Court has also held that a Treaty nullifies an inconsistent law of a state of the Union. *See Hopkirk v. Bell*, 8 U.S. 454 (1806) (holding that the Jay Treaty of 1783 had nullified the running of the Virginia Statue of Limitations on breach-of-contract claims for the period of the war between the United States and Great Britain).

216. *See Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 230 (1986), (citing *Baker v. Carr*, 369 U.S. 186, (1969) (holding that “courts have authority to construe treaties and executive agreements”); *Valentine v. United States*, 299 U.S. 5, 10-11 (1936); *Doe v. Braden*, 57 U.S. 635, 657 (1853); *Xerox Corp. v. United States*, 41 F.3d 647, 652 (Fed. Cir. 1995); *British Caledonian Airways, Ltd. v. Bond*, 665 F.2d 1153, 1160 (D.C. Cir. 1981); *Alcan Aluminum Corp. v. United States*, 986 F. Supp. 1436, 1440 (Ct. Int'l Trade 1997); *Snap-On Tools, Inc. v. United States*, 26 Cl. Ct. 1045, 1064 (Cl. Ct. 1997); *United States v. Busby*, 1996 WL 927938, at *3 (N.M. Ct. Crim. App.) (1996); *see also* James C. Wolf, *The Jurisprudence of Treaty Interpretation*, 21 U.C. DAVIS L. REV. 1023, 1026 n.14 (1988) (discussing the principles courts use in interpreting treaties and providing a list of sixty-five Supreme Court decisions interpreting treaties from 1795-1988).

217. *See United States v. Stuart*, 489 U.S. 353, 369 (1989) (noting the weight paid to the interpretation and “practice of treaty signatories . . . since their conduct generally evinces their understanding of the agreement they signed.”); *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180-85 (1982); *Kolovrat v. Oregon*, 366 U.S. 187, 194-95 (1961); *Air Canada v. United States Dept. of Transp.*, 843 F.2d 1483, 1487 (D.C. Cir. 1988); *Sullivan v. Kidd*, 254 U.S. 433, 442 (1920); *see also Military Payment Orders and Certificates Issued to Prisoners of War-Treaty Interpretation Claims Before and Subsequent to Treaty*, 38 COMP. GEN. 7, 8 (1958) (noting that weight is given to the interpretation of treaty provisions “by the political department of the government”).

218. *See Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 133-34 (1989) (rejecting the Executive Branch’s interpretation of the Article of the Warsaw Convention for the Unification of Certain Rules Relating to International Transportation By Air); *see also Clark v. Allen*, 331 U.S. 503, 515-16 (1947); *Perkins v. Elg*, 307 U.S. 325, 334-41 (1939); *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1350, 1361-65 (2nd Cir. 1992), *cert. granted*, 506 U.S. 814 (1992), *vacated as moot* 509 U.S. 918 (1993); *British Caledonian Airways Ltd. v. Bond*, 665 F.2d 1153, 1160-61 (1981); *Galanis v. Pallanck*, 568 F.2d 234, 239 (2d. Cir. 1977); *Greci v. Birknes*, 527 F.2d 956, 960 (1st Cir. 1976); *Cannon v. U.S. Dept. of Justice, United States Parole Comm’n*, 973 F.2d 1190, 1192 (5th Cir. 1992); *In re Mackin*, 668 F.2d 122, 132-

Perhaps the most celebrated case of judicial rejection of an Executive Branch treaty interpretation is *United States v. Libellants and Claimants of the Schooner Amistad*,²¹⁹ the subject of the motion picture "Amistad." In that case, inhabitants of Africa who had been kidnapped by Spaniards in violation of the laws of Spain mutinied on the high seas and were later apprehended in Connecticut by American officials. The Attorney General asked the court to order that the detainees be delivered to persons claiming to be the detainees' owners. The Attorney General argued that the Treaty of 1795 between the United States and Spain should be construed to deny a person held in custody a right to assert that he is not anyone's property. The Court, per Justice Story, rejected the Attorney General's interpretation of the Treaty: "[t]he Treaty with Spain never could have intended to take away the equal rights of all foreigners, who should contest their claims before any of our Courts, to equal justice."²²⁰

Moreover, it is often impossible to measure the "weight" a court gives to an Executive Branch view, because, at the same time that the court announces that it is giving the Executive Branch view great weight, the court has independently satisfied itself of the correctness of that view. Thus, one court said it concurred in the State Department's view because that view was coupled with the court's conclusion that the view was "based on supporting facts."²²¹ Another court accepted the Executive Branch's interpretation of a treaty after "finding it well-founded and supported by the weight of legal

37 (2d Cir. 1981); *Abu Eain v. Wilkes*, 641 F. 2d 504, 517-18 (7th Cir. 1981); *Caltagirone v. Grant*, 629 F.2d 739, 742 (2d Cir. 1980); see also David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 U.C.L.A. L. Rev. 953, 962 (1994) (explaining the grounds upon which courts depart from executive treaty construction). Judicial treaty interpretation that accepted as accurate the views of the Executive Branch include *Kolovrat v. Oregon*, 366 U.S. 187, 192-93 (1961); *Bacardi Corp. of America v. Domenech*, 311 U.S. 150, 157-64 (1940).

219. 40 U.S. 518 (1841) (adjudicating the claims of ownership by foreign citizens over slaves onboard a ship that was captured in U.S. waters following a mutiny on board).

220. See *id.* at 596 (rejecting the claims of ownership by the foreign citizens).

221. See *Ivancevic v. Artukovic*, 211 F.2d 565, 573 (9th Cir.) (1954), (holding a 1902 extradition treaty between the U.S. and Serbia continued between the United States and Yugoslavia), *cert denied*, 348 U.S. 818 (1954).

authority.”²²² One commentator observed:

A typical passage from a court opinion interpreting a treaty will begin with the acknowledgment that “the views of the State Department are ordinarily entitled to great weight,” but then will go on to say in words or substance that “we find them wholly unpersuasive in the present case” The judicial adjectives to describe the State Department’s various communications on the meaning and application of the treaty ranged from “entirely conclusory” to “largely insignificant” to “an aberration.”²²³

One scholar observed:

Yet it is clear that the President’s interpretive power is limited. He cannot make an altogether new treaty and dispense with the requirement of Senate advice and consent by calling that treaty an “interpretation” of an earlier one The President’s semantic denomination of his act cannot by itself control the procedure constitutionally required.²²⁴

The Judiciary’s power to interpret treaties includes the power to determine whether a treaty continues to exist. One court stated that in exercising the power to decide whether a treaty exists, the court gives weight to the Executive Branch’s view when the court is satisfied that view “is based on supporting facts.”²²⁵

222. See *In re Extradition of Demjanjuk*, 612 F. Supp. 544, 562-63 (N.D. Ohio 1985) (agreeing with the Executive Branch’s interpretation and therefore finding Demjanjuk’s crimes to be covered by the extradition treaty).

223. James Crawford, John Dugard, Lori Fisler Darosh, John Claydon & Paul Hoffman, *Application of Customary International Law by National Tribunals*, 76 AM. SOC’Y INT’L PROC. 231, 252 (Apr. 22-24, 1984) (citation omitted) (discussing “judicial skepticism about Executive Branch submissions on the meaning of treaties”).

224. GLENNON, *supra* note 123, at 134 (1990) (discussing the ability of the President to interpret treaties).

225. See *Ivancevic*, 211 F.2d at 573 (describing when it is appropriate to afford weight to the Executive Branch’s interpretation). In articulating the rule that courts should give great weight to the Executive Branch view, courts place varying degrees of emphasis on the weight they say they are giving to the view of the Executive Branch. See, e.g., *Terlinden v. Ames*, 184 U.S. 270, 285 (1902) (reviewing the history of the creation of the German Empire in the Nineteenth Century, and finding that in the creation of the Empire, the Kingdom of Prussia had not lost its identity, and therefore that the Treaty of extradition between the United States and the Kingdom of Prussia remained in effect unless it had later

The preceding description of judicial paramountcy in treaty interpretation is not intended to imply that every separation-of-power dispute can be resolved by a court. Some cannot be so resolved, because they are “political” questions, and therefore non-justiciable. For example, whether a particular state measure fulfills the Constitution’s guaranty of a “republican form of government” is a non-justiciable political question.²²⁶ But the fact that a particular action of the Executive Branch cannot be tested in court does not give that branch *carte blanche* to encroach on another branch. The

been terminated by one of the parties). On the issue of whether the Treaty had been terminated, the court found no evidence of “governmental action” to terminate. *See id.* at 490. The Court’s inquiry into the German Empire’s constitution and the international law of treaties and state succession in order to determine whether the treaty with Prussia survived the formation of the German Empire has been characterized as “an ordinary adjudication in which the Court plays its usual role, albeit with some deference to the evidence adduced by government experts.” *See* THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? 23-25 (1992); *see also* *Then v. Melendez*, 92 F.3d 851, 854 (9th Cir. 1996) (examining the history of extradition treaties between the United States and the United Kingdom to satisfy itself that none of the changes that occurred when the British colony of Singapore emerged as an independent State nullified, as to territory within Singapore, the 1931 U.S.-U.K. extradition treaty). In reaching that conclusion, the court said it had given great weight to the views of the Executive Branch as to the historical facts, because “federal courts are not as well equipped as the Executive Branch to determine when the emergence of a new country brings changes that terminate old treaty obligations.” *See id.*; *see also* *Arnbjornsdottir-Mendler v. United States*, 721 F.2d 679, 683 (9th Cir. 1983) (concluding that an extradition treaty existed between the United States and Iceland after giving “deference” to the Executive Branch on extradition matters, and after having made “an independent review” of Iceland’s “historical continuity”). One Court of Appeals decision, *Saroop v. Garcia*, 109 F.3d 165 (3rd Cir. 1997), contains language to the effect that whether a treaty exists between the United States and another state is a “political question” that no American court has capacity to decide. *See* 109 F.3d at 171. That language was not necessary to resolve the case, because the court held that in any event, on the question before it, the court would, as a matter of “comity,” defer to a decision of the highest court of Trinidad and Tobago. *See id.* at 173. In any event, the Executive Branch is expected to stay within its zone of Constitutional authority, even when a case challenging its encroachment cannot be presented to a court in a justiciable form. *See infra* notes 229-230 and accompanying text (addressing the political question doctrine).

226. *See* *Colegrove v. Green*, 328 U.S. 549 (1946) (dismissing an action brought by Illinois voters as non-justiciable); *see also* *Baker v. Carr*, 369 U.S. 186, 209 (1962) (examining the doctrine of political question and finding it inapplicable because the plaintiffs had a justiciable claim under the equal protection clause).

Supreme Court made the point in 1992 in *United States Dept. of Commerce v. Montana*²²⁷: “[i]n invoking the political question doctrine, a court acknowledges the possibility that a constitutional provision may not be judicially enforceable. *Such a decision is of course very different from determining that specific congressional action does not violate the Constitution.*”²²⁸

As AAG Dellinger stated in a May 1996 opinion, the Executive Branch has an “independent constitutional obligation to interpret and apply the Constitution.”²²⁹ Dellinger also stated that the Congress as well as the President has a duty to resist unconstitutional encroachment by the other branch. Dellinger invoked a 1933 opinion of then Attorney General Mitchell: “[s]ince the organization of the Government, Presidents have felt bound to insist upon the maintenance of the Executive functions unimpaired [sic] by legislative encroachment, just as the legislative branch has felt bound to resist interferences with its power by the Executive.”²³⁰

In short, the absence of an opportunity for judicial review for a particular treaty interpretation would not give the President authority to encroach on the Senate’s power of advice and consent, or to arrogate to himself the Congressional power to nullify a treaty by means of a statute that came into law without the President’s signature, *i.e.*, by an override of a Presidential veto.

The rule that the Judiciary has the last word on treaty interpretation was not impaired by the announcement in the *United States v. Curtiss-Wright Export Corp.*,²³¹ in 1936, that the President

227. 503 U.S. 442 (1992) (involving a claim by the state of Montana that a federal apportionment statute violated the Constitution).

228. *Id.* at 457-58 (citation omitted) (emphasis added) (noting the difference between non-justiciable and justiciable issues).

229. See Walter Dellinger, Assistant Att’y Gen., Memorandum for the General Counsels of the Federal Government, *The Constitutional Separation of Powers Between the President and Congress* (May 7, 1996), 1996 WL 876050 (discussing the duties of the Executive Branch).

230. See *Constitutionality of Proposed Legislation Affecting Tax Refunds*, 37 Op. Att’y Gen. 56, 63 (1933) (discussing the relationship between the legislative and executive branches of the government).

231. 299 U.S. 304 (1936) (reversing a grant of the defendant’s demurrer on the grounds that the President had the power to make decisions concerning international affairs involving security issues).

is the "sole organ" of the federal government in the field of international relations.²³² After *Curtiss-Wright*, as well as before, the Judiciary, not the President, interpreted treaties definitively. That is not surprising, given the narrowness of the issue resolved in *Curtiss-Wright*, i.e., whether the Congress, by Joint Resolution, could validly authorize the President to issue regulations prohibiting a violation of a Joint Resolution, when the President issued the proclamation the same day as the Joint Resolution was adopted by both Houses and the Resolution became a statute.

In the sixty-two years that followed the decision in *Curtiss-Wright*, the Supreme Court has not invoked the "sole organ" doctrine to deprive the Judiciary of ultimate authority to interpret treaties. Indeed, soon after *Curtiss-Wright*, the Court decided *Guaranty Trust Co. v. United States*.²³³ The Court construed an executive agreement between the United States and the Soviet Union (an agreement as to

232. See *id.* at 319-22 (defining the role of the President in international affairs and describing why such a role is necessary). A chart attached to this Memorandum displays the foreign policy powers allocated to each Branch of government by the Constitution. See *infra* Appendix A. For critical analyses of the "sole organ" dictum, see DAVID GRAY ADLER & LARRY N. GEORGE, *THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY* 37-38 (1996); RAOUL BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH*, 133-35 (1974); HAROLD HONJU KOH, *THE NATIONAL SECURITY CONSTITUTIONAL, SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 40-45, 138-141 (1990); BERNARD SCHWARTZ, *A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES, PART I, THE POWERS OF GOVERNMENT* 142-158 (1963); PETER M. SHANE & HAROLD H. BRUFF, *THE LAW OF PRESIDENTIAL POWER: CASES AND MATERIALS* 541-544 (1988); Raoul Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972); Arthur Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties—The Original Intent of the Framers of the Constitution Historically Examined*, 55 WASH. L. REV. 4, 73-106 (1979); H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 559-561 (1999); Randall, *supra* note 215, at 1106-10; Stefan A. Reisenfeld, *The Power of Congress and the President in International Relations: Three Recent Decisions*, 87 CAL. L. REV. 86, 810-816 (1999); Anthony Simones, *The Reality of Curtiss-Wright*, 16 N. ILL. U.L. REV. 411, 416-420 (1996); William Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 36 OHIO ST. L.J. 788 (1975).

233. 304 U.S. 126 (1938) (involving an action by the U.S. Government to recover funds from Guaranty Trust that assigned to the United States as a result of a executive agreement between the United States and the USSR).

which Senate advice and consent had not been obtained).²³⁴ In *United States v. Pink*,²³⁵ the Court referred to *Guaranty Trust* as supporting the proposition that “even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States.”²³⁶ To the same purpose, the Court cited *Todok v. Union Bank of Harvard, Nebraska*,²³⁷ construing a treaty between the United States and Norway on testamentary disposition, where “[t]he only question before us is the construction of the treaty.”²³⁸

In short, whatever the sole organ doctrine may mean in other contexts, it does not mean that the Executive Branch has exclusive authority to interpret treaties. Indeed, it does not override the judicial primacy in the interpretation of treaties. Moreover, in light of the rule that a treaty, like a statute, is the supreme law of the land,²³⁹ if the President had the final power to interpret a treaty, he would have the *de facto* power to nullify or “dispense with” or “suspend” a treaty—that is, he would have a power to suspend or dispense with a law. But the President has no power to “dispense with” or to “suspend” a law—a principle announced in *United States v. Smith*²⁴⁰ in 1806. As

234. See *id.* at 142-144 (noting the interpretation by the Court of the executive agreement transferring the interest in the account in question from the USSR to the U.S.).

235. 315 U.S. 203 (1942) (involving an action by the United States to retrieve the assets of a Russian insurance company in New York).

236. See *id.* at 230 (citing *Guaranty Trust Co. v. United States*, 304 U.S. 126, 143 (1938)) (noting the scrutiny with which the Court examines international agreements).

237. 281 U.S. 449 (1930) (involving a suit brought by the son of a non-U.S. citizen claiming certain conveyances of land made by his father before his death, were fraudulently obtained), *cited with approval* in 315 U.S. 203 (1942).

238. See *id.* at 452 (noting that the case revolved around a treaty between the United States and Sweden that provided for testamentary dispositions).

239. See *Reid v. Covert*, 354 U.S. 1, 33 n.34 (1957) (citing *Head Money*, 112 U.S. 580 (1884)) (stating that treaties are the “supreme law of the land”); see also *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (explaining that treaties are equivalent to laws); *supra* note 215 and accompanying text (discussing the Supremacy Clause).

240. 27 F. Cas. 1192 (C.C.D.N.Y. 1806) (holding that President James Madison was bound by an Act of Congress that prohibited citizens from carrying on war against a nation with which the United States was at peace).

the Court explained, "because the President does not possess a dispensing power," he cannot authorize anyone to disregard a statute.²⁴¹

In 1972, in *United States v. Monongahela Connecting R.R. Co.*,²⁴² District Judge Dumbauld stated: "[o]f course there is no 'dispensing power' in an executive or administrative agency unless Congress has specifically granted it."²⁴³ Judge Dumbauld cited his own work, EDWARD DUMBAULD, *THE CONSTITUTION OF THE UNITED STATES* 7, 12 (1964), which describes the struggle between James II and the Parliament that led to James II's abdication and exile, and the acceptance by William and Mary in 1689 of the Bill of Rights, the first article of which recites, "[t]hat the pretended power of suspending laws, of the execution of laws, by regal authority, without consent of parliament is illegal." *Id.* at 12. That event established that the King had no dispensing or suspending power, and therefore made it unnecessary for the Framers of the Constitution to make express that they were not allocating to the office of the President a power to dispense with law. "[N]ot even the most ardent Antifederalists feared that the Constitution of 1787 had given the President a power to suspend the laws."²⁴⁴

241. *See id.* at 1229-31 (noting that the power to declare war lies with Congress); *see also* *Kendall v. United States ex rel Stokes*, 37 U.S. 524 (1838) (declaring invalid the refusal of President Andrew Jackson's Postmaster-General to execute a statute requiring payments to postmasters). The Court stated that, allowing the Postmaster-General, on the President's authority, to refuse to execute a statute:

[W]ould be vesting in the President a dispensing power, which has no countenance for its support in any part of the constitution; and is asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the President with a power entirely to control the legislation of Congress, and paralyze the administration of justice.

Id. at 613.

242. 351 F. Supp. 696, 698 (W.D. Pa. 1972) (involving an action by the United States against the defendant for violations of a federal law and federal regulation on the movement of railroad cars).

243. *See id.* at 698 (citation omitted) (denying the authority of the Transportation Department to grant exemptions from requirements of Congress).

244. Christopher N. May, *Presidential Defiance of 'Unconstitutional Laws': Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 885 (1994) (discussing the perceived limitations on Presidential power); *see also* *Nat'l Treasury Employees Union v. Nixon*, 492 F.2d 587, 604 (D.C. Cir. 1974) (citing

Kendall, 37 U.S. at 613) (concerning the lack of dispensing power in explanation of why the Court had jurisdiction to declare that the President had not obeyed the Federal Pay Comparability Act); *Michigan Head Start Dir. Ass'n Tri-County Cmty. Action v. Butz*, 397 F. Supp. 1124, 1134-35 (W.D. Mich. 1975) (noting the absence of a Presidential power to suspend legislation, "a power not enjoyed by the English Monarch since the Glorious Revolution of 1688."); *Ameron, Inc. v. United States Army Corps of Eng'r*, 610 F. Supp. 750, (D.N.J. 1985), (describing James II's forced exile, and the acceptance of England's Bill of Rights by William and Mary as the foundation for "[t]he rule that no executive official can decide for himself what laws he is bound to obey, but must await the decisions of the Judiciary and until then must obey the laws, [a rule that] has deep roots in our constitutional history."), *modified*, 787 F.2d 875 (3d Cir. 1986), *aff'd* 809 F.2d 979 (3d Cir. 1986), *cert. granted*, 485 U.S. 958 (1988), *cert. dismissed*, 488 U.S. 918 (1988). Also, the duty to execute the law faithfully is viewed as a sign of the non-existence of Presidential suspending power. *See The Executive Branch's Declaration That the Competition in Contracting Act Is Unconstitutional: Hearings Before House Comm. on Government Operations*, 99th Cong., 1st Sess. 264 (1985) (statement of Steven R. Ross, General Counsel, Office of Clerk, House of Representatives) (citations omitted) (stating that "[s]cholars have concluded that the 'faithful execution' clause of our Constitution is a mirror of the English Bill of Rights' 'abolition of the suspending power,' that is, the abolition of what the English Bill of Rights has called 'the pretended [Royal] power of Suspending . . . the Execution of Laws.'"); *see also Hearings on the Constitutionality of GAO's Bid Protest Function Before a House Comm. on Government Operations*, 99th Cong., 1st Sess. 486, 490 (1985) (statement of William S. Cohen, Senator, and Carl Levin, Senator) ("[A]bsent a court ruling, we strongly believe that a unilateral decision by the Executive Branch to refuse to enforce a statute constitutes a usurpation of the proper role of the judiciary and a failure of the President to meet his constitutional responsibility to 'take Care that the Laws be faithfully executed.'"). Moreover, a Presidential defiance of a statutory command to spend funds for a designated defense project may be an impeachable offense. *See* LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 294 (2d ed. 1988) (postulating that a President's intentional decision to render national defense impotent would not necessarily violate criminal law, but would nonetheless likely provide grounds for impeachment); *see also* JOHN R. LABOVITZ, *PRESIDENTIAL IMPEACHMENT* 122-23 (1978) (discussing impeachable offenses); *see also* Abner J. Mikva, *Congress: The Purse, the Purpose and the Power*, 21 GA. L. REV. 1,12-13 (1986), (recounting that the President's impoundment policies were at one time considered as possible grounds for Nixon's impeachment); *RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 67-69 (1973) (outlining a list of British impeachment cases, cases that were likely known to the framers when they drafted the Impeachment Clause, that included impeachment for intentional or negligent failure to expend appropriated funds for the purposes appropriated, including the defenses of the realm). For example, in 1386, Chancellor Michael de la Pole, Earl of Suffolk, was impeached for applying "appropriated funds to purposes other than those specified." *Id.* at 67 (citing 1 Howell 89, 93, Art. 3). In 1624 Lord Treasurer Middlesex was impeached for allowing "the office of Ordinance to go unrepaired though money had been appropriated for that purpose." *Id.* at 67-68 (citing 2 Howell 1183, 1239). For the latest judicial word on the possibility of Presidential

The most recent decision on the question of whether the President has dispensing power is *Spence v. Clinton*,²⁴⁵ a District Court decision in 1996. It explains why the President had no authority to “defy” the Ballistic Missile Defense Act of 1995, stating: “[s]uch an outcome would . . . [give] the President the ability to nullify duly authorized congressional actions. The Founding Fathers strongly believed that such a power would be dangerous and unwarranted. Constitutional scholars speak with one voice in concurring with this assessment.”²⁴⁶ In support of that observation, the court quoted James Madison: “To give such a prerogative would certainly be obnoxious to the temper of this country.”²⁴⁷

Nothing in *Goldwater v. Carter*²⁴⁸ is to the contrary. *Goldwater* involves President Carter’s undoing a treaty with one set of officials claiming to govern China, and recognizing a different set of officials claiming to be the government of China. Neither regime nor the United States claimed that China had ceased to exist. The case arose out of the following events: in 1954 the United States entered into a Mutual Defense Treaty that on its face was a treaty between the United States and China. The treaty was signed by a person who was part of a government situated on Taiwan known as the Republic of China (the “ROC”), and claimed authority over the entire territory of China, including the Chinese mainland. At that time, and ever since,

impeachment for defiance of a statute cutting off funds to support a military action abroad, see *Campbell v. Clinton*, 203 F.3d 19, 23 (D.C. Cir. 2000) (involving a claim that the President’s use of armed forces in Yugoslavia was unconstitutional and noting “there always remains the possibility of impeachment should a President act in disregard of Congress’ authority on these matters.”); see also STAFF OF THE HOUSE COMM. ON THE JUDICIARY, 93d Congress, CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 4-7 (Comm. Print 1973) of the Impeachment Inquiry.

245. 942 F. Supp. 32 (D.D.C. 1996) (involving action by members of Congress against President Clinton claiming the President, through the Secretary of Defense, violated federal law and the Constitution through failing to spend or provide funds for missile defense systems).

246. See *id.* at 38 (footnotes omitted) (noting the restrained powers of the executive in this instance).

247. See *id.* (citing M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 100 (1966)).

248. 444 U.S. 996 (1979) (involving a claim by members of Congress that President Carter unconstitutionally altered legislation by terminating a treaty with Taiwan).

a government situated on the mainland, and calling itself the "People's Republic of China" ("PRC"), claimed authority over the entire territory of China including Taiwan. In 1978, President Jimmy Carter announced that the United States would terminate the Mutual Defense Treaty that had been made with the Taiwan-based government.

Senator Barry Goldwater brought suit in a District Court, asking the Court to declare that without the consent of the Senate, President Carter lacked authority to terminate the Treaty. Senator Goldwater asserted that termination without Senate deliberation would deprive him of an opportunity to vote on the question of whether the Treaty should be terminated.²⁴⁹ A majority of Justices of the Supreme Court concluded that Senator Goldwater's case should be sent to the District Court to be dismissed, but no majority could agree on the reasons for that result. Four Justices (Rehnquist, Burger, Stewart, and Stevens) said that to decide whether the Senate had authority to participate in a treaty-termination decision would be to decide a non-justiciable "political question," *i.e.*, not the kind of controversy that the Constitution vested authority in the Judiciary to decide. Justice Marshall gave no reason for his decision in favor of dismissal. Justice Powell considered the question to be justiciable, but supported dismissal on the ground that it was not ripe for decision because the Congress had not yet challenged the President's authority by "appropriate formal action." 444 U.S. at 536. Two of the Justices who voted to hear the case (Blackmun and White) said the case was ripe, and therefore should be heard on the merits. *Id.* at 1006. Justice Brennan expressed the view that the case was justiciable and that the lower court had correctly decided the case to the extent that it rested on the principle that the President had exclusive authority "to recognize, and withdraw recognition from, foreign governments." *Id.*

Goldwater v. Carter has little value for predictive jurisprudence with respect to treaties with a state that has not lost its existence but only changed its government, let alone with respect to treaties of a state that has ceased to exist, given the absence of a majority explanation of the reason for the result. In any event, even the

249. See *id.* at 997-98 (describing the claims of the plaintiffs).

Judiciary's power to interpret treaties definitively must be exercised so as to avoid making a significant amendment, because that, too, would encroach upon the Senate's power to give advice and consent to the making of the treaty. One court explained: "[A] significant amendment to a treaty must follow the mandate of the Treaty Clause, and therefore must be proposed by the President, and be ratified following the advice and consent of the Senate."²⁵⁰

Similarly, "[c]ourts are not authorized to annul or disregard provisions of a treaty . . . since an annulment or disregard would constitute a modification of the treaty, and treaty modifications are solely within the province of the Senate."²⁵¹

B. THE PRESIDENT DOES NOT HAVE EXCLUSIVE AUTHORITY TO IMPLEMENT TREATIES

Dellinger argued that the President has exclusive authority to implement treaties, but he neglected to mention that the Constitution vests in the Congress the authority to make all laws "necessary and proper" to implement, *i.e.*, to "carry into execution," not only all the law-making powers enumerated in Article I, Section 8, but also "all other[] [powers] vested [by this Constitution] in the Government of the United States, or in any Department or the officers thereof."²⁵²

250. See *New York Chinese TV Programs, Inc. v. U.E. Enters, Inc.*, 954 F.2d 847, 853 (2d Cir. 1991) (involving an action for copyright infringement of Taiwanese television programs).

251. *In re Air Crash Disaster at Warsaw Poland on March 14, 1980*, 535 F. Supp. 833, 843 (E.D.N.Y. 1982), *aff'd*, 705 F.2d 85 (2d Cir. 1983) (citations omitted) (noting the limitations on the power of the courts where treaties are involved); see also *The ABM Treaty and the Constitution: Joint Hearings Before the Comm. on Foreign Relations and the Comm. on the Judiciary*, 100th Cong. 81 (1987) (statement of Louis Henkin, Professor, Columbia Law School) (stating that in making a treaty, the President cannot change the text of the treaty or the meaning to which the Senate consented).

252. See *Neely v. Henkel*, 180 U.S. 109, 121 (1901) (noting that the necessary and proper clause of U.S. Constitution, Article I, Section 8 "includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with a foreign power."); see also *Missouri v. Holland*, 252 U.S. 416, 432-33 (1920) (asserting that Congress has power under the necessary and proper clause, to make laws to implement treaties); *United States v. Lue*, 134 F.3d 79, 82 (2d Cir. 1998) (noting that the necessary and proper clause broadens Congress's power beyond Article I, Section 8); *Goldwater v. Carter*, 617 F.2d 697,

"The recognized powers of Congress to implement (or fail to implement) a treaty by an appropriation or other law essential to its effectuation . . . are legislative powers, not treaty-making or treaty-termination powers."²⁵³

Hence, Congress has the authority to make laws implementing treaties. It follows that the President can no more create a treaty by calling its creation an implementation than he can create a statute by calling its creation an implementation of another statute.

C. PRESIDENTIAL AUTHORITY TO RECOGNIZE THE EXISTENCE OF A FOREIGN STATE DOES NOT IMPLY AUTHORITY TO MAKE TREATIES WITH THAT STATE WITHOUT SENATE CONCURRENCE

As a matter of international law, when the President of the United States recognizes the existence of a foreign state, the President imposes no obligation on the United States that the United States would not in any event be obliged to discharge. In contrast, when the President brings a treaty into force, its terms must be fulfilled (unless there is a valid ground under international law, such as coercion or fraud, for not fulfilling them).²⁵⁴

The Constitution requires the President to "receive Ambassadors

717 (D.C. Cir.), *vacated on other grounds*, 444 U.S. 996 (1979) (MacKinnon, J. dissenting) (arguing that under the necessary and proper clause, Congress has the power to pass laws terminating a treaty).

253. PETER M. SHANE & HAROLD H. BRUFF, *SEPARATION OF POWERS LAW: CASES AND MATERIALS* 621 (1996) (discussing the power of Congress with respect to treaties).

254. See *Factor v. Laubheimer*, 290 U.S. 276, 298 (1933) (stating that "[u]ntil a treaty has been denounced, it is the duty of both the government and the courts to sanction the performance of the obligations reciprocal to the rights which the treaty declares and the government asserts even though the other party to it holds a different view of its meaning"); see also *United States v. Kirby*, 106 F.3d 855, 859 (9th Cir. 1997) (concluding that the U.S. has a legal obligation to abide by its extradition treaties); *United States v. A.L. Burbank & Co.*, 525 F.2d 9, 15-17 (2d Cir. 1975) (concluding that the U.S. should fulfill its obligation under tax cooperation treaty with Canada despite Canada's inconsistent interpretation of treaty negating the IRS's obligation to provide Canadian authorities with tax information); J.H.H. Weiler & Ulrich R. Haltern, *The Autonomy of the Community of Legal Order-Through the Looking Glass*, 37 HARV. INT'L L.J. 411, 441 (1996) (noting the general rule of international law proscribing a State's use of its domestic law to avoid performance of a treaty).

and other public Ministers,”²⁵⁵ a provision that implies authority to determine whether a particular person is a bona fide representative of a particular foreign state. In turn, that implies that the President has authority to decide for purposes of domestic law whether such a foreign state exists. An entity exists as a state if it meets the test of statehood, *i.e.*, has a defined territory and a permanent population, controls its own governance, and has the capacity to conduct formal relations with States.²⁵⁶ International law requires that states treat

255. See U.S. CONST. art. II, § 3 (describing the powers of the President).

256. See RESTATEMENT, *supra* note 21, § 201 (defining statehood under international law). The law pertaining to the recognition of a state's existence is distinct from international law pertinent to the recognition of the government of a state in that under international law, a change in the government of a recognized state, without more, does not impair the state's existence as a state. See Edwin L. Fountain, *Out from the Precarious Orbit of Politics: Reconsidering Recognition and the Standing of Foreign Governments to Sue in American Courts*, 29 VA. J. INT'L L. 473, 474-76 (1989) (discussing the recognition of the government of a state under international law and the practice of American courts concerning the legal effects of recognition); see also D.P. O'CONNELL, 1 INTERNATIONAL LAW 127-28 (2d ed. 1970) (explaining that foreign states can either recognize or refuse governments claiming authority over certain territory, and that acknowledgement of a government's authority over territory alone is not recognition); RESTATEMENT, *supra* note 21, § 202-203 (discussing the recognition or acceptance of states and governments); see generally G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1 (1999) (discussing the development of foreign relations law in the context of the Constitution). In *Keith v. Clark*, 97 U.S. 454 (1878), the Court used two examples to illustrate the legal significance of the difference between change of government and changes of State: (i) the fact that England remained England during the reign of Charles I, during the reign of the Commonwealth under Cromwell, and after the restoration of the Monarchy; and (ii) the fact that France remained France during the Bourbon Monarchy and during the revolutionary governments that followed. See *id.* at 460; see also *Lehigh Valley R.R. v. State of Russia*, 21 F.2d 396, 401 (2d Cir. 1923) (“[T]he granting or refusal of recognition [of governments] has nothing to do with the recognition of the [S]tate itself.”); see also TI-CHIANG CHEN, *THE INTERNATIONAL LAW OF RECOGNITION* 99 (L.C. Green ed. 1951) (“[S]ince the continuity of [s]tates is not interrupted by a change of government, the recognition of governments must be considered as an entirely different matter from the recognition of [s]tates.”). The United States regards itself as duty-bound to recognize the existence of a new state that has maintained and established its independence. See HERSH LAUTERPACHT, *RECOGNITION OF INTERNATIONAL LAW* 65 (1947) (quoting Charles Cheney Hyde's statement that when a country both functions and looks like a state, it is reasonable for it to demand recognition); P.K. MENON, *THE LAW OF RECOGNITION IN INTERNATIONAL LAW, BASIC PRINCIPLES* 45-46 (1994) (observing that in the 19th century, the United States took seriously its obligation to recognize independent states that had established and maintained

each other entity as a state, irrespective of whether such other state has "formally" recognized that entity as a state.²⁵⁷

Recognition, as a *public act of state*, is an optional and political act and there is no legal duty in this regard. However, in a deeper sense, if an entity bears the marks of statehood other states put themselves at risk legally if they ignore the basic obligations of state relations . . . [i]n this context of state *conduct* there is a legal duty to accept and apply certain

their independence, and this attitude may be attributed to the revolutionary history of the United States and its opposition to "monarchic legitimacy"). But the United States' attitude toward recognition of a state's existence does not carry over to recognition of a particular government of a state. *See id.* at 46 nn.69-70 (asserting that the United States takes the position that its recognition of a particular government represents the grant of a privilege, not the discharge of a duty).

257. *See* RESTATEMENT, *supra* note 21, § 202 cmt. c (enumerating the duties that other states owe to qualified entities); *see also* Mark L. Movsesian, *The Decline of the Nation State and its Effect on Constitutional and International Economic Law: Contribution: The President Nation State and the Foreign Sovereign Immunities Act*, 18 CARDOZO L. REV. 1083 (1983) (describing judicial decisions and scholarly works on recognition and non-recognition); Leonard Meeker, *Recognition and Restatement*, 41 N.Y.U. L. REV. 83 (1966) (discussing recognition under the Restatement). "In recent years, U.S. practice has been to de-emphasize and avoid the use of recognition in cases of changes of governments and to concern ourselves with the question of whether we wish to have diplomatic relations with the new governments." U.S. Dep't. St., *Diplomatic Recognition*, 78 DEP'T ST. BULL. 463 (1977) (noting the recent change in U.S. policy); *see also* Mary Beth West & Sean D. Murphy, *The Impact on U.S. Litigation of Non-Recognition of Foreign Governments*, 26 STANFORD J. INT'L L. 435 (1989) (exploring the Executive Branch's non-recognition of foreign governments and the implications or consequences). The United States Department of State, Bureau of Public Affairs, *Establishing Diplomatic Relations: U.S. Policy*, Gist, (August, 1977) describes recognition of governments. No mention is made of recognition of the existence of a State separate and independent of recognition of its government. The document at paragraph 2, states: "[t]he Administration's policy is that establishment of relations does not involve approval or disapproval but merely demonstrates a willingness on our part to conduct affairs with other governments directly. In today's interdependent world effective contacts with other governments are of ever-increasing importance." The necessary negative implication of that explanation is that, at international law, a state's existence does not depend on whether the United States has diplomatic relations with that state's government, with or without recognition of that government. The document next lists eleven states with which at that time existed by the well-understood test of existence but which did not have diplomatic relations with the United States, e.g., Albania, Iraq, and the Peoples Republic of China. *See id.* at paras. 3; *see also* Chen, *supra* note 256 ("[S]ince the continuity of [s]tates is not interrupted by a change of government, the recognition of governments must be considered as an entirely different matter from the recognition of [s]tates.").

fundamental rules of international law: there is a legal duty to "recognize" for certain purposes at least, but no duty to make an express, public, and political determination of the question or to declare readiness to enter into diplomatic relations by means of recognition. This latter type of recognition remains political and discretionary.²⁵⁸

The President would put the United States under a legal obligation to other states without Senate advice and consent if he used the recognition function to make a treaty that would not otherwise exist. Using the recognition power to make a treaty with a successor-state would remove a large part of foreign-policy making from the bipartite mechanism for treaty-making constructed by the Framers—a mechanism that was adopted for the purpose of safeguarding against excessive control of foreign-policy making by the Executive. *See infra*, Part V.G. (explaining that the Framers did not intend to give the President unlimited discretion to disregard the two-thirds concurrence requirement in making a treaty). One scholarly work describes the Constitutional Convention's attitude toward the recognition power as the "Madisonian-Jeffersonian-Hamiltonian doctrine that the recognition power is merely ceremonial, a clerk-like administrative function devoid of discretion and consequence." *THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY* 147 (David Gray Adler & Larry N. George eds., 1996). That doctrine "is quite clearly a product of the international law tradition as explained by Grotius, Bynkershoek, Wolff and Vattel." *Id.* Adler and George also state:

Given the restrictive scope of the recognition clause, as comprehended by Hamilton, Madison, and Jefferson, it is virtually inconceivable that a unilateral presidential power to make and conduct foreign policy could be squeezed from such a narrow, clerklike administrative function. Moreover, there are at least two other policy factors that militate strongly against the expansive construction of the recognition power. The Framers' deep-seated fear of the executive prerogative and their decision to vest in

258. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 94-95 (2d ed. 1973) (citation omitted). "[R]ecognition of [S]tate is the affirmation, usually by the government of another state, that a new nation has come into existence which, at least as far as the recognizer is concerned, is subject to all the rights and duties of a state in international law." THOMAS M. FRANCK & MICHAEL J. GLENNON, *FOREIGN RELATIONS AND NATIONAL SECURITY LAW: CASES, MATERIALS AND SIMULATIONS* 1021 (2d ed. 1993).

the treaty making authority the exclusive power to make and conduct U.S. foreign affairs. If the recognition clause truly were intended to confer upon the president a unilateral power to make foreign policy, such authority would have been contrary to both the constitutional design for collective decision making in the formulation of foreign policy and the Framers' determination to place the primary responsibility for the conduct of foreign relations in the hands of the treaty making power—the president and the senate. *Id.*

Moreover, the process of deciding whether a state should be recognized consists of ascertaining the pertinent facts.²⁵⁹ Once the facts show the existence of statehood, it is the duty of other states to grant recognition.²⁶⁰ “The emphasis—and that emphasis is a constant feature of diplomatic correspondence—on the principle that the existence of a state is a question of fact signifies that, whenever the necessary factual requirements exist, the granting of recognition is a matter of legal duty.”²⁶¹ By necessary negative implication, Lauterpacht opines that if the facts do not support the existence of statehood (*e.g.*, the state has become extinct), by the operation of international law, the recognition of that state's existence has become a nullity. Thus, Professor Lauterpacht's analysis independently supports the general scholarly conclusion that treaties of a state lapse upon that state's extinction. Hence, the international law of state recognition independently refutes Dellinger's assertion that the United States could, by “recognizing” Russia, bring into existence a treaty between the United States and Russia solely because a treaty on the same subject had been in existence with the USSR.

Moreover, if recognition were the magic wand Dellinger suggested it is, the United States would have an absolute right under international law by “recognition” to impose an ABM treaty on Armenia or Turkmenistan, or on all of the fifteen States that succeeded to territory of the USSR. Also, by contending that a state's recognition of another state brings a treaty into force, Dellinger unfounded cause and effect. Making a treaty with an otherwise unrecognized State is one of the ways that a state manifests its

259. See HERSH LAUTERPACHT, *RECOGNITION OF INTERNATIONAL LAW* 23 (1947) (explaining that the recognition of new states is a question of fact).

260. See *id.* at 24 (stating when there is a duty to recognize states).

261. *Id.*

recognition of the existence of the other state.²⁶² But no scholar argues that the act of recognition, without more, creates a treaty.

In short, there was no merit to Dellinger's suggestion that the exclusive power to recognize states allows the President to make treaties without Senate advice and consent. The President's recognition authority cannot be exercised in a manner that would nullify the U.S. Senate's authority to advise and consent on the making of a treaty.

Hence, if a foreign state ceases to exist under international law and, consequently, a bilateral treaty between the extinct state and the United States lapses, the President cannot use the "receive Ambassadors" clause to bring a new treaty into force between the United States and a successor to the extinct state without Senate advice and consent. In other words, the President cannot, without Senate approval, bring a lapsed treaty back to life by declaring that a given foreign state is the successor or continuation of an extinct state. Principles of international law govern the issue of the extinction of states. However broad the President's authority may be to recognize states and governments of states under the "receive Ambassadors" clause, it is necessarily limited by the specific Constitutional requirement for Senate advice and consent to the making of treaties.

D. THE SENATE'S CONCURRENCE IN THE MAKING OF A TREATY WITH ONE STATE DOES NOT CONSTITUTE CONSENT TO THE MAKING OF A TREATY WITH A SUCCESSOR-STATE

When the Senate consents to a treaty with a given foreign state,

262. See LAUTERPACHT, *supra* note 259, at 375-79 (stating that in the case of bilateral treaties, recognition is presumed, and acknowledging the uncertainty that the conclusion of a bilateral treaty with a new state necessarily constitutes recognition); see also AMOS S. HERSHEY, *THE ESSENTIALS OF INTERNATIONAL PUBLIC LAW AND ORGANIZATION* 200 (rev. ed. 1935) (listing the conclusion of a treaty and the sending of diplomatic agents as some of the ways an existing state can recognize a new state); CHARLES CHENEY HYDE, *INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 150 (2d rev. ed. 1945) (asserting that recognition of unrecognized states can be accomplished through conventions or through a formal diplomatic relationship, and explaining how the United States recognized new states in the past); P.K. MENON, *THE LAW OF RECOGNITION IN INTERNATIONAL LAW, BASIC PRINCIPLES* 144-45 (1994) (stating that the conclusion of comprehensive, permanent, or highly political treaties is usually considered recognition).

does it implicitly authorize future Presidents to make a treaty on the same subject with a new state that is a successor to that given foreign state? An affirmative answer would violate the rule against the President's creating law unilaterally. In *The Amiable Isabella*,²⁶³ the Supreme Court stated that a treaty cannot be interpreted "[t]o alter, amend, or add to [the] treaty, by inserting any clause, whether small or great, important or trivial."²⁶⁴ In 1989, in *Chan v. Korean Air Lines, Ltd.*,²⁶⁵ the Supreme Court invoked its 1821 decision in *The Amiable Isabella*, to explain that an interpretation that makes a change in a treaty "whether small or great, important or trivial" would constitute a "usurpation of power, and not an exercise of judicial functions," adding that, "[i]t would be to make, and not to construe, a treaty."²⁶⁶ Though the caution in that case was aimed at judges, it applies equally to interpretations by the Executive Branch because it states that any change would be "to make, not construe, a treaty," a clear reference to the treaty-making process, of which Senate advice and consent is an essential part. In light of that rule, there is no room for an inference that Senate advice and consent implicitly authorizes later changes by a President.

In that regard, Dellinger appeared to argue otherwise, conjecturing that in 1972, the Senate must have known of what Dellinger argued was past U.S. diplomatic practice with regard to state succession, *i.e.*, when a state dissolves, its treaties with the United States bind the United States *vis-à-vis* the extinct state's successor or successors. Dellinger's assertion disregarded the U.S. policy and practice of regarding as lapsed an extinct state's bilateral treaties, a practice that began at least as early as the annexation of the Kingdom of Hawaii in 1898,²⁶⁷ and was recently manifested in dealing with all five states

263. 19 U.S. 1 (1821) (adjudicating a ship and cargo claimed as prizes of war).

264. See *id.* at 71; *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 135-36 (1989); *Kass v. Reno*, 83 F.3d 1186, 1189 (10th Cir. 1996); see also *The Society for the Propagation of the Gospel in Foreign Parts v. New-Haven*, 21 U.S. 464, 490 (1823) (concluding that a treaty cannot be changed or modified where the language of the treaty is unambiguous and the parties to the treaty have made no changes).

265. 490 U.S. 122 (1989) (involving wrongful death claims stemming from the shooting down of an airliner by the USSR).

266. See *id.* at 134-135 (quoting *Amiable Isabella*, 19 U.S. 1, 71 (1821)).

267. See MOORE, *supra* note 85, at 350 (quoting U.S. Secretary of State John Sherman, noting that Hawaii's pre-existing treaties had been terminated); see also

that succeeded the extinct Yugoslavia.²⁶⁸ Thus, if any conjecture about the Senate's 1972 understanding is warranted, the reasonable conjecture is that it knew of the practice of regarding extinct states' treaties as lapsed. In any event, Dellinger did not claim that, after the USSR's dissolution, the Senate consented to the making of an ABM treaty with the Russian Federation. Presumably, Dellinger understood that "Congress' silence is just that—silence,"²⁶⁹ and does not constitute the exercise of its power to make or to repeal laws,²⁷⁰ including treaties.²⁷¹

Also, there is no evidence that after the USSR's dissolution, the Senate, by voting on various ABM Treaty matters, consented to bringing an ABM treaty into force between the United States and the Russian Federation. None of the laws passed since the USSR's extinction that relate to the ABM Treaty contains words that can be fairly construed as giving consent to the bringing into force of an ABM treaty that is not already in force. In construing a statute, its words are to be given their plain meanings.²⁷² Moreover, legislative history, an aid to the construction of ambiguous words,²⁷³ contains no evidence that either house of Congress, in voting on bills relating to ABM Treaty matters, was voting to bring into force an ABM treaty

Hawaii v. Manckichi, 190 U.S. 197, 211 (1903) (noting the treaties of the Kingdom of Hawaii ceased when Hawaii was annexed by the U.S. Government).

268. See *supra* Part IV.F.4. (discussing that the U.S.'s refusal to be bound by treaties concluded with the SFRY after its dissolution).

269. See *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987) (noting the implication of Congressional silence).

270. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) (noting that Congressional failure to overturn statutory precedent is insufficient reason for the Court to follow it); see also *United States v. Wells*, 519 U.S. 482, 495-96 (1997) (cautioning that is dangerous to adopt a rule of law solely on the basis of congressional silence); see also *NLRB v. Plasterers' Local Union No. 79*, 404 U.S. 116, 129-30 (1971) (affirming that a controlling rule of law should not be created out of congressional silence).

271. See *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (emphasizing that a treaty should not be repealed or modified unless Congress' will has been clearly expressed).

272. See *United States v. Gonzales*, 520 U.S. 1 (1997) (holding that words of criminal statutes should be given their plain meaning).

273. See *Barnhill v. Johnson*, 503 U.S. 393, 401 (1992) (citing *Toibb v. Radloff*, 501 U.S. 157, 162 (1991)) (noting that legislative history should only be consulted to resolve "statutory ambiguity").

that was not otherwise in force.

Finally, Congressional consent to an ABM treaty with Russia is only one of the inferences that might be drawn from Congressional silence as to whether the Treaty was in force. Another possible inference is that Congress decided to defer making a decision until the critical geo-political, technological, and economic issues were better defined, an inference in harmony with the practice of the Department of State to study the implications of a State's extinction before forming an opinion as to how to deal with the treaties of the extinct state. *See supra* Part III.C. (discussing the State Department's study of the effect of the USSR's extinction before deciding how to deal with treaties such as the ABM Treaty). In that context, Congressional silence is ambiguous silence, and ambiguous silence is a notoriously poor guide to Congressional intent.²⁷⁴

Hence, Congressional failure to declare that the ABM Treaty lapsed cannot be construed as concurrence in the creation of a legally binding agreement between the United States and Russia on the subject of anti-ballistic missile defense systems.

E. EXCEPT FOR CASES OF MONETARY-CLAIMS SETTLEMENTS,
THE SUPREME COURT HAS NEVER RULED THAT A PRESIDENT
ACTING WITHOUT SENATE CONCURRENCE CAN MAKE AN
AGREEMENT WITH A FOREIGN STATE THAT LEGALLY BINDS THE
UNITED STATES.

The U.S. Constitution, Article II, section 2, clause 2 ("the Treaty Clause"), provides that: "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur. . . ." U.S. CONST. art. 2, §2, cl. 2. From the early days of the Republic, it was understood that not every agreement between two nations was a

274. *See, e.g., Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 387-88 (2000) (concluding that a state's inference of congressional intent is unnecessary because the silence of Congress is ambiguous); *see also Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969) (quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946)) ("[I]t is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law."); *Boys Mkts., Inc. v. Retail Clerks Union*, 398 U.S. 235, 241 (1970) (stating that the Congress' failure to respond to a court decision should not be interpreted as acceptance of that decision).

“treaty” for purposes of the Treaty Clause, *i.e.*, a President had the power without the concurrence of two-thirds of the Senate to make some agreements on behalf of the United States.²⁷⁵ The Framers did not provide an explicit test to determine which international agreements would require a two-thirds Senate vote and which would not. Nor in the ensuing two hundred fourteen years has the Supreme Court provided such a test.

The Supreme Court’s entire jurisprudence on the question of what international agreements would require a two-thirds Senate vote consists of three cases, each of which involved the settlement of claims. In *United States v. Belmont*, 301 U.S. 324 (1937) and *United States v. Pink*, 315 U.S. 203 (1942), the Court held that a claims-settlement agreement had the effect of nullifying inconsistent state law. Another claims-settlement case, *Dames & Moore v. Regan*, 453 U.S. 654 (1981), is sometimes referred to as ruling that the President acting alone has power to conclude a legally binding agreement with another nation. The Court’s opinion does not support this argument, however, because the Court made clear that it upheld the validity of the settlement agreement only because statutes authorized the agreement. *See* 453 U.S. at 654. Thus, as to the legal effect of a claims settlement under the law of the United States, as distinguished from the law of a State of the United States, the Supreme Court has gone no further than to hold that a Senate two-thirds concurrence is not needed if the settlement is made pursuant to federal statutory authorization.

275. Some statutes use the term “treaty” to include international agreements that touch upon United States foreign policy, but that are not treaties within the two-thirds Senate concurrence meaning of the requirement in the Constitution. *See, e.g.*, *Weinberger v. Rossi*, 456 U.S. 25, 31 (1982) (noting Congress’ failure to distinguish between Article II treaties and other international agreements). The Supreme Court, however, has not addressed the question of whether such an agreement is legally enforceable as between the United States and another State. In *Weinberger*, for example, “the question is solely one of statutory construction,” *id.* at 26. The purpose of the statute was not to limit the President’s authority to enter into executive agreements with other states, but to control “ad hoc decision-making of military commanders overseas.” *Id.* at 33. Moreover, the Court made plain that some agreements cannot be made without a concurring vote of two-thirds of the Senate, *i.e.*, submission of Art. II treaties to the Senate is already required by the Constitution. *See id.* at 30 (discussing the meaning of “treaty” under Article II of the Constitution).

Another Supreme Court decision, *United States v. Curtiss-Wright Export Corp.*, 14 F. Supp. 230 (D.C.N.Y. 1936), *rev'd* 299 U.S. 304 (1936), which does not involve an international agreement, is sometimes invoked to support the argument that the Senate concurrence process of the Treaty Clause is not a requirement but only an option that the President can exercise or not in his absolute discretion. The question in *Curtiss-Wright* was whether the Constitution had conferred on the Congress power to enact a law that brought a criminal prohibition into effect upon a subsequent Presidential determination that such a prohibition would lessen conflict between Paraguay and Bolivia over their claims to disputed territory in a region known as the Chaco. In deciding to uphold the statute, the Court did not decide the legal significance of any international agreement, made with or without two-thirds Senate concurrence. Nevertheless, the case is cited by advocates for the view that the President has unlimited power to impose legally binding obligations on the United States. In particular, advocates cite the language the Court used to describe generally the powers of the national government to conduct external relations and the role the President was intended to play in that conduct. As regards communicating with other nations, the Court said, "the President alone has the power to speak or listen as a representative of the nation."²⁷⁶

Regarding the treaty-making process, the Court in *Curtiss-Wright* said, "[the President] makes treaties with the advice and consent of the Senate."²⁷⁷ The Court summarized its observations by borrowing a phrase from a speech made by John Marshall when he was a member of the House of Representatives: "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."²⁷⁸ Advocates have invoked this phrase in a variety of contexts: in an attempt to justify the existence of executive power independent of statutory authorization to revoke a passport on national security grounds, *see Haig v. Agee*, 453 U.S. 280, 289 n.17 (1981); in an attempt to justify a President's seizure of the nation's steel mills without statutory authorization, *see Youngstown Sheet &*

276. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

277. *Id.*

278. *Id.*

Tube Co. v. Sawyer, 343 U.S. 579, 661 (1952); and in an attempt to defer a lawsuit against a President until he was no longer in office, see *Clinton v. Jones*, 520 U.S. 681 (1997). In any event, the Supreme Court has never used the “sole organ doctrine” to support a rule that the President may dispense with the Treaty Clause in his unfettered discretion. Hence, if a Presidential right to bypass the Senate exists, it must originate in a source other than *Curtiss-Wright*.

Wallace McClure made the first elaborate advocacy of the Senate bypass theory, see WALLACE MCCLURE, *INTERNATIONAL EXECUTIVE AGREEMENTS: DEMOCRATIC PROCEDURE UNDER THE CONSTITUTION OF THE UNITED STATES* 332 (Columbia Univ. Press 1941). According to McClure, “the making of agreements with other countries is an executive function and hence, under the Constitution, vested wholly in the President.” *Id.*; see also Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 534-615 (1945) (comparing the implications of using treaties and executive agreements in completing international arrangements).

The notion that a bypass of the Senate is fully interchangeable with a Senate two-thirds concurrence has not overwhelmed the scholarly community. For example, the American Law Institute states that “[s]ome agreements, such as the United Nations Charter or the North Atlantic Treaty, are of sufficient formality, dignity and importance that, in the unlikely event that the President attempted to make such an agreement on his own authority, his lack of authority might be regarded as ‘manifest,’” a conclusion that under international law renders the agreement, if a “fundamental” one, non-effective.²⁷⁹

Likewise, according to Louis Henkin,

There have indeed been suggestions, claiming support in *Belmont* that the President is constitutionally free to make any agreement on any matter involving our relations with another country, although for political reasons... he will often seek Senate consent. As a matter of constitutional construction, however, that view is unacceptable, for it would wholly remove the “check” of Senate consent which the Framers struggled and compromised to write into the Constitution. One is

279. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 311(3) cmt. c (1987).

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, but neither Justice Sutherland nor any one else has told us which are which.²⁸⁰

Other scholarly works reject the notion that a President can make legally binding treaties acting without approval of either the House or Congress (let alone, without Senate two-thirds concurrence). See 5 HACKWORTH DIGEST OF INTERNATIONAL LAW 426 (stating an executive agreement does not become the "law of the land" because two-thirds of the Senators voting have not concurred); CONG. RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 103-6, at 507 (1st Sess. 1996) ("Certainly, executive agreements entered into solely on the authority of the President's constitutional powers are not the law of the land because of the language of the Supremacy Clause, and the absence of any congressional participation denies them the political requirements they may well need to attain this position").

The point that the Treaty Clause means what it says was made in Philip B. Kurland, *The Importance of Reticence*, Vol. 1968 DUKE L.J. 619, 626 (1968):

Let me put aside the argument that action by a majority of both Houses of Congress is equivalent to approval by two-thirds of the Senate. That is not what the Constitution says, but for some reason or other we are always

280. See LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 179 (1972); see also MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 183 (1990) (stating that a two-thirds Senate vote is required for international agreements of "unusual importance"); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1268 (1995) (explaining that Senate two-thirds concurrence is required for international agreements that constrain federal or state sovereignty). In response to Mr. Tribe, Assistant Attorney General Dellinger stated: "[w]e do not dispute Professor Tribe's view that some such agreements [with foreign nations] may have to be ratified as treaties. . . . Whatever may be true of other international agreements such as the United Nations Charter . . . our contention is only that trade agreements such as the Uruguay Round Agreements do not require ratification as 'treaties.'" Whether Uruguay Round Agreements Required Ratification as a Treaty, 18 Op. Off. Legal Counsel 232 (1994), 1994 OLC Lexis 20, at 6 n. 13.

reminded that because it is a Constitution we are expounding we need not be concerned with what it says.

Likewise, George A. Finch, who had attended the Versailles Conferences as Assistant Legal Adviser to the United States Commission to the Peace Negotiations, found it necessary to remind President Woodrow Wilson that the United States' Constitution constrained Wilson's exercise of treaty-making power: "Woodrow Wilson, realizing he was going to have trouble with the Senate, suggested to Lloyd George he would handle it by executive agreement. Mr. Lloyd George in substance said, 'Well, I don't think, Mr. President, you have that constitutional power. I have read your Constitution.'"²⁸¹

In addition, the State Department guidance issued on December 13, 1955 for all its diplomats states: "[e]xecutive agreements shall not be used when the subject matter should be covered by a treaty," a statement that would have made no sense if the State Department believed that any commitment could just as lawfully be made by a sole-executive agreement as by a treaty concurred in by a two-thirds vote in the Senate. *See* U.S. DEP'T OF STATE, CIRCULAR NO. 175, *reprinted in* 50 AM. J. INT'L L. 784, 785 (1956).

To like effect is Secretary of State Henry Clay's instruction to American Commissioner Porter regarding the allowable scope of an agreement to fix the U.S.-Canada Border:

Your powers are to be found in the Treaty of Ghent, and they do not authorize your contracting any new engagements on behalf of the United States. The President is incompetent to vest you with authority to enter any such new engagements, except in the mode in which the Constitution of the United States prescribes. According to that mode it would be necessary that you should possess a diplomatic character and that any compact you might form in concurrence with a representative of Great Britain having a similar character should be submitted to the Senate of the United States for their advice and consent.²⁸²

281. *Hearings Before a Subcomm. of the Comm. on the Judiciary on S.J. Res. 1 and S.J. Res. 43*, 83d Cong., 1st Sess. 80, (1953) (statement of Frank E. Holman).

282. Letter from Henry Clay, Secretary of State, to Mr. Porter, American Commissioner, 21 MS Dom. Let. 422 (Nov. 13, 1826), *reported in* JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW, at 195 (Gov't Printing Office 1906)

Moreover, the Executive Branch has by its conduct conceded that after the USSR's dissolution, the fundamental purpose of the 1972 ABM Treaty could not be served simply with only Russia as the other party, but would have to be recast as a multi-lateral treaty having as its parties the four successor states that had the most significant ABM defense assets, *i.e.*, Russia, Ukraine, Belarus and Kazakhstan. *See infra* Part V (H) (4) (enumerating USSR dissolution-caused uncertainties that U.S. Executive Branch faced). Those assets included Ukraine's nuclear arsenal of 176 ICBM's with 1,240 nuclear-tipped warheads and 3,000 tactical nuclear weapons. *See* ROMAN POPADIUK, AMERICAN-UKRAINIAN NUCLEAR RELATIONS 279 (1996). The Executive Branch concession that the 1972 Treaty could not accomplish its purpose with only Russia as a U.S. partner is manifested by the adoption of a memorandum of understanding ("MOU") among the United States, Russia, Ukraine, Belarus, and Kazakhstan to "multi-lateralize" the ABM Treaty. *See* Memorandum of Understanding Relating to the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems of May 26, 1972, Sept. 26, 1997, *available at* http://www.state.gov/www/global/arms/factsheets/missdef/abm_mou.html. Yet, as two scholars have observed, a treaty with a dissolved predecessor state as a result of the dissolution requires an amendment that "will require the . . . advice and consent of two-thirds of the Senate."²⁸³

Also, the ALI Restatement (Third) of the Foreign Relations Law suggests that an international agreement manifestly requires a Senate two-thirds concurrence if it is of "sufficient formality, dignity, and importance."²⁸⁴ The Restatement also states that the President has authority to make many international agreements pursuant to treaty or Congressional authorization (§ 303(2)), *or on his own authority* (§ 303(4)), "*and since the circumstances in which Senate consent is*

(footnote omitted).

283. Charles N. Brower & Abby Cohen Smutny, *The Effect of Independence of Quebec Upon Treaties and Agreements with the United States*, 27 AM. REV. CANADIAN STUDIES 51, 54 (1997).

284. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 311(3) cmt. c (1987).

essential are uncertain, improper use of an executive agreement in lieu of a treaty would ordinarily not be a "manifest" violation"²⁸⁵ Section 311(3) comment C, however, calls attention to the uncertainty as to the scope of a President's power to make legally binding sole-executive agreements, and for that reason predicts that a sole-Executive agreement, even if beyond the scope of Presidential authority, would not "ordinarily" be a "manifest" violation. Through cross-reference to Section 303(4), the authors, by necessary negative implication, manifest their view as to the limit of the President's authority to make a sole-executive agreement, *i.e.*, the President has that authority with respect to "any matter that falls within his independent power under the constitution."²⁸⁶ Hence, it follows that the Restatement's authors believe that the President may not make such an agreement if it deals with a matter falling outside his independent powers under the Constitution.

With that understanding, Section 311 comment C can be understood to mean that a manifest violation would include an attempt by sole-executive agreement to impose on the United States a binding legal obligation that the President acting alone would not have Constitutional authority to impose. The authors illustrate the rule by reference to examples: "[s]ome agreements, such as the United Nations Charter or the North Atlantic Treaty, are of sufficient formality, dignity, and importance that, in the unlikely event that the President attempted to make such an agreement on his own authority, his lack of authority might be regarded as manifest." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 311(3) cmt. c (1987).

Case law does not suggest a different rule except for claims settlements. *United States v. Belmont*, 85 F.2d 542 (S.D.N.Y. 1936), *rev'd* 301 U.S. 324 (1937), involved a claim of the United States to a deposit at the Belmont Bank in New York. In 1918, Petrograd Metal Works, a Russian Corporation, deposited funds in Belmont Bank, a private bank in New York. Shortly thereafter, the Bolsheviks, in the name of the Soviet Union, seized control of the Czarist government and issued a decree dissolving Petrograd Metal Works and

285. *Id.* (emphasis added).

286. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(4) (1987).

appropriating all its property, including the deposit at Belmont Bank. The Soviet government did not thereafter acquire the deposited funds and the lower court refused to enter a judgment for the United States. In 1933 Franklin D. Roosevelt, representing the United States, and Maxim Litvinov, representing the government of the USSR, exchanged letters in which the United States promised to recognize the USSR government as the *de jure* government of a territory that had been the territory of Imperial Russia. In return the USSR promised to, and did, assign to the government of the United States all the USSR's rights in and title to property located in the United States that the USSR government had purported to acquire by its seizure decrees. The Assignment has since been called the "Litvinov Assignment," see *United States v. Pink*, 315 U.S. 203, 210-13 (1942) (displaying full text of the Litvinov Assignment).

The Petrograd Metal Works' deposit at Belmont Bank was one of the properties within the scope of the Litvinov Assignment. The State of New York took the position that the deposit (and others located in New York to which the USSR laid claim) should be allocated by the courts of New York in accordance with New York law. Allegedly, one feature of New York law was a rule that an attempt to transfer an asset located in New York, if contrary to New York public policy or New York law, would not be given effect in New York courts. Another alleged feature of New York law was that a foreign government's forcible transfer of title to property was contrary to public policy if made without just compensation. Hence, applying New York policy and laws to the property within the scope of the Litvinov Assignment would deprive the United States of the benefit of the Assignment. In addition, the full value of all the properties involved (including the Petrograd Metal Works deposit) would be available to satisfy creditors of the USSR. Those creditors did not include citizens of the United States—their claims had already been satisfied by other means.

The lower court ruled in *Belmont* that a judgment in favor of enforcing the Litvinov Assignment would have the effect of confiscating property located in New York, a process that "would be contrary to the public policy of the state of New York." *Belmont*, 85 F.2d at 543. In addition, the court held that the result would infringe the public policy of the United States. *Id.* at 544. The Supreme Court rejected the New York public policy argument, explaining: "[w]e do

not pause to inquire whether in fact there was any policy of the State of New York to be infringed since we are of [the] opinion that no state policy can prevail against the international compact here involved.” *Belmont*, 301 U.S. at 327. The Court further asserted, “Plainly, the external powers of the United States are to be exercised without regard to state laws or policies.” *Id.* at 331. Similarly,

And while this rule in respect of treaties is established by the express language of clause 2, article 6, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states. . . . [i]n respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist. Within the field of its power, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation [*i.e.* to enforce an assignment to the United States], state [c]onstitutions, state laws, and state policies are irrelevant to the inquiry and the decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power.²⁸⁷

Having disposed of New York’s policy argument, the Court addressed the defendant’s assertion that a federal policy precluded enforcement of the Assignment, *i.e.*, the policy expressed in the Constitution that private property shall not be taken without just compensation.²⁸⁸ The Court responded,

But the answer is that our Constitution, laws, and policies have no extraterritorial operation, unless in respect of our own citizens. . . . What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here . . . [i]t does not appear that respondents have any interest in the matter beyond that of a custodian. Thus far no question under the Fifth Amendment is involved.²⁸⁹

287. *United States v. Belmont*, 85 F.2d 542 (S.D.N.Y. 1936), *rev’d* 301 U.S. 324, at 331-32 (1937).

288. *See* U.S. CONST. amend. V.

289. *Belmont*, 301 U.S. at 332.

Thus, *Belmont*: (i) *held* that the United States could not be denied the benefit of the Litvinov Assignment by reason of any policy of New York; (ii) *uttered a dictum* that the United States could not be denied the benefit of the Assignment by reason of a New York statute or New York's constitution; and (iii) *expressed no opinion* as to how the Assignment might affect the claims of third parties.

The *Belmont* ruling was in material respects reaffirmed in *Pink*, a case also involving claims within the Litvinov Assignment that the courts of New York resisted recognizing. First, *Pink*, like *Belmont*, involved the question of whether New York law may deny to the United States a benefit that it assumed would flow from the Litvinov Assignment, *i.e.*, a right to share with other claimants the Russian property located in the United States that was claimed by the USSR government. The USSR government's claim was based on title it obtained by confiscation from the owners without just compensation. The Supreme Court held, as it had in *Belmont*, that New York's law and policy must yield to the Litvinov Assignment, to the extent that New York law might impair rights obtained by the United States in the Assignment. *See Pink*, 315 U.S. at 234. Second, like *Belmont*, *Pink* dealt only with the validity of the rights obtained by the United States and involved no conflict between the powers of the Presidency and the powers of the Congress. *Pink*, like *Belmont*, invoked as the basis for its ruling a conclusion that the recognition of the Bolshevik regime as the *de jure* government of the USSR was an essential element of the Litvinov Agreement. A state's law must yield if it would impede the United States in conducting its power to recognize the legitimacy of a particular regime as the government of a foreign State. *Id.* at 230-31. Thus, *Pink*, like *Belmont*, contains no ruling as to the federal law effect of a sole-Executive agreement on federal statutes or on treaties made with two-thirds Senate concurrence.

Dames & Moore v. Regan, 453 U.S. 654 (1981), arose out of an agreement (the "Algiers Declarations") made on January 19, 1981, whereby Iran promised to free the United States citizens it was holding as hostages in exchange for a promise by the United States to free all of Iran's property in the United States from claims made and encumbrances obtained in American courts. One day after the agreement was entered into force, Iran released the hostages. In the months that followed, Americans holding claims against Iran brought suits attacking the Algiers Declarations on the grounds that the

actions of Presidents Carter and Reagan pursuant to the declarations, *i.e.*, to protect Iran's property from judgment execution and to protect Iran from having to defend against the creditors' claims, exceeded their authority. The Supreme Court rejected the claimants' argument and held that the Executive Orders blocking execution on judgments were authorized by the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §1702 (West 1991). *See Dames & Moore*, 453 U.S. at 670. As to the suspending of claims not yet reduced to judgment, the Court held that the Executive Orders, though not "directly" authorized by statute, were authorized by a combination of statutes and an implied Presidential power to settle claims. *Id.* at 675. In reaching this conclusion the Court emphasized that the President's implied foreign-policy powers standing alone would not have authorized the suspension of the claims:

Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement. This is best demonstrated by Congress' enactment of the International Claims Settlement Act of 1949. The Act had two purposes: (1) to allocate to United States nationals funds received in the course of an executive claims settlements with Yugoslavia, and (2) to provide a procedure whereby funds resulting from future settlements could be distributed. To achieve these ends Congress created the International Claims Commission, now the Foreign Claims Settlement Commission, and gave it jurisdiction to make final and binding decisions with respect to claims by United States nationals against settlement funds. By creating a procedure to implement future settlement agreements, Congress placed its stamp of approval on such agreements. Indeed, the legislative history of the Act observed that the United States was seeking settlements with countries other than Yugoslavia and that the bill contemplated settlements of a similar nature in the future.²⁹⁰

The court further concluded:

Finally, we re-emphasize the narrowness of our decision. We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities. As the Court of Appeals for the First Circuit stressed, [t]he sheer magnitude of such a power, considered against the background of the diversity and complexity of modern international trade, cautions against any broader construction of authority

290. *Dames & Moore v. Regan*, 453 U.S. 654, 680-81 (1981) (emphasis added) (citations omitted).

than is necessary." *But where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.*²⁹¹

To complete the explanation of its combined—source analysis, the Court referred to judicial decisions upholding claims settlements where a settlement was "integrally connected with normalizing the United States relations with a foreign state."²⁹² In addition, the Court's allusion to the law of public necessity is noteworthy:

*But where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.*²⁹³

By the law of public necessity, a government has implied power to take immediate action to prevent a significant harm to its citizens that would likely occur before express authority to take the action can be obtained. The doctrine of public necessity is sometimes manifested in a statute, as in *Bowditch v. Boston*, 101 U.S. 16 (1879), in which Massachusetts statutes and a Boston ordinance authorized public officers, in the event of fire, to demolish a building if they judged the demolition necessary to prevent the fire from spreading. According to the Court, "[t]he rights of necessity are a part of the law." *Id.* at 18-19 (quoting *Respublica v. Sparhawk*, 1 U.S. (Dall.) 357, 362 (1788)).

The law of necessity is summarized in PROSSER & KEETON, THE LAW OF TORTS 146 (5th ed. 1984) (footnote omitted):

Where the danger affects the entire community, or so many people that the public interest is involved, that interest serves as a complete justification to the defendant who acts to avert the peril to all. Thus, one

291. *Id.* at 688 (emphasis added) (citation omitted).

292. *Id.* at 683 (citing *Pink*, 315 U.S. at 229-230 and *Ozanic v. United States*, 188 F.2d 228, 231 (2d Cir. 1951)).

293. *Id.* at 688 (emphasis added).

who dynamites a house to stop the spread of a conflagration that threatens a town, or shoots a mad dog in the street, or burns clothing infected with smallpox germs, or in time of war, destroys property which should not be allowed to fall into the hands of the enemy, is not liable to the owner, so long as the emergency is great enough, and he has acted reasonable under the circumstances. This notion does not require the "champion of the public" to pay for the general salvation out of his own pocket. The number of persons who must be endangered in order to create a public necessity has not been determined by the courts. It would seem that the moral obligation upon the group affected to make compensation in such a case should be recognized by the law, but recovery usually has been denied.²⁹⁴

Regarding the Court's decision in *Dames & Moore*, it is impossible to believe that a United States court would hold that the Executive Branch of the United States Government had no right to interfere with the collection of private claims against Iran in the face of incontrovertible evidence that such interference was necessary to free the hostages. Nonetheless the Court made it clear in that case that whether the taxpayers should compensate the claims holders for their losses was a separate question, which the Court preserved for future deliberation: "[t]hough we conclude that the President has settled petitioner's claims against Iran, we do not suggest that the settlement has terminated petitioner's possible taking claim against the United States. We express no views on petitioner's claims that it has suffered a taking."²⁹⁵

Justice Powell, concurring, and dissenting in part, emphasized:

The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts. The extraordinary powers of the President and Congress upon which our decision rests cannot in the circumstances of this case, displace the Just Compensation Clause of the Constitution.²⁹⁶

294. See also *Ralli v. Troop*, 157 U.S. 386, 405-06 (1895) (citing *Gravesend Barge (Mouse's Case)*, 12 Co. Rep. 63, 77 Eng. Rep. 1341 (1609) for proposition that in a tempest, in order to save the lives of passengers, a passenger can cast out valuable goods without incurring liability to the owners).

295. *Dames & Moore*, 453 U.S. at 689, n. 14.

296. *Id.* at 690.

In short, *Dames & Moore* does not hold that the President has unlimited discretion without the concurrence of Congress, by agreement with a foreign state, to impose any kind of legally binding obligation on the United States. Moreover, even with congressional concurrence, the President's exercise of power to bind the United States legally was upheld only with respect to the settlement of claims against a foreign state. Hence, nothing in *Dames & Moore* justifies a conclusion that a President can impose on the United States an obligation to forego in perpetuity the creation and maintenance of a defense against any other state's intercontinental ballistic missile attack.

Moreover, the President's power to act in an emergency cannot be extended without limit. In *Youngtown Sheet & Tube Co. v. Sawyer*,²⁹⁷ the Court held the powers vested in the President by the Constitution did not authorize the President, acting without statutory authorization, to seize and operate the nation's steel mills.²⁹⁸ At the time, the United States was at war with North Korea and a strike would have shut down the steel mills and impaired production of armaments to conduct the war. The United States argued (among other things) that the President's military power as Commander in Chief of the Armed Forces and the President's power as "executive," coupled with his duty to execute the law faithfully, authorized the President to seize and operate the mills.²⁹⁹ The Supreme Court rejected the argument. The Court's opinion was written by Justice Black, joined by Justices Frankfurter and Jackson, who also wrote separate opinions.

As to the military power of the President as Commander in Chief of the Armed Forces, the Court in *Youngtown* distinguished cases "upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war." The Court explained:

Even though "theater of war" is an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from

297. 343 U.S. 579 (1952).

298. See *id.* at 585-86.

299. See *Youngtown*, 343 U.S. at 582.

stopping production. This is a job for the Nation's lawmakers, not for its military authorities.³⁰⁰

As to implied powers of the Executive and the imposition of a duty to see to faithfully execute the laws, the Court explained that a decision to seize and operate the mills without statutory authority was the making, not the execution, of law and the Constitution had vested in the Congress "all" power to legislate, including the power to make laws necessary and proper to carry into execution the enumerated law-making powers and all the other powers vested by the Constitution in the Government of the United States or in any Department or officer thereof.³⁰¹ Accordingly, the Court held that the Constitution did not confer power on the President, acting without statutory authority, to seize and operate the nation's steel mills, even for the purpose of conducting a war in which the nation was currently engaged.

F. THE SUPREME COURT'S DECISION IN *CURTISS-WRIGHT EXPORT CORPORATION* DOES NOT AUTHORIZE A PRESIDENT, ACTING WITHOUT SENATE CONCURRENCE, TO MAKE AN AGREEMENT WITH A FOREIGN STATE THAT WOULD LEGALLY BIND THE UNITED STATES WITH RESPECT TO A SIGNIFICANT NATIONAL-SECURITY COURSE OF ACTION.

According to some scholars, in *Curtiss-Wright*, discussed in Part V (E), the Court announced a sweeping rule, the "sole organ" doctrine, which is a proposition that if the President enters into an agreement with another nation and does not seek approval of either a majority of both Houses or two-thirds of the Senate, that agreement is every bit as legally efficacious as if it had been concurred in by a vote of two-thirds of the Senate, or approved by a majority vote in each House of the Congress. See *Curtiss-Wright Export Corp.*, 299 U.S. at 320. Presumably, that conclusion undergirds the Lawyers' Alliance for World Security's argument that the Baker-Yeltsin agreement imposed a legally binding obligation on the United States whereby the Russian Federation, substituting for the USSR, became

300. *Id.* at 587.

301. See *id.* at 588.

in all material respects a party to the ABM Treaty of 1972. *See supra* Part II (A).

In *Curtiss-Wright*, seven justices upheld the conviction of Curtiss-Wright Export Corp. for conspiring to sell fifteen machine guns in the United States to Bolivia, which at the time was engaged in warfare in the Chaco, an area in dispute between Bolivia and Paraguay. The sale of the guns violated a Joint Resolution that became the Arms Sale Resolution Act, 48 Stat. 811 (1934), which imposed a maximum fine of \$10,000 or maximum imprisonment for two years, or both. According to the Joint Resolution,

(i) if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the establishment of peace between those countries, (ii) and after consultation with the governments of other governments the President makes a proclamation to that effect, then, it "shall be unlawful to sell . . . any arms or munitions of war any place in the United States to the countries now engaged in that armed conflict, or to any person . . . acting in the interest of either country. . .

The defendants challenged the constitutionality of the Joint Resolution on the ground that it delegated to the Executive Branch the power to make law, a power that under the Constitution is vested exclusively in the Legislative Branch. The defendants based their argument on two recently decided Supreme Court cases, *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), in which the Court declared unconstitutional parts of the National Industrial Recovery Act ("NIRA") on the ground that the Act unconstitutionally delegated law-making power to the Executive Branch.³⁰²

In *Panama Refining Co.*, the Court dealt with Section 9(c) of the National Industrial Recovery Act of June 16, 1933, 15 U.S.C. tit I, §709(c):

The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order

302. *See Curtiss-Wright Export Corp.*, 14 F. Supp. at 235.

prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State. Any violation of any order of the President issued under the provisions of this subsection shall be punishable by fine of not to exceed \$1,000, or imprisonment for not to exceed six months, or both.

The Court observed:

Section 9(c) is assailed upon the ground that it is an unconstitutional delegation of legislative power. The section purports to authorize the President to pass a prohibitory law. The subject to which this authority relates is defined. It is the transportation in interstate and foreign commerce of petroleum and petroleum products which are produced or withdrawn from storage in excess of the amount permitted by state authority. Assuming for the present purpose, without deciding, that the Congress has power to interdict the transportation of that excess in interstate and foreign commerce, the question whether that transportation shall be prohibited by law is obviously one of legislative policy. Accordingly, we look to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition.

Section 9(c) is brief and unambiguous. It does not attempt to control the production of petroleum and petroleum products with a State. It does not seek to lay down ground rules for the guidance of state legislatures or state officers. It leaves to the States and to their constituted authorities the determination of what production shall be permitted. It does not qualify the President's authority by reference to the basis, or extent, of the State's limitation of production. Section 9(c) does not state whether, or in what circumstances or under what conditions, the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the State's permission. It establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. The Congress in § 9(c) thus declares no policy as to the transportation of the excess production. So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition . . . or not to lay it down, as he may see fit. And disobedience to his order is made a crime punishable by fine and imprisonment.³⁰³

Having ruled that Section 9(c) placed no limit on any state's

303. *Panama Refining Co.*, 293 U.S. 388, 414-15 (1935).

decision as to how much oil production it will permit, the Court examined other sections of the Act, and concluded that none of them limited or controlled the authority conferred by Section 9(c).³⁰⁴ The Court also distinguished cases upholding other statutory schemes on the ground that the authority they gave to the President was bounded by a declaration of policy, the establishment of a standard, and a definition of circumstances and conditions under which conduct is to be allowed or prohibited.³⁰⁵ The Court concluded:

We are not dealing with action which, appropriately belonging to the executive province, is not the subject of judicial review, or with the presumptions attaching to executive action. To repeat, we are concerned with the question of the delegation of legislative power. If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determinations of fact, those determinations must be shown.³⁰⁶

Accordingly, the Court held that Section 9(c) unconstitutionally delegated legislative power to the President.

The Joint Resolution considered in *Curtiss-Wright* bore some resemblance to Section 9(c) of the NIRA. For example, under each statute a regimen for punishment by criminal law came into existence upon the issuance of a Presidential proclamation by reason of a decision of another governmental body, *i.e.*, the states in *Panama Refining Co.* and the President in *Curtiss-Wright*. The defendants in *Curtiss-Wright* argued that the resemblance was close enough to support a conclusion that the ruling in *Panama Refining Co.* governed the Presidential Proclamation in *Curtiss-Wright*. See *Curtiss-Wright Export Corp.*, 14 F. Supp. at 235. The statutory regimes, however, differed in a notable respect: in *Panama Refining Co.*, as to each state's oil output, the President was required to issue the proclamation if, as and when a state government decreed a maximum on the amount that could lawfully be produced deriving from land within the state during a designated period. In contrast, in

304. See *id.* at 416-20.

305. See *id.* at 427-28.

306. *Id.* at 432.

Curtiss-Wright under the Joint Resolution, the President was required to make his own decision, on the basis of his own perception of the facts. The United States argued the difference was critical, citing a number of rulings upholding regulatory statutes that declared policy and left it to the President to execute the policy. *See Id.* at 234. Thus, in *Curtiss-Wright*, the Supreme Court had a basis to distinguish *Panama Refining Co.* Had the Court chosen to limit its opinion to making that distinction, it would not have had to consider the scope of the President's constitutional role in the conduct of foreign relations. The Court, however, explained its decision as resting on another ground: in the area of foreign relations the President has more latitude to make rules on his own pertaining to foreign relations than to execute a statute dealing solely with internal matters. *See Curtiss-Wright Export Corp.*, 299 U.S. at 319-29.

The Court observed that the President has "delicate, plenary, and exclusive power" as the "sole organ of the federal government in the field of international relations," and that such power "does not require as a basis for its exercise an act of Congress, but which, of course, like every other government power must be exercised in subordination to the applicable provisions of the Constitution."³⁰⁷ The Court reasoned that the President had been given greater latitude in conducting foreign affairs than internal affairs because he President had greater ability than the Congress to obtain pertinent information about conditions in foreign countries because he could better avoid premature (and harmful) disclosure of confidentially-provided information. *See id.* at 319-22. Moreover, the Congress could not be expected to maintain confidentiality as well as the President. Therefore, if the Congress were to conduct external relations, more confidential information would be imparted by the government and the conduct of external relations would suffer. *Id.* at 320-21. In the Court's words:

When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, the legislator properly bears in mind the important consideration that the form of the President's action- or, indeed, whether he shall act at all- may well depend, among other things, upon the nature of the confidential information which he has or may thereafter receive, or upon the effect

307. 299 U.S. at 320.

which his action may have upon our foreign relations. This consideration, in connection with what we have already said on the subject, discloses the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed.³⁰⁸

The emphasis on access to information from foreign sources fit the facts before the Court in *Curtiss-Wright*. The Joint Resolution authorized the President to make a proclamation only after he consulted with the governments of the American Republics other than the combatants and sought their cooperation, and only then if he found that the "prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries . . ." See *Curtiss-Wright Export Corp.*, 299 U.S. at 312. To buttress its reasoning, the Court described a "steady stream for a century and a half of time" of statutes pertaining to foreign relations providing that prohibitions of law come into effect upon determinations made by the President. See *id.* at 328. The existence of this stream of statutes "goes a long way in the direction of providing the presence of unassailable ground for the constitutionality of the practice. . . ." *Id.*

The Court therefore concluded:

It is enough to summarize by saying that, both upon principle and in accordance with precedent, we conclude that there is sufficient warrant for the broad discretion vested in the President to determine whether the enforcement of the statute will have a beneficial effect upon the reestablishment of peace in the affected countries; whether he shall make proclamation to bring the resolution into operation; whether and when the resolution shall cease to operate and to make proclamation accordingly; and to prescribe limitations and exceptions to which the enforcement of the resolution shall be subject.³⁰⁹

Thus, the Court in *Curtiss-Wright* upheld the authority of the Congress to vest in the President a substantial latitude to determine facts on which to predicate a proclamation that a particular statutory punishment shall go into effect. The Court's opinion said more,

308. *Id.* at 321-22.

309. *Id.* at 329.

however; it spoke of a “sole organ” doctrine under which the President has “plenary” or “exclusive” power to conduct the foreign relations of the United States, and that such power derived from the external sovereignty that devolved on the government of the United States from the British Monarchy. *See id.* at 317.

The notion that the sole organ doctrine has nullified the Constitutional requirement for two-thirds Senate concurrence in making treaties has no support in the case law and has not awed the scholarly community. *See, e.g., The World Trade Organization and the Treaty Clause: The Constitutional Requirement of Submitting the Uruguay Round of GATT as a Treaty: Hearings before the Senate Comm. on Commerce, Sciences and Transportation*, 103d Cong., 2d Sess. (1994) (statement of Laurence H. Tribe, Professor, Harvard Univ. Law School):

The current controversy over the Uruguay Round, then is not the first occasion in our nation's history when debate over approval of a particular international agreement overlapping with debate over the Treaty Clause. Over half a century ago, prominent scholars crafted boldly revisionist histories that are often cited as proof that, from the nation's founding, executive agreements, coupled with bicameral congressional approval, were available as substitutes for formal treaties ratified by the Senate. But Professor Ackerman's forthcoming article convincingly debunks the myth that those scholars had invented—the myth that it was always recognized that any international agreement negotiated by the president, regardless of its nature and sweep, could escape the requirement of Senate ratification as a treaty. Similarly, the Supreme Court cases that are sometimes trotted out for the proposition that any executive agreement can become “the supreme Law of the Land” through majority approval of the House and Senate in fact establish no such thing—as I have elaborated elsewhere and as Professor Ackerman has established in his forthcoming article. These cases often deal with the very different issues of unilateral presidential settlement or suspension of claims against foreign nations, *see, e.g., United States v. Pink*, 135 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937) . . .³¹⁰

310. *See also* Memorandum of Law on Constitutionality of the Sinai Accords, Office of Legislative Counsel, U.S. Senate (Sept. 24, 1975), *reprinted in* 1 UNITED STATES FOREIGN RELATIONS LAW: DOCUMENTS AND SOURCES 273, 274 (Michael Glennon & Thomas Franck eds., 1980) (noting that the Constitution does not expressly authorize the President to enter into agreements without Senate consent); Memorandum of Law: Response to Memorandum of Dept. of State Legal Adviser

A tabular comparison of foreign policy powers of the three branches is attached to this Memorandum as Appendix A. It shows that the "sole" Presidential foreign relations powers are modest when compared to sole Congressional foreign relations powers, such as to make law (including the appropriation of funds for the armed forces) by veto override or to grant letters of marque and reprisal, or to the sole Judiciary powers such as to declare laws unconstitutional, to declare that a treaty has superseded a statute, or to declare that a statute has superseded a treaty. In short, the opinion in *Curtiss-Wright* cannot be understood to remove the Constitutional check on the President's treaty-making power.

G. THE RECORD OF THE CONSTITUTIONAL CONVENTION SHOWS THAT THE FRAMERS OF THE CONSTITUTION DID NOT INTEND THE SENATE'S TREATY-CONCURRENCE POWER TO BE AN OPTION GIVING A PRESIDENT UNLIMITED DISCRETION TO DISREGARD THE

Regarding Secret Middle East Agreements (Oct. 22, 1975), *reprinted in UNITED STATES FOREIGN RELATIONS LAW: DOCUMENTS AND SOURCES* 311, 312-13 (Michael Glennon & Thomas Franck eds., 1980) (asserting that, since some international agreements are regarded as treaties, it is a violation of the Constitution for the President to enter into an international agreement without the advice and consent of the Senate); Walter Dellinger, *Whether Uruguay Round Agreements Required Ratification as a Treaty*, 18 Op. Off. Legal Counsel 232, 1994 OLC LEXIS 20, at 6 n.13, 15 n.24 (1994) ("[W]e do not dispute Professor Tribe's view that some such [executive] agreements may have to be ratified as treaties. . . . [O]ur contention is only that trade agreements such as the Uruguay round do not require ratification as treaties."); Arthur Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties: The Original Intent of the Framers of the Constitution Historically Examined*, 55 WASH. L. REV. 1 (1979-1980); *THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY* 27-32 (David Gray Adler & Larry N. George eds., 1996) (discussing presidential use of executive agreements to conduct foreign policy); Jody S. Fink, *Notes on Presidential Foreign Policy Power (Part II): The Foreign Policy Role of the President: Origins and Limitations*, 11 HOFSTRA L. REV. 773, 782-89 (1983) (explaining theories of executive power in foreign affairs); STAFF OF SENATE COMM. ON THE JUDICIARY, 83D CONG., REPORT ON CONSTITUTIONAL AMENDMENT RELATIVE TO TREATIES AND EXECUTIVE AGREEMENTS, S. REP. NO. 83-412 (1953) (recommending adoption of the "Bricker Amendment". S.J. Res. 1, which addresses the legal effect of certain treaties and executive agreements); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 295-96 (1996) (asserting that the intention of the Framers was to establish a joint role between the president and Congress in declaring war).

REQUIREMENT FOR A TWO-THIRDS CONCURRENCE.

1. *The Framers' Purpose Was to Prevent a Minority of Citizens from Pushing a Treaty Down on the Majority.*

Given that every state was to have an equal vote in the Senate, irrespective of population, the immediate purpose of the requirement for a concurrence of two-thirds of the Senators was to minimize the likelihood of a treaty concurrence without the acquiescence of at least several of the populous states. Hence, the ultimate purpose was to insure that a vicarious vote of at least a majority of the population (through its Senators) would be required to make a treaty. It is therefore fair to infer from the text of the Treaty Clause alone that the Framers were uneasy about, if not hostile to, the making of treaties. Such an inference is supported by the context, at least with respect to "political" (as distinguished from "commercial") treaties.³¹¹

A few years later President George Washington expressed a similar caution in his Farewell Address:

The great rule of conduct for us in regard to foreign nations is, in extending our commercial relations to have with them as little *political* connection as possible. So far as we have already formed engagements let them be fulfilled with perfect good faith. Here let us stop.

Europe has a set of primary interests which to us have none or a very remote relation. Hence she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns. Hence, therefore, it must be unwise in us to implicate ourselves by artificial ties in the ordinary vicissitudes of her politics or the ordinary combinations and collisions of her friendship or enmities

... Why quit our own to stand to upon foreign ground? Why, by interweaving our destiny with that of any part of Europe, entangle our peace and prosperity in the toils of European ambition, rivalry, interest, humor, or caprice?

311. See e.g., 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1108 (John P. Kaminski & Gaspare J. Saladino eds., 1990) (quoting James Monroe at the Virginia Convention to consider ratification: "Our object is the regulation of commerce and not of treaties. . . I apprehend no treaty that could be made, can be of any advantage to us.").

It is our true policy to steer clear of permanent alliances with any portion of the foreign world, so far, I mean, as we are now at liberty to do it; for let me not be understood as capable of patronizing infidelity to existing engagements. I hold the maxim no less applicable to public than private affairs that honesty is always the best policy. I repeat, therefore, let those engagements be observed in their genuine sense. But in my opinion it is unnecessary and would be unwise to extend them.

Taking care always to keep ourselves by suitable establishments on a respectable defensive posture, we may safely trust to temporary alliances for extraordinary emergencies.³¹²

Thomas Jefferson shared President Washington's view: "[o]n the subject of treaties, our system is to have none with any nation, as far as can be avoided."³¹³ Similarly, John Jay said he "would not give a farthing for any parchment security whatever."³¹⁴

Western and southern states were particularly apprehensive that a treaty power unconstrained by a super-majority requirement for approval would lead to a treaty that would concede to Spain (whose territory straddled the Mississippi River) a right to interfere with navigation on the River. See Letter from Hugh Williamson to James Madison (June 2, 1788), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 306, 306-07 (Max Farrand ed., 1966). For a description of the controversy, see Michael D. Ramsey, *Executive Agreements and the (Non) Treaty Power*, 77 N.C. L. REV. 134, 192-93 (1998); Bruce Stein, *Note on Presidential Foreign Policy Power (Part I): The Framers' Intent and the Early Years of the Republic*, 11 HOFSTRA L. REV. 413, 436 (1982).

On September 8, 1787, during the final debate on the Treaty Clause, James Madison observed "that it had been too easy in the present Congress [of the Confederation of the United States] to make Treaties."³¹⁵

312. George Washington, Farewell Address (Sept. 17, 1796), in 1 MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897 213, 222-23 (1897).

313. Letter From Thomas Jefferson to Philip Mazzei (July 18, 1804), in 11 THE WRITINGS OF THOMAS JEFFERSON 38, 38-9 (Albert Ellery Bergh ed., 1904).

314. Report from Richard Oswald to Thomas Townshend (Aug. 7, 1782), in 8 THE COMPLETE WORKS OF BENJAMIN FRANKLIN 141, 143 (John Bigelow ed., 1888).

315. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF

The Framers' concern about excessive entanglement in the affairs of other nations has not entirely disappeared, even in academia. For example, Detlev Vagts, Professor of Law at Harvard University, wrote in 1997 "[o]ne is right to be troubled about the potential of international commitments to frustrate American democratic processes by shifting functions from local representatives—who can be questioned and persuaded by their constituencies—to distant and anonymous groups of experts."³¹⁶

Requiring the use of a super-majority of states to make a treaty in order to ensure majority support of the American people was understood by the Framers. In his speech opposing Oliver Ellsworth of Connecticut's motion to allow each State an equal vote in "ye 2d branch," *i.e.*, the Senate, Wilson described the counter-majoritarian consequence of a rule that would allow a measure to be approved in the Senate by a simple majority vote. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 482-83 (Max Farrand ed., 1966). Ellsworth had predicted that if his motion failed, "of all the States North of [Pennsylvania] one only would agree to any [General] Government," *id.* at 482, to which Wilson responded:

[N]or lasting, any other principle will be local, confined & temporary. He entertained more favorable hopes of [Connecticut] and of the other Northern States. He hoped the alarms exceeded their cause, and that they would not abandon a Country to which they were bound by so many strong and endearing ties. But should the deplored event happen, it would neither stagger his sentiments nor his duty. If the minority of the people of America refuse to coalesce with the majority on just and proper principles, if a separation must take place, it could never happen on better grounds. The votes of yesterday [against the] just principle of representation, were as 22 to 90 of the people of America. Taking the opinions to be the same on this point, and he was sure if there was any room for change it could not be on the side of the majority, the question will be shall less than [one fourth] of the United States withdraw themselves from the Union, or shall more than [three fourths] renounce the inherent, indisputable, and unalienable rights of men, in favor of the

1787 603 (Ohio Univ. Press, 1966) (1840).

316. Detlev V. Vagts, *International Agreements, the Senate and the Constitution*, 36 COLUM. J. TRANSNAT'L L. 143, 155 (1997). See also Michael J. Glennon, *There's a Point to Going it Alone: Unilateralism Has Often Served Us Well*, WASH. POST., Aug. 12, 2001, at B2 (explaining why the United States acts unilaterally, as opposed to multilaterally).

artificial systems of States. If issue must be joined, it was on this point he would chose to join it. The gentleman from Connecticut in supposing that the preponderancy secured to the majority in the [first] branch had removed the objections to an equality of votes in the [second] branch for the security of the minority narrowed the case extremely. Such an equality will enable the minority to control in all cases whatsoever, the sentiments and interests of the majority. Seven States will control six: seven States according to the estimates that had been used, composed 2/9 of the whole people. It would be in the power then of less than [one-third] to overrule [two-thirds] whenever a question should happen to divide the States in that manner. Can we forget for whom we are forming a Government? Is it for *men*, or for the imaginary being called States? Will our honest Constituents be satisfied with metaphysical distinctions? Will they, ought they to be satisfied with being told that the one third, compose the greater number of states. The rule of suffrage ought on every principle to be the same in the [second] as in the [first] branch. If the Government be not laid on this foundation, it can be neither solid.³¹⁷

Although Wilson lost the argument as to Senator voting power generally, the issue of treaty making was again raised in September 1787, toward the end of the Convention. The Partial Report of the Committee of Eleven, as adopted on September 4, 1787, provides at paragraph 7: “[t]he President by and with the advice and consent of the Senate, should have the power to make Treaties . . . [b]ut no Treaty shall be made without the consent of two-thirds of the members present.”³¹⁸

On September 7, Madison successfully moved to insert after the word “treaty” the words “except treaties of peace,” therefore allowing peace treaties to be made with less difficulty than other treaties.³¹⁹ On September 8, 1787, a motion carried to reconsider the Treaty Clause, and upon reconsideration, Madison’s exception for treaties of peace was struck. Without a peace-treaty provision, the Treaty Clause, as it now reads, was passed.³²⁰

317. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 482 (Max Farrand ed., 1966).

318. MADISON, *supra* note 315, at 575.

319. *See id.* at 599.

320. *See id.* at 602-04; 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 317, at 544-54; *see also* Brett W. King, *The Use of Supermajority Provisions in the Constitution: The Framers, the Federalist Papers and the Reinforcement of a Fundamental Principle*, 8 SETON HALL CONST. L. J. 363, 382-

The debate at the Constitutional Convention was conducted against the backdrop of a controversy that arose during the Confederation preceding adoption of the Constitution in 1786. The controversy involved Secretary of Foreign Affairs John Jay's proposal to conclude a treaty with Spain by which the United States would for twenty-five to thirty years relinquish its right to sail the Mississippi River to its outlet in exchange for diplomatic privileges and economic benefits. Delegates from the South claimed this would benefit the North and East at the expense of the South.³²¹ According to Slonim,

[T]he underlying consideration prompting the delegates to vest treaty-making power in the Senate was the desire of the states to retain maximal control over foreign affairs. The final clause on treaty-making power emerged as the product of several basic conflicts which had beset the Constitutional Convention: clashes between 'nationalists' and 'federalists', between large and small States, and between the North and the South. By means of compromise, the President was given a role in the treaty-making power process, while the vote required in the Senate was raised from a simple majority to two-thirds. Against this background, it becomes evident that the latter requirement was a deliberate policy decision designed to ensure protection of factional interests, other than merely a less stringent alternative to a majority vote in both houses.³²²

Thus, at least as to the power to make legally binding promises to other nations, the Framers diminished the power "of less than one-third to overrule two-thirds of the population" whenever a question should happen to divide the States in that manner and "assured that a treaty would not come into existence without the support of 'the whole people'."³²³

83 (1998) (recounting the adoption of Hamilton's proposal of vesting the treaty-making power with the President and the Committee's modification, which included the two-thirds voting requirement of the Senate).

321. See Solomon Slonim, *Congressional-Executive Agreements*, 14 COLUM. J. TRANSNAT'L L. 434, 443-44 (1975).

322. *Id.* at 436-37.

323. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 317, at 482-83; see also *Edwards v. Carter*, 580 F.2d 1055, 1060 (D.C. Cir. 1978), *cert. denied*, 436 U.S. 907 (1978) (arguing that the Framers chose a "supermajoritarian requirement in the Senate [for treaty concurrence], rather than House approval, to serve as a check upon the improvident cession of United States territory."); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self Execution, and the*

On the need for popular representation, see THE FEDERALIST NO. 22 138, 142 (Alexander Hamilton) (Henry B. Dawson ed., Charles Scribner's Sons 1897):

Every idea of proportion and every rule of fair representation conspire to condemn a principal which gives to Rhode Island an equal weight in the scale of power with Massachusetts, or Connecticut, or New York; and to Delaware an equal voice in national deliberations with Pennsylvania, or Virginia, or North Carolina. Its operation contradicts that fundamental maxim of republican government, which requires that the sense of the majority should prevail.

Similarly, according to Alexander Hamilton in THE FEDERALIST NO. 74 519, 522 (Alexander Hamilton) (Henry B. Dawson ed., Charles Scribner's Sons 1897):

To have entrusted the power of making treaties to the Senate alone would have been to relinquish the benefits of the constitutional agency of the President in the conduct of foreign relations. It is true that the Senate would, in that case, have the option of employing him in this capacity, but they would also have the option of letting it alone, and pique or cabal might induce the latter rather than the former. Besides this, the ministerial service of the Senate could not be expected to enjoy the confidence and respect of foreign powers in the same degree with the constitutional representations of the nation, and, of course, would not be able to act with an equal degree of weight or efficacy. While the Union would from this cause, lose a considerable advantage in the management of its external concerns, the people would lose the additional security which would result from the co-operation of the Executive. Though it would be imprudent to confide in him solely so important a trust, yet it cannot be doubted that his participation would materially add to the safety of the society. It must indeed be clear to a demonstration that the joint possession of the power in question, by the President and the Senate, would afford a greater prospect of security, than the separate possession

Original Understanding, 99 COLUM. L. REV. 1955, 2074 (1999) (asserting that "permitting one-third of the Senate plus one to block treaties amounted to a normative decision by the Framers to make it difficult for the nation to enter international agreements. A popular voice in treaty-making was seen as necessary to prevent treaties, not to form them"); King, *supra* note 320 at 363 (examining the history behind the supermajority provisions in the United States Constitution). See generally Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CALIF. L. REV. 671, 731-38 (1998) (describing the shaping of the Treaty Clause and the selling of the Clause in the Constitutional Ratification campaign).

of it by either of them.

2. *The Serious Consequences of Breach of a Treaty*

The Framers' caution as to the making of treaties is easy to comprehend in light of the then well-known serious consequence of a breach of treaty—the right of the aggrieved treaty partner to make war on the partner that committed the breach. At that time, war was considered an acceptable remedy for breach of a treaty. According to Emmerich De Vattel, whose work was much read in the American Colonies and in the Confederation of the United States of America, an intentional breach of treaty was so reprehensible that states other than the injured state were justified in forming an alliance to make war on the treaty-breaching state:

As all nations are interested in maintaining the faith of treaties, and causing it to be everywhere considered as sacred and inviolable, so likewise they are justifiable in forming a confederacy for the purpose of repressing him who testifies a disregard for it—who openly sports with it—who violates and tramples it under foot. Such a man is a public enemy who saps the foundations of the peace and common safety of nations.³²⁴

According to *The Brig Amy Warwick, et al.* ("Prize Cases"), 67 U.S. 635, 666 (1862), "[w]ar has been well defined to be, '[t]hat state in which a nation prosecutes its right by force.'" The historic notions of a just war and an unjust war are described in THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTION 245-59 (1995). Similarly, George B. Davis, who was Judge-Advocate-General of the United States Army and a Delegate Plenipotentiary to the Geneva Conference of 1906 and to the Second Peace Conference at the Hague in 1907, stated in GEORGE B. DAVIS, THE ELEMENTS OF INTERNATIONAL LAW 94-95 (3d ed. 1908) that "[t]reaties are voluntary engagements entered into by sovereign states, by which duties and obligations are created or defined. As they operate to convert *imperfect* into *perfect rights*, the violation of a treaty stipulation may afford just cause for war." (footnote omitted).

324. EMMERICH DE VATTEL, THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 229-30 (1876).

According to RENE ALBRECHT-CARRIE, A DIPLOMATIC HISTORY OF EUROPE SINCE THE CONGRESS OF VIENNA 7 (1958) (emphasis added):

Treaties, to be sure, are supposed to retain their validity under the tacit qualification *rebus sic stantibus*, conditions persisting that prevailed at the time of their making. When these conditions alter, as in time they will, there is no agency with power to adjudicate the measure of the change or the consequences that should ensue from it. *Against the breach of a treaty, there is only one recourse, force, and to speak of the sanctity of treaties is to make a purely moral judgment that carries no foreseeable or previously known sanction with it.*

John Jay, in undertaking to show why a “United America” would be safer from “foreign arms and influence,” than from a “Disunited America,” employed the argument that a united nation would be likely to give the fewest “just causes of war.” THE FEDERALIST NO. 3 13 (John Jay) (Henry B. Dawson ed., Charles Scribner’s Sons 1897). Jay asserted that “[t]he *just* causes of war, for the most part, arise either from violation of treaties or from direct violence.” *Id.* Jay further wrote in THE FEDERALIST NO. 4 17 (John Jay) (Henry B. Dawson ed., Charles Scribner’s Sons 1897):

But the safety of the people of America against dangers from *foreign* force depends not only on their forbearing to give *just* causes of war to other nations, but also on their placing and continuing themselves in such a situation as not to *invite* hostility or insult; for it need not be observed that there are *pretended* as well as just causes of war.

Furthermore, according to SIR SHERSTON BAKER, 1 HALLECK’S INTERNATIONAL LAW 288 (3d ed.1878) (1893),

One who openly violates the obligations of a treaty, will incur the disgrace of infamy and the reproach of mankind, but, so far as penal consequences are concerned, it is only the injured party who is justified in resorting to open and solemn war for the purpose of inflicting punishment.

An abbreviated account of the many violations of “political” treaties, or “pledges to aid in war and to make or keep peace,” in the century that immediately preceded the Constitutional Convention occupies nearly fifty pages in LAURENCE W. BEILSON, THE

TREATY TRAP 56-95 (1969). The futility of relying on an oath to guarantee faithfulness to a treaty is illustrated by an event with which some of the Framers must have been familiar: Harold the Saxon promised to support William of Normandy's claim to succeed Edward the Confessor as King of England. Harold made the promise under oath while touching an altar that was located above a sacred relic and his promise was supported by the Pope. Nonetheless, Harold broke his promise and resisted William's landing at Hastings to claim the Crown. See CYRIL E. ROBINSON, *ENGLAND: A HISTORY OF BRITISH PROGRESS FROM THE EARLY AGES TO THE PRESENT DAY* 38-39 (1932). Even today, according to some scholars, the fact that powerful states "cannot be punished when they violate international law" may particularly tempt them to violate international law. See Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1135-36 (1999).

Among civilized nations, warfare was considered a lawful means to remedy a breach of treaty until the adoption of the League of Nations Covenant. See LEAGUE OF NATIONS COVENANT arts. 12-16, *reprinted in* 2 MAJOR PEACE TREATIES OF MODERN HISTORY 1648-1967 1265-81 (Fred L. Israel ed., Chelsea House 1967). Article 13 of the League of Nations Covenant provides:

Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared generally suitable for submission to arbitration.

LEAGUE OF NATIONS COVENANT art. 13.

Article 13 further provides that members of the League "will carry out in full good faith any award that may be rendered, and that they will not resort to war against a Member of the League which complies therewith." *Id.* Furthermore, Article 16 provides that "should any Member of the League resort to warfare in disregard of its covenants under [Article 13] it shall *ipso facto* be deemed to have committed an act of war against all other members of the League." *Id.* art. 16. Other members are obligated to sever trade and financial with and place an embargo on the offending state, and the Council of the League is obliged to recommend to the states concerned "what effective military, naval or air force the Members of the League shall

severally contribute to the armed forces to be used to protect the covenants of the League.” *Id.*

The disapproval of war to settle disputes was further enunciated in 1928 in the Kellogg-Briand Pact, in which Germany, France, Great Britain, Japan, Italy, Canada, the USSR, China and thirty-four other nations renounced the use of war to settle disputes, thereby implicitly abjuring warfare as a remedy for breach of treaty.³²⁵

Concerning the binding effect of treaties, William Hall asserted in WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 343 (6th ed. 1909) (emphasis added) that:

In organi[z]ed communities it is settled by municipal law whether a contract which has been broken shall be enforced or annulled; *but internationally, as no superior coercive power exists, and as enforcement is not always convenient or practicable to the injured party, the individual state must be allowed in all cases to enforce or annul for itself as it may choose.* The general rule then is clear that a treaty which has been broken by one of the parties to it is not binding upon the other, through the fact itself of the breach, and without reference to any kind of tribunal.

Moreover, as explained in THE FEDERALIST NO. 63 446, 451 (John Jay) (Henry B. Dawson ed., Charles Scribner’s Sons 1897):

These gentlemen [who are averse to treaties being the supreme laws of the land] would do well to reflect that a treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely*, but on

325. See Treaty of Paris (Kellogg-Briand), Aug. 27, 1928, arts. 2, 3, *reprinted in* 4 MAJOR PEACE TREATIES OF MODERN HISTORY 2393-96 (Fred Israel ed., Chelsea House 1967). Article 2 of the United Nations Charter also prohibits warfare as a means of resolving disputes. See U.N. CHARTER art. 2, paras. 3-4 (noting that all U.N. Members must settle international disputes by peaceful means and refrain from the threat or use of force against a State). *But see* 2 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (James Dewitt Andrews, 4th ed. 1899) (emphasis added) (“For offences against this law are principally incident to whole states or nations, in which case recourse can only *be had to war*; which is an appeal to the God of hosts, to punish such infractions of public faith as are committed by one independent people against another: neither state having any superior jurisdiction to resort to upon earth for justice.”); Michael D. Ramsey, *Executive Agreements and the (Non) Treaty Power*, 77 N.C. L. REV. 134, 196 (1998) (commenting that “[o]f course, international law generally is not (and plainly in 1817 was not) subject to supernational enforcement mechanisms, and as a practical matter is (and was) subject to violation on a regular basis.”).

us only so long and so far as we may think proper to be bound by it. They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both; and consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them. The proposed Constitution, therefore, has not in the least extended the obligation of treaties. They are just as binding, and just as far beyond the lawful reach of Legislative Acts now, as they will be at any future period, or under any form of government.

John Jay also argued that a federal union was superior to a loose confederation with regard to observing treaties because, among other things: (i) a violation of a treaty was one of the “just causes of war;” and (ii) the United States was more likely to observe treaties, or “obey the law of nations”, if these were one national government rather than “in thirteen States or in three or four confederacies.” THE FEDERALIST NO. 3 14-16 (John Jay) (Charles Scribner’s Sons ed., 1897).³²⁶

H. ASSUMING *ARGUENDO* THAT THE CONSTITUTION GAVE A PRESIDENT UNLIMITED DISCRETION WITHOUT SENATE CONCURRENCE TO MAKE AN AGREEMENT WITH A FOREIGN STATE THAT WOULD LEGALLY BIND THE UNITED STATES, PRESIDENT BUSH (ACTING THROUGH SECRETARY BAKER) DID NOT EXERCISE THAT OPTION BY WAY OF A JANUARY, 1992 EXCHANGE BETWEEN SECRETARY BAKER AND RUSSIA’S PRESIDENT BORIS YELTSIN.

1. Secretary Baker’s Press Statement on January 29, 1992 Cannot Reasonably Be Interpreted as Accepting a Russian Offer to Make a Legally Binding Agreement

Under international law, as well as U.S. law, words of commitment, accord, or agreement do not create a legally binding agreement unless they were so intended. Otherwise the words create only a political or moral agreement. Hence, the validity of the theory that Secretary Baker’s words of commitment created a legally

326. John Jay did not say, “perhaps,” because it was (and still is) understood that it is lawful to terminate for a treaty breach, change of fundamental circumstances, and impossibility of performance.

binding agreement with Russia depends on how Secretary Baker's words are interpreted. The discussion below shows that under accepted rules of interpretation, Secretary Baker's words cannot reasonably be interpreted as manifesting an intent to create a legally binding agreement. Hence, when Secretary Baker said that the United States remains "committed" to *the* ABM Treaty, he was referring to a political or moral commitment to work toward the making of an agreement on ABM systems that would account for the fundamental changes resulting from the USSR's dissolution and the emergence of fifteen successor States on what had been the USSR's territory. Such a commitment is often called a *modus vivendi* and constitutes what Professor Glennon referred to as a declaration of "nonbinding adherence to a treaty."³²⁷ The State Department has referred to such undertakings as "intended to have political or moral weight, but not intended to be legally binding agreements."³²⁸

Some of the reasons for using non-legally binding agreements are described in RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: INTERNATIONAL AGREEMENTS: DEFINITION, NATURE, AND SCOPE § 303 n.2 (1987), which include to avoid legal remedies and to avoid "processes required by a national constitutional system for making legally binding agreements." The United States practice of using a *modus vivendi* has been described as making an agreement of a "temporary nature, effective pending the completion of some other process, like the resolution of an international arbitration or the conclusion of a formal treaty." Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 801, 816 (1995). *Modi vivendi* were "sometimes very important, and lasted for considerable periods, but their stop-gap character was their *raison d'être*". *Id.* (footnote omitted).

A *modus vivendi* is "an instrument recording an international agreement of temporary or provisional nature intended to be replaced by an arrangement of a more permanent nature and detailed character. It is usually made in an informal way and never requires

327. Michael J. Glennon, *The Senate Role in Treaty Ratification*, 77 AM. J. INT'L L. 257, 267 (1983).

328. United States Department of State, Airgram to All Diplomatic Posts (Mar. 9, 1976), *reprinted in* 1 UNITED STATES FOREIGN RELATIONS LAW: DOCUMENTS AND SOURCES (Michael J. Glennon and Thomas M. Franck, eds., 1980).

ratification.” United Nations, *Definition of Key Terms Used in the Treaty Collection*, at <http://untreaty.un.org/English/guide.asp#modus>. See also 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 442-44 (Peter Macalister-Smith ed., 1997) (explaining the motion of *modus vivendi*); *N. Am. Commercial Co. v. United States*, 171 U.S. 110, 130-34 (1898) (illustrating the use of *modii vivendi* in the nineteenth century); SAMUEL B. CRANDALL, *TREATIES, THEIR MAKING AND ENFORCEMENT* 87-88 (Colum. Univ. Press 1904) (describing various *modus vivendi* transactions where the United States was a party); 2 CHARLES HENRY BUTLER, *THE TREATY-MAKING POWER OF THE UNITED STATES* 369-70 (1902) (providing instances where *modus vivendi* have been used); John Bassett Moore, *Treaties and Executive Agreements*, 20 POL. SCI. Q. 385, 397-98 (1905) (offering background information on *modus vivendi* in the United States). On the character of *modi vivendi* and “mere pious declarations” of intentions, see Myres McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 308 (1945).

Sometimes provisional agreements as to “the basis of future negotiations” are called “protocols of agreement”, a term that is used interchangeably with *modus vivendi*. See SAMUEL B. CRANDALL at 87-88. President Theodore Roosevelt’s agreement to protect Santo Domingo during the construction of the Panama Canal is an example of the use of a provisional presidential commitment that lapses when the President who made the commitment leaves office. According to THEODORE ROOSEVELT, *AN AUTOBIOGRAPHY* 551 (1919):

The Constitution did not explicitly give me power to bring about the necessary agreement with Santo Domingo. But the Constitution did not forbid my doing what I did. I put the agreement into effect, and I continued its execution for two years before the Senate acted; and I would have continued it until the end of my term, if necessary, without any action by Congress. But it was far preferable that there should be action by Congress, so 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. I therefore did my best to get the Senate to ratify what I had done.

For an account of how the State Department decides which

agreements are legally binding on the United States and which are not, see Marian Nash (Leich), *Contemporary Practice of the United States Relating to International Law*, 88 AM. J. INT'L L. 515-19 (1994). The Nash article refers to a 1994 Memorandum prepared by Robert B. Dalton, Assistant Legal Advisor for Treaty Affairs, which in turn refers to the State Department Regulations issued to comply with the Case-Zablocki Act of 1972, as amended, 1 U.S.C. § 112a-b (2001). *See id.* at 515. The Case-Zablocki Act requires the State Department to transmit to the Congress the text of any international agreement other than a treaty to which the United States is a party "as soon as practicable" after coming into force but "in no event later than sixty days thereafter."³²⁹ The regulations implementing the Act list four criteria for deciding whether an agreement must be reported. *See* 22 C.F.R. § 181.2(a)(1)-(a)(4) (2001). Under the first criterion "[t]he parties must intend their undertaking to be legally binding, and not merely of political or personal effect."³³⁰ Further, the parties "must intend their undertaking to be governed by international law, although this intent need not be manifested by a third-party dispute settlement mechanism or any express reference to international law."³³¹

According to Alfred P. Rubin, *Enforcing the Rules of International Law*, 34 HARV. INT'L L.J. 149, 157 (1993):

Frequently enough, the human lawmakers and statesmen engaging in diplomatic correspondence or concluding treaties evade precision about the legal results that might flow from various supposed delicts. On close reading, many treaties that purport to translate public or private virtue into rules binding in the positive legal order only restate principles or agreement on policy goals. They cannot be enforced as positive law because they do not define rules of positive law or allocate authority to determine whether their prescriptions are violated and what legal result should flow from a violation.

On the other hand, some negotiated non-treaties, like the 1975 Final Act of the Helsinki Conference on Security and Co-operation in Europe, marshal the moral order to enforce virtue. They use the

329. 22 C.F.R. § 112b(a) (2001).

330. 22 C.F.R. § 181.2 (a)(1) (2001).

331. *Id.*

enforcement tools of the virtue-moral order: publicity, exposure of hypocrisy, and opprobrium.

Another kind of non-binding agreement is a "gentlemen's agreement." The DICTIONARY OF INTERNATIONAL AND COMPARATIVE LAW 174 (James R. Fox ed., 1992) defines a "gentlemen's agreement" as an "agreement (not legally binding) between statesmen or diplomats, who are to perform the obligation on the basis of good faith. Because the commitment is only political, there is no legal or legally enforceable claim to specific performance." An example of such an agreement is that between the U.S. and Japan in 1907-1908, whereby Japan promised to restrict the emigration of Japanese laborers to the United States. *See* Treaties, 5 HACKWORTH DIGEST OF INTERNATIONAL LAW 344 (1943). Japan later replaced this agreement with an immigration act. *See id.* Regarding such agreements, one diplomat has quipped that "before you can have a gentlemen's agreement you have to have gentlemen," and "a gentlemen's agreement is something which a gentleman would avoid."³³²

Diplomats and scholars use the term "legally binding" in a broader sense than common lawyers. In the argot of international law, an obligation is legally binding if it is intended to be legally binding, irrespective of whether it is enforceable in a court or other independent tribunal.³³³

An example of a non-legally binding "convention" that is not a treaty is found in *Watts v. United States*, 1 Wash. Terr. (N.S.) 288, 293-294 (1870). In *Watts*, the court dealt with a provisional sole-Executive "convention" made between the United States and Great Britain, under which the United States conducted certain governmental functions in a disputed territory (San Juan Island) in the Washington Territory. The court held that the President had authority to enter into the convention.

332. SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES 1945-1986 116 (1989).

333. *See supra* Part II.A. (addressing the international law implications of U.S.-USSR relations regarding the ABM Treaty of 1972 uses "legally binding" in the broad sense, *i.e.*, to include a promise made by a state with the intention that it be legally binding on that state).

The power to make and enforce such a temporary convention respecting its own territory is a necessary incident to every national government, and inheres where the executive power is vested. Such conventions are not treaties within the meaning of the Constitution, and, as treaties, supreme law of the land, conclusive on the courts, but they are provisional arrangements, rendered necessary by national differences involving the faith of the nation and entitled to the respect of the courts.³³⁴

Diplomats and international scholars commonly accept the notion a promise can at the same time be both "legally binding" and not legally enforceable. If international law scholars wanted to be understood by common lawyers, they would define a legally binding promise to include a promise that though not enforceable in a neutral tribunal would be legally binding if it were enforceable in a neutral tribunal.

The case law of the United States recognizes that not every promise made by an international agreement is legally enforceable. An obligation in an international agreement that is not "self-executing" and for that reason is not legally enforceable is called "merely precatory".³³⁵

2. The Non-Publication of the Baker-Yeltsin Exchange and the Failure to Send the Documents to the Congress Suggest That the State Department Did Not Consider the Baker-Yeltsin Exchange to Be Either a Treaty Requiring Senate Concurrence or Otherwise a Legally Binding International Agreement to Which the United States

334. *Watts v. United States*, 1 Wash. Terr. (N.S.) 288, 294 (1870). See also Fritz Munch, *Comments on the 1968 Draft Convention on the Law of Treaties: Non-binding Agreements*, 29 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VOLKERRECHT 1 (1969); Oscar Schachter, Editorial Comment, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L. 296 (1977) (describing non-legally binding international agreements).

335. See *INS v. Stevic*, 467 U.S. 407, 428 n.22 (1984) (indicating that the language of Article 34 of the Refugee Convention was precatory and not self-executing and, as such, merely called on nations to facilitate the admission of refugees to the extent possible); see also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 441 (1987) (describing Article 34 as a precatory and non-self-executing principle); *American Baptist Churches v. Meese*, 712 F. Supp. 756, 770 (N.D. Cal. 1989) (finding that Article 1 of the Geneva Convention is a non-self-executing treaty provision). See generally Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 712 (1995) (noting that non-self-executing treaties "do not impose obligations but, instead, set forth aspirations").

Was a Party

The Case-Zablocki Act of 1972 requires the Secretary of State to publish annually all treaties and “international agreements other than treaties” to which the United States became a party during that year. *See* 1 U.S.C. § 112a(a) (2001). The Secretary of State must transmit to the Congress every treaty or other international agreement to which the United States has become a party “as soon as is practicable after such agreement has entered into force with respect to the United States but in no event later than sixty days thereafter,” with a special provision for secret transmissions where public disclosure would prejudice national security. *See* 1 U.S.C. § 112b. Although there is no evidence that the State Department ever transmitted the text of the Baker-Yeltsin exchange to the Congress pursuant to the Case-Zablocki Act, since the USSR’s dissolution the State Department has transmitted to the Congress at least 135 treaties and other international agreements with Russia.

3. *The Distinction Between Legally Binding Commitments on the One Hand and Moral and Political Commitments on the Other is Understood by the Congress*

Senator Joseph Biden emphasized the distinction between legally binding commitments and moral and political commitments in his remarks on consideration of NATO’s “Strategic Concept,” in the context of the National Defense Authorization for Fiscal Year 2000:

Mr. President, one of the things that we sometimes confuse here—I know I do—is what is a political obligation and what is a constitutional obligation. I respectfully suggest that there is no constitutional requirement for the President of the United States—this President or any future President—to submit to the Senate for ratification, as if it were an amendment to a treaty, a Strategic Concept that is a political document. We use the words interchangeably on this floor. A new commitment or obligation, as I said, does not a treaty make.³³⁶

In addition, Senator Biden stated that international law also recognizes the distinction required by U.S. law:

336. 145 CONG. REC. S5901 (daily ed. May 25, 1999) (statement of Sen. Biden).

The rules under U.S. law on what constitutes a binding international agreement are set forth in the Restatement of Foreign Relations Law of the United States, as well as in the State Department regulations implementing the Case-Zablocki Act.

Under the Restatement, *the key criterion as to whether an international agreement is legally binding is if the parties intend that it be legally binding and governed by international law.* (Restatement Sec. 301(1)).

Similarly, the State Department regulations state that the “parties must intend their undertaking to be legally binding and not merely of political or personal effect.” (22 Code of Federal Regulations §181.2(a)(1)).

Thus, many agreements that are not binding are essentially political statements. *There is a moral and political obligation to comply in such cases, but not a legal one.*

The most well-known example of such a political statement is the Helsinki Final Act of 1975, negotiated under the Ford administration and credited by most of us as the beginning of the end of the Soviet Union, the most significant political act that began to tear the Berlin Wall down.³³⁷

4. *Secretary of State James Baker Could Not Have Intended to Create a Legally Binding Agreement*

Secretary Baker’s words, standing alone, do not express an intention to create a legally binding agreement. Moreover, Secretary Baker’s words do not stand alone. Rather, they appear in the context of adjustment to the USSR’s dissolution and uncertainty within the U.S. Executive Branch as to how to create an ABM regime that accounts for the fact that four USSR successor-States possessed in their territories substantial parts of what had been one ABM defense system under the USSR’s control. The dissolution-caused uncertainties include the following:

- Not only Russia, but each of fourteen other newly independent

337. *Id.* at S5902 (emphasis added). See also Michael J. Glennon, *The Senate Role in Treaty Ratification*, 77 AM. J. INT’L L. 257, 268 n.72 (1983) (explaining that in *Nuclear Tests (N.Z. v. Fr.)* 1974 I.C.J. 457, 472 (Dec. 20), the International Court of Justice cautioned that a State’s declaration of intent to pursue a course of action does not bind the State legally unless “it is the intention of the state making the declaration that it should become bound.”).

states, could claim a right to deploy 100 launchers of an ABM defense system around its capital.

- Six of the twelve early warning radar systems granted to the USSR by the ABM Treaty were located outside the territory of Russia, *i.e.*, in Latvia, Belarus, Ukraine, Azerbaijan and Kazakhstan.

- ICBM launch sites, equipped with nuclear-armed ICBMs, were located in states other than Russia, *i.e.*, in Belarus, Ukraine, and Kazakhstan.

- Ukraine alone was the third largest nuclear-weapon state in the world. See ROMAN POPADIUK, AMERICAN-UKRAINIAN NUCLEAR RELATIONS 2 (1996). Ukraine's nuclear arsenal included 176 ICBMs with 1,240 nuclear-tipped warheads, and 3,000 tactical nuclear weapons. *Id.* at 279.

- Both before and after Baker's January 29, 1992 conference with Yeltsin, the U.S. Executive Branch was troubled by Ukraine's and Kazakhstan's possession and control of strategic nuclear weapons and sought to have those weapons placed under the control of Russia. See POPADIUK at 6.

- By April 1992, "it had become obvious that this plan would not work, as Ukraine and Kazakhstan, unable to work out their differences with Russia at CIS summits, began to insist on equal treatment with Russia." *Id.*

- During the period before May 1992, when Ukraine signed the Lisbon Protocol to START I (a treaty that required, and received, two-thirds consent of the U.S. Senate), Ukraine had "balked" when it came to implementing its promises to give up control of or dismantle, its nuclear weapons. *Id.* at 7.

- After the signing of START I, and before it was ratified, Ukraine's Prime Minister Leonid Kuchma stated that Ukraine may have to retain its more modern SS-24 missiles "temporarily." *Id.* at 12.

- In March 1993, the Executive Branch was "deeply concerned" that Ukraine was developing its own launch capability and Russia expressed its own concern on that score to the United States. *Id.* at 26-30.

- The issue of right-to-control Ukraine's nuclear weapons, as a practical matter, was not resolved until November 1994, when the

Ukrainian parliament acceded to the Non-Proliferation Treaty. *Id.* at 41-43.

- The only ABM testing site in the USSR's territory was in Kazakhstan.

- The distance between Moscow and the USSR's periphery (on its west and southwest) was far greater than the distance between Moscow and Russia's periphery (on its west and southwest). This change raised questions as to the capacity of Russia's radar to protect a Moscow ABM defense area as compared to the capacity of the USSR's capacity to protect a Moscow ABM defense area. The careful arrangement of the locations of early warning radars was critical to a reliable defense against inter-continental ballistic missiles. For that reason, the USSR's early warning radar located in Latvia was a critical part of its ABM defense. The USSR's dissolution restored the independence of Latvia. As a consequence, Latvia was no longer controlled by a regime in Moscow and the early warning radar in Latvia was closed creating a large gap in northern coverage of Russia's ABM defense. The gap was not filled, which for the United States has meant a lower level of confidence that the Moscow-controlled system can correctly determine whether an object perceived to be coming from the area that had been covered by the Latvian radar is an incoming ICBM. Hence, the United States has less confidence that the Moscow-controlled system will not launch a first strike out of error. *See* David Hoffman, *Russia "Blind" to Attack by US. Missiles: Satellites' Deficiencies Fuel Fears of Shield*, WASH. POST, June 1, 2000, at A1 (providing an account of this weakness and others in the Moscow based early-warning system).

- By a separate Agreement on Joint Measures with Respect to Nuclear Weapons, Dec. 21, 1991, 31 I.L.M. 152, at Alma Ata, Russia, Ukraine, Belarus and Kazakhstan agreed to "jointly develop a policy on nuclear issues." *Id.* art. 3. Also, they agreed that until nuclear weapons were eliminated from the territories of Ukraine and Belarus, a decision to use those weapons would require agreement of Belarus, Ukraine, Kazakhstan and Russia (the "participating states"). *Id.* art. 4. At the same time, no participating state agreed to share with any other participating state its decision as to whether to develop and deploy an ABM defense system.

• By contrast, Secretary Baker expected “the States of the Commonwealth to abide by all of the international treaties and obligations that were entered into by the former Soviet Union, including the ABM treaty.” *Supra* Part II (A) (2). Yet, the Commonwealth included seven states that were not “participating States” within the meaning of the Alma Ata separate agreement on nuclear weapons. Hence, it was not clear how much control Secretary Baker assumed the seven non-participating states would have over the four participating states as regards ABM defense matters.

George Bunn and John B. Rhinelander, U.S. officials who participated substantially in the development of U.S. arms-control policies and treaties and advocated the continuation of an ABM Treaty regime with the USSR successor states, made the following observations in 1993:

If each of the former Soviet republics - including all the “states of the Commonwealth” in Secretary Baker’s words—succeeded to all Soviet rights under the ABM treaty, each might theoretically claim the right to build 100 launchers for an ABM system around its capital. (There is already one around Moscow equipped with short- and longer-range nuclear-armed ABM missiles). *That would clearly be inconsistent with the purpose of the ABM Treaty, as amended in 1974, to limit the ABM systems to one small, regional system ON EACH side. Unless the ABM Treaty were formally amended, to permit each republic to have an ABM system would change the basic bargain of the ABM Treaty as much as permitting each to become a nuclear-weapon state would change the NPT.* Nevertheless, as in the case of each of the other three arms control treaties discussed in this Article, *further negotiations between the United States and the pertinent former republics will be necessary.*³³⁸

At the Commonwealth of Independent States summit in Bishkek on October 9, 1992, ten of the Commonwealth members, including Ukraine, stated that they “will implement the terms” of the ABM Treaty “as applied to their territories and in consideration of the national security interests of each of them.” The simplest way of doing this might have been to treat Russia as the primary successor to the Soviet Union and ask it to work out whatever implementation steps are necessary with other former republics concerning the ABM Treaty. This method, however, did

338. George Bunn & John B. Rhinelander, *The Arms Control Obligations of the Former Soviet Union*, 33 VA. J. INT’L L. 323, 339-40 (1993) (footnotes omitted) (emphasis added).

not work for the START I Treaty. . . . An alternative that is suggested by the Bishkek resolution is the method used for START I: a multilateral agreement between the United States and all of the relevant former republics with either treaty-limited facilities on their territories or with the possibility of building defensive missile systems.³³⁹

Bunn and Rhinelander's observations predicted the course that the U.S. Executive Branch has pursued and that led to the publication of a proposed multilateralization Memorandum of Understanding of September 1997. Memorandum of Understanding Relating to the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems of May 26, 1972, Sept. 26, 1997, *available at* http://www.state.gov/www/global/arms/factsheets/missdef/abm_mou.html. The MOU is a proposed multilateral agreement among the United States and all of the relevant successor States that possess what had been ABM Treaty-limited facilities on their territories.

What Bunn and Rhinelander spoke of in 1993 must have been known to Secretary Baker and President Yeltsin in 1992: An ABM treaty with Russia that did not place necessary restraints on Ukraine, Belarus, and Kazakhstan "would change the basic bargain of the ABM Treaty."³⁴⁰ Secretary Baker therefore must have known at the time of his January 29, 1992 press conference that he was not, as a matter of law, committing the United States to continue to abjure strategic missile defense while Belarus, Kazakhstan and Ukraine (which together had massive ICBM delivery capacity and substantial ABM early warning radars on their western and southern peripheries) were legally free to develop and deploy full ABM systems. It is also implausible that Yeltsin understood Baker as committing the United States to such a one-sided bargain.

Moreover, the words of Baker and Yeltsin do not have to be read to reach such an absurd result. Baker must have known that at that time the State Department was studying the question of which U.S.-USSR treaties (if any) legally survived the USSR's dissolution, he surely knew that the State Department had not declared the ABM Treaty to be in effect with any state other than the USSR. Indeed, the

339. *Id.*

340. *Id.* at 340.

January 1, 1993 issue of the State Department's official annual listing of treaties in force does not list an ABM Treaty between the United States and Russia. See UNITED STATES DEPARTMENT OF STATE, TREATIES IN FORCE (1993). Moreover, with respect to the USSR, that listing states that the ABM Treaty's status is "under review" in view of the developments in the USSR in 1991. See *id.* at 252-53.

5. *Secretary of State Baker's Remarks Can Be Read as Expressing a Moral or Political Commitment*

Secretary Baker's remarks can be understood as a moral or political commitment to make an ABM treaty that would take into account the changes resulting from the USSR's dissolution and thereby fulfill the object and purpose of the ABM Treaty of 1972. Such a reading not only comports with the reality of changed circumstances, but adheres to the rule that the words of an agreement should be construed in context to avoid producing an absurd result.³⁴¹

In *O'Connor v. United States*, 479 U.S. 27 (1986), the Court rejected the reading of a treaty out of context where that would lead to an "utterly implausible" result. 479 U.S. at 31; see also *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534 (1991) (listing cases standing for the proposition that "when interpreting a treaty, we 'begin with the text of the treaty and the context in which the words are used.'"). See generally Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 28, 29 (1999) (analogizing treaties to contract law); David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 975-1015 (1994) (chronicling the Rehnquist Court's treaty interpretation cases). An ABM treaty that did not place under its

341. See, e.g., *Smith v. Maryland*, 10 U.S. (6 Cranch.) 286, 294 (1810) (citation omitted) ("No construction of a treaty is to be admitted which leads to an absurdity. . . ."); see also *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989) (utilizing textual analysis to resolve conflicting provisions of a treaty); *Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, 533 (1987) (noting that a treaty is "in the nature of a contract between nations.") (quoting *TransWorld Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 253 (1984)); *Air France v. Saks*, 470 U.S. 392, 397 (1985) (ruling that a treaty analysis incorporates both the document's text and the context of the written words).

control the ABM facilities of Ukraine, Belarus, and Kazakhstan would have been absurd because, as Bunn and Rhinelanders observed, it "would change the basic bargain of the ABM Treaty."³⁴²

*6. The Executive Branch's Conduct After January 1992
Independently Shows That Secretary Baker's Words Were Not
Understood to Have Created a Legally Binding ABM Treaty with
Russia.*

The following evidence demonstrates that Secretary Baker's words were not understood to have created a legally binding ABM Treaty:

- Neither the President, the Department of Justice, nor the State Department has ever publicly declared that Secretary Baker's January 29, 1992 response to President Yeltsin created a legally binding ABM agreement with Russia.

- The purpose of Assistant Attorney General Walter Dellinger's Memorandum to John Quinn, Counsel to President Clinton of June 26, 1996, was to establish support for an argument that the ABM treaty of 1972 survived the USSR's dissolution, yet the Memorandum does not even mention the Baker-Yeltsin exchange.

- As recently as October 1997, the Arms Control and Disarmament Agency's Chief Negotiator on the MOU and START II claimed that the conclusions of those agreements in September 1997 preserved and enhanced the "viability" of the ABM Treaty in three ways, the first of which was "by settling the issue of which states of the former Soviet Union are parties to the ABM Treaty." Matt Murphy, *ACDA: Threat Control Through Arms Control*, ST. MAG., Nov./Dec. 1997, at 1.

- The Executive Branch did not register the Baker-Yeltsin exchange with the United Nations, an action that U.N. Charter Article 102 requires of "every international agreement" entered into by a U.N. Member. U.N. CHARTER art. 102, para. 1.

- The State Department has never reported the Baker-Yeltsin exchange to the Congress, as the State Department would be required to do under the Case-Zablocki Act if the State Department considers

342. Bunn & Rhinelanders, *supra* note 338, at 340.

the exchange to constitute a legally enforceable agreement.

In any case, Secretary Baker should be imputed with knowledge of 22 U.S.C. § 2573, which provides in pertinent part as follows:

The Director [of the Arms Control and Disarmament Agency] is authorized and directed to prepare for the President, the Secretary of State, and the heads of such other Government agencies, as the President may determine, recommendations concerning United States arms control and disarmament policy: *Provided, however*, that no action shall be taken under this chapter or any other law that will obligate the United States to disarm or to reduce or to limit the Armed Forces or armaments of the United States, *except pursuant to the treaty making power of the President under the Constitution or unless authorized by further affirmative legislation by the Congress of the United States.* . . .³⁴³

Thus, Secretary Baker knew that the President was statutorily barred from obligating the United States, pursuant to any law, to “limit” the “armaments” of the United States, except pursuant to a Senate-approved treaty or if authorized by “further affirmative legislation.”³⁴⁴ Secretary Baker could not have reasonably read that prohibition as containing a loophole whereby he could legally obligate the United States if he did so in a manner that was not pursuant to a law of the United States.

7. The United States is Not Required by International Law to Denounce a Lapsed Treaty

In testimony before the Senate Foreign Relations Committee, Professor Michael Glennon separately invoked the principle of international law that if a party to a treaty in force wishes to terminate it or to declare it invalid, that party must take an affirmative step toward doing so. *See Ballistic Missiles: Threat and Response: The Legal Status of the ABM Treaty: Hearings Before the Comm. On Foreign Relations*, 106th Cong. 276-79 (1999) (statement of Michael Glennon). That is a correct statement of the rule, but the rule assumes that a treaty is in effect. If no treaty is in effect, there is no treaty to terminate or to declare invalid. When a state becomes

343. 22 U.S.C. § 2573 (1994), amended by Pub. L. No. 103-236, § 709, 22 U.S.C.A. § 2573 (West Supp. 2001) (emphasis added).

344. *Id.*

extinct, all of its bilateral treaties (other than dispositive ones) lapse by operation of law. *See supra* Part IV (D). Hence, when the USSR became extinct, there was no ABM Treaty in effect with the USSR. Indeed, Professor Glennon implicitly conceded this point when he argued that only after Secretary Baker's press statement on January 29, 1992, did a process begin for making the United States a party to a legally binding ABM agreement with Russia.

The difference between denouncing a treaty that is in effect and taking as given that an extinct state's bilateral, non-dispositive treaties have lapsed by operation of law is illustrated by the fact that the drafters of the 1969 Vienna Convention on the Law of Treaties (which includes a provision for giving notification of intention to denounce treaties that are in effect) intentionally avoided dealing with treaty relations in the context of State succession. Article 73 provides: "[t]he provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or . . . from the outbreak of hostilities between States."³⁴⁵

8. Neither Article 34 of the 1978 Vienna Convention on Succession of States in Respect of Treaties nor the Principle That It Exemplifies is Legally Binding on the United States

Professor Glennon also cited Article 34 of the 1978 Vienna Convention on Succession of States in Respect of Treaties as support for his thesis that the Baker-Yeltsin press conference of January 29, 1992, produced a legally binding ABM agreement between the United States and Russia. *See Ballistic Missiles: Threat and Response: The Legal Status of the ABM Treaty: Hearings Before the Comm. On Foreign Relations* at 276-79. The 1978 Vienna Convention, however, does not legally bind the United States because the United States is not a party and because Article 34 of the 1978 Vienna Convention has not passed into customary international law. *See supra* Part IV (H).

9. The United States is Not Estopped to Deny That It Has a Legally

345. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 73.

Binding ABM Treaty with Russia

Citing *Nuclear Tests (Aust. v. Fr.)*, 1974 I.C.J. 253 (Dec. 20), Professor Glennon asserted that the United States is barred from denying that a legally binding ABM agreement between the United States and Russia came into existence. In Professor Glennon's opinion, U.S. officials (Executive Branch and the Congress) made public statements that the ABM Treaty of 1972 was in effect between the United States and Russia. Presumably, Professor Glennon believes Russia would argue that the United States was estopped to deny that it made a legally binding agreement with Russia, but the law of promissory estoppel, like the law on agreements, does not enforce a promise that the promisee knew or should have known was absurd.³⁴⁶

Russia knew or should have known that it would have been absurd for Secretary Baker to have promised that the United States would abjure a defense against ICBMs irrespective of whether the three ICBM powers (Ukraine, Belarus, and Kazakhstan) were legally bound as tightly as the United States and Russia allegedly were bound to obligations of the character imposed by the ABM Treaty of 1972. Moreover, Russia knew or should have known of the practice of States of making commitments that are not legally binding, though they may have moral or political effect.

The distinction between legally binding agreements and agreements having only political or moral effect is a recognized part of international law. See MALCOLM N. SHAW, *INTERNATIONAL LAW* 635-36 (4th ed. 1997); 3 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 606-12 (Rudolf Bernhardt et al. eds., 1997); Marian Nash (Leich), *Contemporary Practice of the United States Relating to International Law*, 88 AM. J. INT'L L. 89 (1994) NOT A RESPONSIVE SOURCE; Oscar Schachter, *Editorial Comment, The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L. 296 (1977) (commenting that international agreements are not legally binding if parties do not intend to create legal rights and

346. See, e.g., *Principal Mut. Life Ins. Co. v. Charter Barclay Hosp., Inc.*, 81 F.3d 53, 57 (7th Cir. 1996) (finding reliance must be reasonable to invoke promissory estoppel); *Wilsmann v. Upjohn Co.*, 865 F.2d 1269 (6th Cir. 1989) (unpublished opinion) (holding that promissory estoppel is not an available remedy if the alleged obligation appears to be totally implausible).

obligations); David A. Koplow, *When is an Amendment Not an Amendment? Modification of Arms Control Agreements Without the Senate*, 59 U. CHI. L. REV. 981, 1005-06 (1992) (stating that the President has occasionally made policy through non-binding political agreements or through the exchange of revocable "statements of intention"). In short, Russia cannot make a case that it understood that the United States, by means of Secretary Baker's oral comments, had legally foregone its right to develop a defense against ICBMs.

10. The Nuclear Tests Case Decision of the International Court of Justice Does Not Support a Conclusion That Secretary Baker Intended to Make a Legally Binding ABM Treaty with Russia

Professor Glennon cites *Nuclear Tests (Aust. v. Fr.)* in support of his estoppel argument. This case, however, does not depart from, and indeed does not address, the rule that words should be interpreted so as to avoid (to the extent possible) an absurd construction. The case involves an interpretation of statements by the government of France that it intended to end atmospheric nuclear testing in the Pacific after the summer of 1974. France did not appear in the proceedings. After Australia filed its claim, France announced several times that, it did not intend to conduct atmospheric nuclear tests after 1974. France's announcement included a proviso: "[t]hus, the atmospheric tests which are soon to be carried out will, *in the normal course of events*, be the last of this type." *Nuclear Tests*, 1974 I.C.J. at 266 (emphasis added). Australia tried to convince the Court that France's announcements were inadequate because a proviso therein left France free to resume testing. Therefore, Australia argued, France's announced intention to end testing was not by itself legally binding. *Id.* at 268-69. The Court disagreed: "[t]he Court finds that the unilateral undertaking resulting from [France's] statements cannot be interpreted as having been made in implicit reliance of an arbitrary power of reconsideration." *Id.* at 270. The Court ruled that France's announcement gave Australia all the relief it sought in Court, *i.e.*, an unambiguous promise to end the testing, and Australia's claim therefore need not be given further consideration. *Id.* at 272. *Nuclear Tests* involved an interpretation of a particular state's announcement of a particular commitment, not the establishment of a broad rule that every state's announcement of a commitment on any subject must be read as intending to create a legally binding obligation. In any event,

to the extent that the Court opined on the method of interpreting the promise of a state, it cautioned that when the “[s]tates make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.” *Id.* at 267.

VI. CONCLUSION

The ABM Treaty was a bilateral, non-dispositive treaty. In accordance with longstanding principles of international law, expounded with remarkable consistency by numerous officials and scholars from various countries over hundreds of years, when the USSR became extinct, its bilateral, non-dispositive treaties lapsed. Hence, the ABM Treaty lapsed by operation of law —that is, automatically — when the USSR dissolved in 1991. It did not become a treaty between the United States and the Russian Federation.

APPENDIX A

*Constitutionally-Allocated Powers of Each Branch of the U.S.
Government Regarding "Foreign Relations," "Foreign Affairs,"
"Foreign Policy," or "External Relations"*

		Branch		
		Executive	Legislative	Judicial
A.	Power to make law without the consent of another Branch			
i.	By veto override to regulate commerce with foreign nations, U.S. CONST. art. I, § 8, cl. 3. ³⁴⁷	No	Yes	No
ii.	By veto override to provide for the common defense, U.S. CONST. art. I, § 8, cl. 1.	No	Yes	No
iii.	By veto override to establish a uniform rule of naturalization, U.S. CONST. art. I, § 8, cl. 4.	No	Yes	No
iv.	By veto override to regulate the value of foreign coin, U.S. CONST. art. I, § 8, cl. 5.	No	Yes	No
v.	By veto override to define and punish piracies and felonies committed on the high seas, U.S. CONST. art. I § 8, cl. 10.	No	Yes	No

347. As of March of 1995, Presidents had exercised the veto power 2,513 times. The Congress overrode the veto 104 times. 141 Cong. Rec. S4426 (daily ed. Mar. 23, 1995) (statement of Senator Leahy). Between 1975 and 1998 the President vetoed bills 226 times. Noteworthy statutes created by override include the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737; Cable Television Consumer Protection and Competition Act of 1992, Publ. L. No. 102-385, 106 Stat. 1460; Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 27; Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7; Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086; the War Powers Resolution Act of 1973, Pub. L. No. 93-148, 87 Stat. 555; Labor Management Relations Act of 1947 (Taft-Hartley Act), Pub. L. No. 80-101, 61 Stat. 136.

		Executive	Legislative	Judicial
vi.	By veto override to define offenses against the law of nations, U.S. CONST. art. I, § 8, cl. 10.	No	Yes	No
vii.	By veto override to make rules concerning captures on land and water, U.S. CONST. art. I, § 8, cl. 11.	No	Yes	No
viii.	By veto override to raise and support armies, U.S. CONST. art. I, § 8, cl. 13.	No	Yes	No
ix.	By veto override to make rules for the government and regulation of the land and naval forces, U.S. CONST. art. I, § 8, cl. 14.	No	Yes	No
x.	By veto override to provide for calling forth the militia to execute the laws of the Union, suppress insurrection, and repel invasion, U.S. CONST. art. I, § 8, cl. 15.	No	Yes	No
xi.	By veto override to exercise exclusive legislation over all places purchased by the consent of the legislature of a state, for the erection of forts, magazines, arsenals, and dockyards, U.S. CONST. art. I, § 8, cl. 17.	No	Yes	No
xii.	By veto override to make all laws necessary and proper for carrying into execution the powers listed above, and all other powers vested by the Constitution "in the Government of the United States or in any Department of officer thereof," e.g., the President, and the departments and officers conducting foreign policy, U.S. CONST. art. I, § 8, cl. 18	No	Yes	No
xiii.	By veto override to appropriate funds for foreign-policy activity of the office of the President, and of any other part of the Government, U.S. CONST. art. I, § 9, cl. 7.	No	Yes	No

		Executive	Legislative	Judicial
xiv.	By veto override to vest the appointment of inferior officers in the President alone, the courts of law, or the heads of departments, U.S. CONST. art. II, §2, cl. 2.	No	Yes	No
B.	Power that can be exercised other than by the making of law.			
i.	To declare war, U.S. CONST. art. I, § 8, cl. 11.	No	Yes	No
ii.	To grant letters of Marque and Reprisal, U.S. CONST. art. I, § 8, cl. 11.	No	Yes	No
iii.	By a two-thirds vote to remove an officer of another Branch (including an officer who exercises D85 foreign-policy power) upon that officer's impeachment and conviction of a designated offense, U.S. CONST. art. I, § 3, cl. 6, 7.	No	Yes	No
iv.	To permit any officer-holder of the United States to accept a present emolument, office or title from any King, Prince or foreign state, U.S. CONST. art. I, § 9, cl. 8.	No	Yes	No
v.	To permit a state to lay imposts or duties on imports or exports (except as necessary to execute its inspection laws), U.S. CONST. art. I, § 10, cl. 2.	No	Yes	No
vi.	To revise and control state inspection laws as they relate to imposts or duties on imports or exports, U.S. CONST. art. I, § 10, cl. 2.	No	Yes	No
vii.	To permit a state to lay a duty on tonnage, U.S. CONST. art. I, § 10, cl. 3.	No	Yes	No
viii.	To permit a state to keep troops or ships of war in time of peace, U.S. CONST. art. I, § 10, cl. 3.	No	Yes	No
ix.	To permit a state to enter into an agreement or compact with a foreign power, U.S. CONST. art. I, § 10, cl. 3.	No	Yes	No

		Executive	Legislative	Judicial
x.	To permit a state to engage in war notwithstanding that the state has not been actually invaded or in such an imminent danger as will not admit of delay. U.S. CONST. art. I, § 10, cl. 3.	No	Yes	No
xi.	To propose amendments to the Constitution (not excluding amendments relating to foreign-policy matters). U.S. CONST. art. V.	No	Yes	No
xii.	Upon application of the legislatures of two-thirds of the states, to call a convention to propose amendments to the Constitution, U.S. CONST. art. V.	No	Yes	No
C.	Power, without participation of another Branch, to make a treaty	No	No	No
D.	Power, with participation of another Branch, to make a treaty, Art. II Sec. 2, Cl. 2	Yes	Yes	No
E.	Power to interpret treaties definitively irrespective of the view of another Branch, Art. VI Sec. 2 with U.S. CONST. art. III, § 2.	No	No	Yes
F.	Power, without participation of another Branch, to amend a treaty	No	No	No
G.	Power, with participation of another Branch, to amend a treaty, U.S. CONST. art. II, § 2, cl. 2.	Yes	Yes	No
H.	Executive Power, U.S. CONST. art. II, § 1.	Yes	No	No
I.	Power attaching to the office of Commander in Chief of the Army and the Navy, and of the state militias when called into active service of the United States, U.S. CONST. art. II, § 2, cl. 1.	Yes	No	No
J.	Power, with participation of another Branch, to appoint ambassadors, U.S. CONST. art. II, § 2.	Yes	No	No

		Executive	Legislative	Judicial
K.	Power, without participation of another Branch, to fill vacancies that occur during a Senate recess, U.S. CONST. art. II, § 2, cl. 3.	Yes	No	No
L.	Power, without participation of another Branch, to receive ambassadors and other public ministers, U.S. CONST. art. II, § 3.	No	No	No
M.	Power, without participation of another Branch, to take care that the laws (including those relating to foreign policy) be faithfully executed, U.S. CONST. art. II, § 3.	Yes	No	No
N.	Power, without participation of another Branch, to commission all officers of the United States (including those whose duties relate to foreign policy), U.S. CONST. art. II, § 3.	Yes	No	No
O.	Judicial power with respect to cases arising under treaties, U.S. CONST. art. III, § 2, cl. 1.	No	No	Yes
P.	Judicial power with respect to cases affecting ambassadors, other public ministers, and consuls, U.S. CONST. art. III, § 2, cl. 1.	No	No	Yes
Q.	Judicial power with respect to cases of admiralty and maritime jurisdiction, U.S. CONST. art. III, § 2, cl. 1.	No	No	Yes
R.	Judicial power with respect to a controversy between a state or citizens thereof of a state and foreign states, citizens or subjects, Art. 111 Sec. 2 Cl. 1. citizens or subjects, U.S. CONST. art. III, § 2, cl. 1.	No	No	Yes