

1998

All Fall Down: The Treaty Power in the Clinton Administration

Phillip R. Trimble

Alexander W. Koff

Recommended Citation

Phillip R. Trimble and Alexander W. Koff, *All Fall Down: The Treaty Power in the Clinton Administration*, 16 BERKELEY J. INT'L LAW. 55 (1998).

Available at: <http://scholarship.law.berkeley.edu/bjil/vol16/iss1/3>

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of International Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

All Fall Down: The Treaty Power in the Clinton Administration*

By

Phillip R. Trimble† and Alexander W. Koff††

For the United States to play an optimum leadership role in an increasingly interdependent world, the President must prevail over the conservative, isolationist minority in the Senate that has plagued U.S. participation in world affairs throughout this century. Yet in less than two months last year, the Clinton administration made four significant concessions of constitutional principle that, if repeated in the future, could significantly alter the constitutional balance between the President and the Senate affecting treaties. The presidential foreign relations powers affecting international agreements are among the most important executive branch powers, and the globalization of economic and political relations has increased their importance.

The Treaty Power is a presidential power. Article II of the Constitution places the power to “make” treaties in the President, subject to the advice and consent of the Senate by a vote of two-thirds of the Senators present. Under the Constitution, the role of the Senate ends when it consents to the President’s making of a treaty. Moreover, under the Vesting Clause of Article II¹ and the implied foreign relations power² the President has the power to interpret and administer the operation of treaties. Historically, the executive branch has concluded treaty amendments of a technical, administrative or minor substantive nature on the basis of its own constitutional authority, and has likewise adjusted treaty relations to take account of the break-up of states and state succession. In addition, the executive branch has historically exercised its prerogative to determine whether to seek required legislative support for international agreements through the Article II procedure or, alternatively, an act of Congress. In its interaction with the Senate over adjustment of two major arms control treaties,

* The title is inspired by *Insekta*, a music theatre work by Diamanda Galas directed by Valeria Vasilevski. It is also the title of Gary Sick’s 1985 book recounting the last Democratic President’s major foreign policy debacle (the Iran Hostage crisis). This article grew out of a paper suggested by Professor Trimble to Mr. Koff for a seminar at the University of Michigan Law School in the Fall 1995 semester. Part C of this article is based on Mr. Koff’s paper as subsequently revised both by him and by Professor Trimble. The rest of the article is solely Professor Trimble’s responsibility.

† Professor of Law, University of California, Los Angeles.

†† Member, D.C. Bar and New York State Bar.

1. “The executive power shall be vested in a President of the United States of America.” U.S. CONST. art. II, sec. 1.

2. See *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320-21 (1936).

however, the Clinton Administration may have contributed to the erosion of executive prerogative on all these points. From the perspective of engaged internationalists, we regret this potential erosion of executive power, and the concomitant increased influence the conservative, isolationist minority of the American political community now wields over important policy matters. At the same time, the highly politicized nature of arms control and the political weakness of the Clinton presidency may offer some hope for limiting the precedential weight of these concessions. The developments recounted in this article graphically illustrate the highly political nature of foreign relations law, and the vulnerability of the constitutional balance to political weakness.

The Clinton Administration has made a series of unfortunate concessions to the legislative branch. By agreeing to submit the CFE Flank Agreement³ to the Senate for its approval under Article II of the Constitution, abandoning its earlier decision to seek simple legislative approval from both houses of Congress,⁴ the President made two conceptually distinct concessions. First, he acceded to the Senate's hitherto unsupportable position that "militarily significant" agreements had to be submitted to the Senate as Article II treaties rather than to Congress as congressional-executive agreements. Second, he failed to preserve the prerogative to choose which Constitutional procedure—Article II or an Act of Congress—to follow. The Clinton administration's concession was meekly qualified⁵ but the end result was that the President capitulated to an assertion of Senate power that is unsupported by history and that exceeds the expansive, and unsuccessful, claims made by the Senate in the National Commitments Resolution⁶ in the Vietnam era. The President thereby set a poor precedent that not only expands the role of the Senate and the power of its conservative "blocking third", but also undercuts the Executive's traditional authority to choose the constitutional procedure by which to bring an international agreement into force.

Third, the Administration accepted the Senate's position that the Executive cannot subsequently change "shared understandings" between the executive branch and the Senate at the time of a ratification vote. In this case, the change in question may or may not have been a minor treaty amendment that under prior precedents the President could have made on the basis of his constitutional executive and foreign relations authorities. Because it involved a change in the text of the agreement, and because important military realignments were at stake, the change probably did not qualify as a "minor" amendment. Consequently the Executive probably should have sought Senate or congressional approval. The end result may therefore be legally appropriate. The unfortunate

3. The Flank Agreement updates the Treaty on Armed Conventional Forces in Europe, 40 I.L.M. 1 (1990) [hereinafter CFE Treaty].

4. Letter from Samuel R. Berger, Assistant to the President for National Security Affairs, to Trent Lott, Majority Leader of the Senate, dated March 25, 1997, quoted in *THE ARMS CONTROL REPORTER* 1997 at 603.D.45.

5. The concession was "without prejudice to its legal position *vis-à-vis* the approval options we believe are available to us." *Id.* This language hardly conveys a sense of importance. One might have expected an executive branch lawyer to state that the options *are* or at least *have been* available to the President under established constitutional practice.

6. S. REP. NO. 91-129 (1969).

aspect of the Administration's decision is that President Clinton accepted as a correct statement of constitutional law the dubious "Biden Condition" that grew out of President Reagan's misguided attempt to amend the Treaty on the Limitation of Anti-Ballistic Missile Systems⁷ unilaterally under the guise of a "reinterpretation" of the treaty.⁸ The Biden Condition restricts the Executive's ability to change treaty interpretation if it has made an "authoritative statement" concerning the meaning of a treaty to the Senate during the ratification process such that there is a "shared understanding" of that meaning. The condition apparently applies even if the treaty adjustment is based on changed circumstances and is entirely uncontroversial. The consequence of this concession may be to restrict the future ability of the Executive to adjust treaty relations in the normal course of diplomacy.

Finally, the President agreed to and then complied with a Senate condition that was both unrelated to the treaty under consideration and perhaps unconstitutional as well.⁹ Condition 9 requires the President to submit an agreement that will multilateralize the ABM Treaty to the Senate for advice and consent.¹⁰ When the Senate consents to ratification of a treaty, it may without question attach conditions to its consent that relate to the treaty obligations that it accepts and, more controversially, to associated domestic matters and the domestic effect of the treaty in question. On the other hand, the Senate presumably cannot condition its consent, at least as a formal legal matter, to presidential action wholly unrelated to the treaty. Condition 9 in the Senate's resolution of ratification of the CFE Flank Agreement falls in the middle in that it relates to an entirely different treaty, although that treaty also deals with arms control and is therefore loosely related to the subject matter of the CFE Flank Agreement. Senate Condition 9 is accordingly of dubious constitutionality.

More problematic, the other agreement affected by Condition 9 would adjust the operation of the ABM Treaty to take account of the break-up of the Soviet Union. Normally such matters involving the succession of states would be settled by executive agreement and the President's constitutional foreign affairs authority.¹¹ Historically, this had been an uncontroversial executive function, but Condition 9 requires the President to treat it as an Article II treaty and submit it to the Senate.

Part A of this article outlines the legal background regarding the President's authority to choose, among equally legitimate constitutional alternatives, the procedure to be followed in concluding an international agreement. Part B sketches the law governing the interpretation and amendment of treaties, including the Reagan administration's attempt to "reinterpret" the ABM Treaty and the

7. Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3435 [hereinafter ABM Treaty].

8. See David A. Koplow, *Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties*, 137 U. PA. L. REV. 1353, 1366 (1989) (discussing the controversy over Reagan's attempt).

9. THE ARMS CONTROL REPORTER 1997 at 407.B.561.

10. 143 CONG. REC. S4452 (Biden).

11. *Id.* at 45-46.

history of the "Biden Condition" which forms the immediate context for one of the Clinton concessions. Part C explains the issues growing out of the CFE Flank Agreement. Part D deals with "Condition 9." Part E concludes, describing the potential consequences arising from the Clinton Administration's concessions.

A. *Legal Background*

Under American constitutional practice, the President has the exclusive power to negotiate international agreements on behalf of the United States. Congress, the Senate or individual members may well have an impact as a practical matter on those decisions, but as a matter of formal law the President has exclusive constitutional authority to open a treaty negotiation and to control the process of the negotiation itself. Upon successful conclusion of a negotiation, the President must decide which constitutional procedure to use to secure the necessary domestic law authority to support his decision to bring the treaty into force as an obligation of the United States. Traditionally, the President chooses between submitting the agreement to the Senate for its approval in accordance with Article II of the Constitution, or relying for approval on an act of the whole Congress, or, on some occasions, relying on the President's foreign relations power. Arms control agreements have historically been concluded on the basis of each of these three alternatives, and agreements to take account of state secession have historically been based on the President's constitutional affairs authority.¹²

The President may elect to submit the agreement as an Article II treaty to the Senate for its advice and consent to ratification by a vote of two-thirds of the Senators present. Article II is the only provision in the text of the Constitution that expressly provides authority for the conclusion of international agreements by the United States.

Nevertheless, the Constitution does not require the President to use Article II. The President may alternatively seek congressional authorization of an international agreement by joint resolution or act of Congress, which requires a majority vote of both Houses, or he may use existing legislation as a basis for ratification of the agreement. These congressional-executive agreements provide an alternative procedure that is accepted as constitutionally equivalent to the Article II procedure, and which has been used from time to time for arms control agreements.¹³

Although there is no direct authority in the text of the Constitution for such agreements, the parts of the text that limit the authority of states to conclude treaties refer to "agreement or compact." This reference implies that the Framers contemplated international agreements concluded by means other than the Article II procedure. Because the Constitution grants the Federal Government

12. THE ARMS CONTROL REPORTER 1997 at 407.B.561.

13. See generally Jack S. Weiss, *The Approval of Arms Control Agreements as Congressional-Executive Agreements*, 38 UCLA L. REV. 1533 (1991).

full foreign relations authority, it is more than likely that the original implicit understanding of the Vesting Clause was that the President would receive the foreign relations powers subsumed in Locke's federative power and exercised by the Crown. Such powers, however, would be subject to the very substantial qualifications of Senate participation and the equally substantial checks of the legislative and appropriations powers of Congress. The conclusion of international agreements other than "treaties" in the constitutional sense was one such power, and the power of the President to conclude congressional—executive agreements has been exercised regularly since President Washington's time¹⁴ with the endorsement of the Supreme Court.¹⁵

After World War II, some internationalist academics argued that the congressional-executive agreements were not only constitutionally legitimate, but also entirely equivalent to Article II treaties as a matter of constitutional law, and the two forms were therefore completely interchangeable.¹⁶ Their concern was to avoid a repetition of the experience with the Treaty of Versailles in which a conservative minority in the Senate blocked American participation in the League of Nations. American internationalists feared a reversion to our traditional isolationism after World War II. They desired to maximize the ability of the United States to participate in the post-war international institution-building without the potential roadblock created by the Article II requirement of a two-thirds vote which gives a conservative minority the ability to dictate policy. At that time several important agreements, such as those authorizing U.S. participation in the World Bank and the IMF, were concluded as congressional-executive agreements rather than as Article II treaties. Since then Congress has on several occasions acknowledged in legislation that the two procedures are equally permissible, notably in Section 33 of the Arms Control and Disarmament Act,¹⁷ and in the Case-Zablocki Act.¹⁸ One of the first major nuclear arms reduction agreements, SALT I,¹⁹ was concluded as a congressional-executive agreement. Most recently, U.S. accession to the WTO stimulated a major debate over the constitutional equivalence of congressional-executive agreements and Article II treaties.²⁰ The prevailing view was that, at least in the area of trade, the two

14. See CONGRESSIONAL RESEARCH SERVICE, *Constitutionality of Entering Uruguay Round Agreements by Means of Congressional-Executive Agreement Rather Than by Treaty*, Sept. 20, 1994 (on file with Professor Trimble).

15. Field v. Clark, 143 U.S. 649 (1892); Altman & Co. v. U.S., 224 U.S. 583 (1912).

16. Myres S. McDougal and Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181 (1945).

17. See Arms Control and Disarmament Act sec. 33, 22 U.S.C. § 2573 (1988) which provides that certain arms control agreements may be concluded only pursuant to Article II or Congressional legislation, thereby implying their equivalence. See Phillip R. Trimble and Jack M. Weiss, *The Role of the President, the Senate and Congress with respect to Arms Control Treaties concluded by the United States*, 67 CHI.-KENT L. REV. 645 (1992).

18. The Case-Zablocki Act, 1 U.S.C. § 112b (1988), requires submission of both types of agreements to Congress.

19. See 23 U.S.T. 3462, T.I.A.S. No. 7504.

20. See CONGRESSIONAL RESEARCH SERVICE, *supra* note 14, and Statements of Professors Ackerman, Golore, Tribe and Parker to Senate Commerce Committee, Oct. 18, 1994, Fed. Doc. Clearing House Cong. Testimony.

procedures are equivalent. Until President Clinton's concession the choices seemed open for arms control agreements as well.

Although some members of the Senate have expressed the view that major treaties must be concluded under Article II, the historical record does not support that contention. Congressional-executive agreements concluded during the nineteenth century, for example, were of great importance to the nation. The treaty finalizing the annexation of Texas, upon its rejection by the Senate, was subsequently approved by a joint resolution of both houses of Congress;²¹ the Supreme Court upheld this congressional action.²² Likewise, a joint resolution of Congress accomplished the annexation of Hawaii after the Senate failed to ratify a treaty of annexation.²³ Significant international agreements in the early twentieth century were also approved as congressional-executive agreements. After the Senate failed to ratify the Treaty of Versailles ending World War I, Congress declared the end of the war by a joint resolution.²⁴ Congress also passed a joint resolution approving the entry of the United States into the International Labor Organization.²⁵ After World War II, Congress authorized U.S. participation in the World Bank and the International Monetary Fund through congressionally-approved agreements, and most trade agreements have been based on congressional authority rather than Article II.²⁶ The use of executive agreements has grown dramatically in the twentieth century. From 1939 to 1982, the United States concluded 608 Article II treaties and 9,548 executive agreements.²⁷ In 1982 alone the United States concluded 372 executive agreements and only seventeen Article II treaties.²⁸

As a practical matter, the choice of constitutional procedure by the President has been at least in part a political choice. Nevertheless, historical factors most often seem to explain the choice of procedure. In the past, international agreements dealing with arms control and military alliances have almost always been submitted to the Senate as Article II treaties. Nevertheless, President Bush maintained the right to submit the U.S.-U.S.S.R. bilateral Chemical Weapons Agreement to Congress as a congressional-executive agreement.²⁹

President Clinton is naturally following tradition by making his decisions for political reasons. Reversing course only makes the political nature of the decisions more transparent, and unfortunately reveals President Clinton's political weakness. From the point of view of an engaged internationalist, it is nevertheless unfortunate that the President did not insist on using legislative authorization for the CFE Flank Agreement for two reasons: First, because he thereby seemed to accept to the Senate's position that militarily important agree-

21. 5 Stat. 797 (1845).

22. *Texas v. White*, 74 U.S. 700 (1868).

23. *See* 30 Stat. 750 (1898).

24. 42 Stat. 105 (1921).

25. 48 Stat. 1182 (1934).

26. *See* CONGRESSIONAL RESEARCH SERVICE, *supra* note 14.

27. L. JOHNSON, *THE MAKING OF INTERNATIONAL AGREEMENTS* 3-19 (1986).

28. *Id.*

29. *See* Weiss, *supra* note 13.

ments must be authorized under Article II; and, second, because he lost a chance to reinforce the interchangeability of congressional-executive agreements and Article II treaties, which is important to contain the influence of the conservative wing of the Senate.

At one time it apparently seemed possible that the President would not even have to get congressional approval, let alone a 2/3 vote in the Senate, for the CFE Flank Agreement, but instead could rely on executive authority alone. The President has authority to interpret treaties and amend them in minor ways. The changes in the CFE Treaty accomplished by the CFE Flank Agreement were characterized as “redrawing a map” that was not even part of the original CFE Treaty. The Executive could have relied on its authority to reinterpret or modify treaties. However, such a move would recall the Reagan administration’s attempt to modify the understanding of an important term in the ABM Treaty. The Clinton attempt to change the CFE Treaty encountered similar problems in the Senate. We address the background of the executive branch—Senate controversy over treaty interpretation and amendment in Part B, and describe the problems in modifying the CFE Treaty in Part C.

B. Treaty Interpretation and Amendment

Once a treaty has been ratified, the President oversees its implementation, monitors compliance with its norms, and asserts rights that the United States may have under it. This activity is based on his duty to execute the laws and, more persuasively, on the Vesting Clause and the President’s foreign relations power. In this regard the President has the power to interpret the treaty, either unilaterally or in agreement with treaty partners. The power to interpret has been an executive function since the era of President Washington, and is not ordinarily controversial. In addition, after the Senate or Congress gives any necessary approval for the President’s ratification of an international agreement, it is well-established doctrine that the legislators have no further role with respect to its interpretation. A congressional or Senate declaration or opinion has no more authority than the interpretation of a statute by a subsequent Congress.

A reinterpretation of an ambiguous treaty term can have the same effect as an amendment of that term. Whereas interpretation is an executive prerogative, amendment is tantamount to making a new agreement, which may require legislative or Senate authorization. The Constitution, however, does not require such authorization for every formal change, no matter how insignificant, in a treaty text. Indeed, per established practice, the executive branch possesses the power to make minor or technical amendments to a treaty on the basis of the President’s foreign affairs authority.³⁰ But where the line between a minor amendment and a significant change is drawn remains unclear. It would seem at a minimum to depend on the importance of the matter to Congress or the Senate.

30. David A. Koplow, *When Is an Amendment Not an Amendment? Modification of Arms Control Agreements without the Senate*, 59 U. CHI. L. REV. 981, 1008-31 (1992) (discussing various amendments of international treaties).

President Reagan's attempt to "reinterpret" the ABM Treaty presented a graphic instance of this problem. The reinterpretation controversy involved the 1972 U.S.-U.S.S.R. ABM Treaty.³¹ When President Nixon submitted the ABM Treaty to the Senate for its advice and consent to ratification, executive branch officials told the Senate that the treaty prohibited the development and testing of space-based ABM systems based on "other physical principles" than those existing in 1972, such as lasers. Thirteen years later the Reagan Administration "reinterpreted" the treaty to permit the development and testing of those space-based ABM systems. However, several senators, former officials who negotiated the treaty and academic commentators vigorously disputed the Administration's case, contending that the Executive was attempting to amend the treaty under the guise of reinterpretation. Moreover, the amendment was unilateral and removed a major restraint imposed by the treaty. Congress thereupon used its legislative and appropriations powers to force the executive branch to limit development and testing of ABM systems to activities permitted under the original interpretation.

In addition to the controversy over the substantive question of how the ABM Treaty should be interpreted, the ABM reinterpretation attempt sparked a dispute over the constitutional limits on presidential interpretation power.³² The Senate considered, but declined to adopt, Senate Resolution 167,³³ which was a general resolution stating that the meaning of a treaty cannot be unilaterally changed by the President from "what the Senate understands the treaty to mean when it gives its advice and consent to ratification."³⁴ After another round of debate of the constitutional issue, the Senate attached a similar condition (the "Biden Condition") in its consent to ratification of the 1987 U.S.-U.S.S.R. Treaty on the Elimination of Intermediate-range and Shorter-range Missiles,³⁵ but the condition was only applicable to the INF Treaty. In both cases it was clear that the Senate considered, but declined to adopt, the general principles of constitutional law embodied in the Biden Condition, and of course the President did not accept them either.

In ratifying the CFE Treaty, however, the Senate finally adopted a general Declaration embodying the Biden Condition: "[T]he Senate affirms the applicability to all treaties of the constitutionally-based principles of interpretation set forth in [the INF Treaty's] resolution of ratification."³⁶ The Senate also added a new principle of constitutional law, to the effect that international agreements that "reduce or limit the armed forces or armaments of the United States in a

31. ABM Treaty, *supra* note 7.

32. For a more detailed account, see Phillip R. Trimble, *The Constitutional Common Law of Treaty Interpretation*, 137 U. PA. L. REV. 1461 (1989).

33. S. Res. 167, 100th Cong. (1987).

34. *Id.*

35. Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of their Intermediate-Range and Shorter-Range Missiles, December 8, 1987, 27 I.L.M. 90 [hereinafter INF Treaty].

36. 137 CONG. REC. S17845-46 (daily ed. Nov. 23, 1991).

militarily significant manner"³⁷ can only be approved pursuant to the Article II treaty power. The Report of the Foreign Relations Committee explained:

In attaching this declaration, the committee intends to make clear that it will consider militarily significant agreements only as treaties. The prominent case in point is the recently signed bilateral agreement on chemical weapons. That agreement imposes a permanent ban on the production of chemical weapons. As such, it is a militarily significant agreement that should be a treaty, and the committee intends to consider it as such if it is forwarded to the Senate. This declaration thus serves to put the administration on notice that it should proceed henceforth to submit any agreement on chemical weapons as a treaty."³⁸

These declarations were authoritative expressions of the Senate's views, but would not necessarily be persuasive as constitutional precedent. But President Clinton's actions may contribute to a change of that.

C. *The CFE Treaty*

The Treaty on Armed Conventional Forces in Europe (CFE Treaty) was signed on November 19, 1990, after roughly two decades of negotiations between NATO and the Warsaw Pact.³⁹ The parties designed the CFE Treaty to reduce the dangers of large-scale conventional warfare by placing substantial limits on conventional armaments, destruction of equipment in excess of those limits, and an intrusive verification regime. Its area of application was limited to Europe—from the Atlantic Ocean to the Ural Mountains (ATTU). Its limitations were not applied to individual countries but rather to "groupings of States Parties." In ratifying the treaty, each individual state was assigned to one of two groups—NATO or the Warsaw Pact. Each grouping agreed to stay below the overall armament limits established in Articles IV and V but could allocate this limit among its members, limited only by the terms of the Treaty. New states admitted to the CFE Treaty regime from the territory of the former Warsaw-Pact countries (such as Georgia) were subject to the Warsaw-Pact group's overall limitations.

The CFE Treaty is extraordinarily complicated. One scholar noted that its provisions "fill a small book, and the initial data exchange prompted by it has generated several more."⁴⁰ In the course of the floor debate many Senators remarked on the complexity and potential imprecision of the treaty. One stated that it is "a nitpicker's paradise."⁴¹ At the time of signing, twenty-two nations were involved in the negotiations. Since the collapse of the Soviet Union, the number of CFE signatories has swelled to thirty.

President Bush submitted the treaty to the Senate for its advice and consent to ratification on July 9, 1991. The Senate Foreign Relations Committee (SFRC) unanimously approved a resolution of ratification containing five bind-

37. *Id.* at S17846.

38. S. EXEC. REP. No. 22, 102d Cong., 65 (1991).

39. *See* CFE Treaty, *supra* note 3.

40. Koplow, *supra* note 30, at 981, 990, n.33-34.

41. *The CFE Treaty: Hearings before the Subcommittee on European Affairs of the Committee on Foreign Relations*, 102 Cong., 1st Sess. at 27 [hereinafter *CFE Hearings*] (Senator Biden's introductory remarks).

ing conditions and four declarations on November 19, 1991. Four of the conditions related to various kinds of Soviet military equipment and data. A fifth condition addressed the possibility that a successor state to the obligations of the Soviet Union such as Ukraine, Georgia, or Russia itself, might not opt to be bound by the CFE Treaty. The international law of state succession was interpreted by the Third Restatement of Foreign Relations Law⁴² to permit such an option, although customary international law was unclear on the point. In view of this uncertainty, the Senate made it clear that should a state opt not to be a party to the CFE Treaty, the President “shall consult with” the Senate. If the President determines that such state’s military holdings are of such significance as to constitute a changed circumstance affecting the object and purpose of the Treaty—such as if Russia or the Ukraine decided to not observe the treaty—then the President was directed to submit changes in obligations of states parties, other than changes of minor matters, for the Senate’s advice and consent. This condition reflects a sensible distinction between major changes and minor changes, with only the former amendments requiring new advice and consent.

The Senate also added a declaration on treaty interpretation. Continuing its devotion to the Biden Condition, the Senate “affirm[ed] the applicability to all treaties of the constitutionally-based principles of treaty-interpretation” articulated in condition (1) of the INF Treaty’s resolution of ratification. In addition, the Senate expressed its intention to consider “militarily significant agreements only as treaties” as opposed to executive agreements.

As the Senate considered the CFE Treaty, the cold war was over, the Warsaw Pact was defunct, and the Soviet Union was disintegrating, with significant effect on the object, purpose, and interpretation of the CFE Treaty. The heart of the CFE Treaty interpretation problem is found in Article V. Article V governs weapons permitted in the “flank” zones. Primarily concerned with the threat of war on the European plain, the treaty negotiators designed a system of regional sublimits to eliminate the capability to wage large-scale offensive war in Europe. The Treaty defines four “zones” with special sublimits on the number of active and stored units that could be deployed in each. The three central zones—emanating from Germany and moving outward to the Atlantic and to the Urals, respectively—are concentric: the inner zones are wholly contained within the outer ones and have lower ceilings. The fourth flank zone—covering the flank areas—is divided between territory in northern and southern Europe. Concerned that the thrust of the treaty would lead to military buildups near their borders, Norway and Turkey strongly advocated the creation of this fourth zone and its restrictive ceiling.

The text of article V is as follows:

Article V

1. To ensure that the security of each State Party is not affected adversely at any stage:
 - (A) within the area consisting of the entire land territory in Europe, which includes all the European island territories, of the Republic of Bulgaria,

42. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW (1987).

the Hellenic Republic, the Republic of Iceland, the Kingdom of Norway, Romania, the part of the Republic of Turkey within the area of application and that part of the Union of Soviet Socialist Republics comprising the Leningrad, Odessa, Transcaucasus and North Caucasus Military Districts, each State Party shall limit, as necessary, or reduce its [specified equipment] . . . for the group of States Parties to which it belongs [so that it does not exceed . . . : [the specified limits].

The disintegration of the Soviet Union, however, meant that six new states shared the old Soviet entitlement. Armenia, Azerbaijan and Georgia comprise the old Transcaucasus military district (MD); Moldavia and the southern quarter of Ukraine comprise the Odessa MD; and the Leningrad and North Caucasus MDs are the northern and southern parts of European Russia, respectively. The entitlements of Armenia, Azerbaijan, Georgia and Moldavia are individually quite small in the overall Treaty framework but together they comprise roughly thirty percent of the former Soviet Union's allotment. Russia and Ukraine possess the bulk of the entitlement, but the problem is that they are permitted to hold only a very small proportion of their total entitlement to *active* equipment in the "flank zone." The result is that Ukraine may only keep eight percent of its entitlement in the southern one-fourth of its territory; and Russia must divide about ten percent of its total between the Leningrad MD (in the north bordering Norway) and the Caucasus region (in the south bordering Turkey). The Russian Parliament ratified the Treaty in July 1992, but as the strategic importance of the southern flank increased with civil war in Georgia, Armenia, Azerbaijan and Chechnya, the Article V provisions became more troublesome, and Russian dissatisfaction with the flank limits grew. In September 1993, Russia officially announced its intention to review the flank quotas at a meeting of the Joint Consultative Group (JCG) established in the treaty to deal with issues of implementation.

By September 1995, as a compliance deadline approached, NATO decided to grant Russia some form of a concession. One senior American diplomat was quoted saying, "We're trying to preserve the treaty, to gain Russian compliance and to get the added security that would come even from a modified treaty. . . . To say that something has to be done 100 percent the way we thought during the cold war doesn't make any sense."⁴³ A spokesman for the Chairman of the Senate Foreign Relations Committee, however, called a concession a "mistake of the highest proportions."⁴⁴ A flurry of Russian statements appeared suggesting that Russian acquiescence to NATO's eastern expansion was linked to western concessions over CFE flank limits. Although the governments officially denied the claims, the Russian press concluded that such a linkage existed. Turkey remained resolute against such a concession, claiming that "a shadow has been cast over the CFE's effectiveness," but in the end both Norway and Turkey reversed their positions.⁴⁵

43. See Steven Greenhouse, *Arms Treaty Restrictions on Russia Eased*, N.Y. TIMES, Sept. 16, 1995, at A5.

44. *Id.* (statement of Marc Theissen).

45. *Ankara Concerned About CFE Concession to Russia*, FBIS, Sept. 26, 1995, at WEU-29.

In early October 1995, a plan was tabled at the JCG to “redraw the map” governing the flank regions. Areas formerly considered part of the flank zone would subsequently be considered part of one of the ATTU inner concentric-circle zones. NATO representatives apparently believed that the new plan could be approved by the JCG without amending the treaty (thereby avoiding submission to each state party’s legislature), because the original maps that spelled out the flanks and subdivisions were not formally part of the treaty. Although they characterized the problem as simply redrawing the map, which was not a treaty-related document, that characterization seems disingenuous because the changes would seem also to require changing the literal language of the treaty itself. Article V specifically refers to certain Soviet military districts, which were at the time existing, precisely defined geographic references. However, this area of the world is admittedly not general knowledge. The executive branch brought a map to the Senate hearings to which both the Senators and the executive branch officials referred. One Senator remarked that “[w]ithout the map I am not going to remember all of the various districts that are covered.”⁴⁶ At the same time it is quite clear that the executive branch told the Senators *not* to rely on the map as a part of the treaty. In a response to a written question from Senator Pell - “Is there an official map of the ATTU?”⁴⁷—senior administration officials⁴⁸ submitted the following answer:⁴⁹

There is *no official map* of the ATTU. . . . It was further agreed not to seek maps as integral parts of the treaty. It is not expected that this imprecision will cause problems in implementing the treaty; should the issue come up, it can be addressed within NATO.

Just before the conclusions of the CFE negotiation, the Soviets provided to the treaty depository (the Netherlands), for circulation to all signatories a map showing the delineation of their military districts, which also shows the eastern-most boundary of the ATTU zone. This map, while not a part of the treaty is a treaty-associated document.

The delineations on the Soviet map provide a sound basis for dealing with future disputes over boundaries in the Soviet Union.

The problem that the officials anticipated was a unilateral Soviet change in the boundaries of the military districts. They seem to have expected disputes over those boundaries (which were precisely fixed on the map) and expected to deal with those disputes in subsequent NATO-led negotiations. This seems to assume that subsequent adjustment of the boundaries would be by executive agreement. Hence, on the basis of the Administration’s “authoritative statement” (the answer to a written question), the Administration and the Senate arguably have a “shared understanding” of the meaning of the treaty references to the various military districts—viz. that the existing boundaries reflected on the map could be renegotiated. Thus applying the Biden Condition would oddly yield a result opposite to the policy preferences of the Senate conservatives.

46. *CFE Hearings*, *supra* note 41, at 156 (statement of Senator Biden).

47. *Id.* at 243.

48. Ambassadors Woolsey and Lehman.

49. *CFE Hearings*, *supra* note 41, at 243-44.

In response to another set of questions on the same topic, the administration responded:⁵⁰

ZONES OF APPLICATION

Question: Please explain what effect a decision by the former Soviet Union to establish military districts that correspond directly to each Republic would have on the zones of application envisaged by the CFE Treaty? Would the Treaty zones need to be renegotiated?

Answer: [The Soviets unilaterally redrawing boundaries] would have no effect on the Treaty sublimits or other obligations. The military district boundaries for purposes of the *Treaty* [sic] were set as of Treaty signature. At the time, the U.S.S.R. submitted to the Treaty depository a map of its military districts. The purpose of this submission was to assure that Treaty obligations could not be *unilaterally* altered by district redrawing. While the Treaty could be amended to redraw those boundaries, in our view this is not necessary, and could provoke a complete renegotiation of sublimits.

As the Administration's answer indicates, the map was provided to prevent unilateral alteration of treaty zones. A negative implication could be drawn to the effect that consensus alteration was contemplated. On the other hand, the Executive seemed to say that the Soviet military districts specified in the text of the treaty were fixed, and that a change would constitute an "amendment" and would be a significant matter.

The problem of "redrawing the map" was dealt with in the JCG. In pertinent part, the Treaty provision relating to the JCG is as follows:

Article XVI⁵¹

1. To promote the objectives and implementation of the provisions of this Treaty, the States Parties hereby establish a Joint Consultative Group. . . .
4. The Joint Consultative Group shall take decisions or make recommendations by consensus. Consensus shall be understood to mean the absence of any objection by any representative of a State Party to the taking of a decision or the making of a recommendation.
5. The Joint Consultative Group may propose amendments to the Treaty for consideration and confirmation in accordance with Article XX [requiring approval in accordance with each States Parties constitutional procedures]. The Joint Consultative Group may also agree on improvements to *the viability and effectiveness* of this Treaty, consistent with its provisions. Unless such improvements relate only to minor matters of an administrative or technical nature, they shall be subject to consideration and confirmation in accordance with Article XX before they can take effect.

The JCG clearly had the power to address the CFE flank issue, but equally clearly any adjustment would amount to an amendment of the treaty.

The central issue is whether the flank change should be characterized as "minor," "administrative" or "technical." It is clear that the executive branch has some authority to create or modify treaty terms on its own. Established practice confirms its authority to correct errors, to make a treaty "provisionally applicable," to add technical annexes to maritime pollution and safety treaties, and to change uncontroversial terms of treaties dealing with migrating birds and

50. *Id.* at 296 (questions asked of Secretary of State Baker by Senator Biden) (emphasis added).

51. *CFE Treaty*, *supra* note 3, at 241-42 (emphasis added).

fish.⁵² This practice has been followed in treaties with Canada to change the coverage of rules protecting migrating birds and the allowable catch of salmon. Similarly, the Executive can approve changes in technical treaty rules by voting or otherwise acting in an international organization, like the IMO or ICAO. In addition, arms control treaties typically have established commissions with authority to adopt more elaborate verification procedures and to settle disputes by adjusting such procedures. It would be impossible for these commissions to operate efficiently if all their decisions had to be approved by the Senate.

On the other hand, if the subsequent agreement covers a new matter or especially if it revises in a nontrivial manner an earlier provision, then additional authorization would seem to be called for. Most commentators would probably agree that the President may not change a treaty provision in a major respect, even with the agreement of a treaty partner, without seeking Senate or congressional consent. Such a change would properly be classified as a "significant amendment" to the treaty and, as such, would require that consent. It would also seem that the President could make other changes with Senate or congressional acquiescence. If Congress disagrees with a presidential interpretation, it can always reflect its non-acquiescence through its legislative or appropriations power. Moreover, the Executive now seems highly sensitive, even in informal ways, to congressional views, especially on matters of arms control. Hence, here again exclusive executive prerogative is strongly tempered in practice. In context it seems appropriate to regard the CFE Flank Agreement as a significant amendment to the CFE Treaty, which requires congressional or Senate approval. However, from an executive point of view it is unfortunate, and unnecessary as well, for the Clinton Administration to have accepted without protest the premise of the Biden Condition, and not even to have made a statement about the ironic "shared understanding" with respect to the map.

D. Adjustment of the ABM Treaty and Condition 9

There are two separate problems that have arisen in connection with the application in the 1990s of the ABM Treaty. Both could have been addressed as Presidential-executive agreements, but will instead go to the Senate under Article II as a result of the Clinton concessions.

One agreement—the Demarcation Agreement—interprets the coverage of the ABM Treaty, in effect demarcating the difference between permissible theater, or tactical missile defense systems, on the one hand, and strategic missile defense systems, on the other hand.⁵³ To get the Senate to act on the CFE Flank Agreement, Clinton had to agree to submit the ABM Demarcation Agreement to the Senate.

The second agreement—the ABM Succession Agreement—deals with the break-up of the Soviet Union. It allocates the obligations of the ABM Treaty among Russia and other former Soviet republics, and changes some terms to

52. See Koplou, *supra* note 30.

53. See 143 CONG. REC. S4451, S4454 (1997) (Warner).

conform to the new situation. For example, “national territory” of the USSR will be changed to refer to the national territory of Russia and other former Soviet Republics. It would seem that the Succession Agreement does not change any substantive obligation, and hence would fall within the historic executive authority to deal with state succession to treaty obligations by executive agreement. The conservatives in the Senate, however, pointed out that now a change in the treaty would require the consent of many states instead of a single Soviet Union, and that the United States is only one of five members of the SCC, suggesting it may be more difficult to get a consensus decision.⁵⁴ Neither change seems substantial and, as Senator Biden pointed out, the CFE and INF treaties were multilateralized without Senate approval.⁵⁵ Several Democratic Senators, including Biden, Levin, Kerry, Dodd, and Daschle, objected to the Senate invasion of executive prerogative.⁵⁶ The President’s authority to adjust treaty relations in light of state succession is based on his power to recognize foreign states, and the executive foreign relations power to interpret and implement treaties. These executive powers were exercised without controversy with respect to other aspects of the break-up of the Soviet Union and later Yugoslavia.⁵⁷ The difference is pure politics—the conservative Senators want to attack the ABM Treaty on every possible front.

In addition to invading a traditional executive prerogative, Condition 9 may be faulted on the ground that it is unrelated—except by generic subject matter—to the CFE Flank Agreement. This objection did not seem to be voiced by the Democratic minority,⁵⁸ and Senator Dodd specifically asserted the Senate’s right to attach unrelated conditions.⁵⁹ Here the Clinton administration simply missed an opportunity to keep the Senate in tighter constitutional boundaries.

E. Conclusion

In the end, the lesson is that a strong Senate minority can push a weak President into concessions that could, if sustained in the future, change the scope of the Executive’s international agreement powers. The Clinton concessions also show how partisan politics and ideological politics can drive legal change. Foreign relations law is a curious blend of politics and law, and here the political dimension was especially apparent. We write this article in the hope that more public scrutiny and debate of the Senate’s role will influence the attitude of future Presidents and their advisors. The Clinton concessions may represent

54. *Id.* at S4451-01, S4459-60 (Smith); *see also id.* at S4454-55 (Helms), S4455 (Thurmond).

55. *Id.* at S4453.

56. *Id.* at S4453-75.

57. *See id.* at S4461-63.

58. *Id.* at S4453 (“This condition has nothing to do with CFE and it is more about whether you like ABM or do not like ABM, not about who has constitutional responsibility.”) (quoting Senator Biden).

59. *Id.* at S4468.

an anomaly in the development of foreign relations law. Since World War II presidential power has been ascendant. The post-Watergate congressional resurgence, most aggressively reflected in the War Powers Resolution, did not last. The Clinton-era Senate resurgence will hopefully meet the same fate.