AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers/Presidential War and Foreign Affairs Powers

*Walter Dellinger*, **Constitutionality of Legislative Provision Regarding ABM Treaty** (1996)[[1]](#footnote-1)

*The Senate proposed including in the Department of Defense Authorization Act for Fiscal Year 1997 a provision that would have barred the president from entering any executive agreement that would substantially modify the Anti-Ballistic Missile Treaty of 1972 and in particular that would transform the treaty from a bilateral agreement between the United States and the Soviet Union into a multilateral agreement between the United States and various states of the former Soviet Union. Due to opposition from the Clinton administration, the provision was dropped from the final version of the legislation. As negotiations between the White House and the Congress were proceeding, the Office of Legal Counsel in the Department of Justice produced an opinion expressing the administration’s doubts about the constitutionality of the proposed provision and the authority of Congress to tie the president’s hands in entering into executive agreements. In 1997, the United States issued a Memorandum of Understanding with a number of member states of the former Soviet Union indicating that the terms of the treaty would continue to bind those several countries. In 2001, President George W. Bush withdrew the United States from the treaty entirely in order to pursue missile defense projects (which were severely limited by the 1972 treaty).*

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Section 233(a) raises serious constitutional questions. It is “a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another.” It follows that Congress may not hamper or curtail the preroga­tives that the Constitution commits exclusively to the executive branch. We have serious doubts about the constitutionality of section 233(a), given that it intrudes on two exclusively Executive prerogatives: the power to interpret and execute treaties, and the power of recognition.

The dissolution of the former Soviet Union during the autumn and winter of 1991 required the United States to re-evaluate the bilateral treaties that had existed between the Soviet Union and itself, including the ABM Treaty. Both President Bush and President Clinton operated on the general principle that the treaty rights and obligations of the former Soviet Union had passed to the suc­cessor States, unless the terms or the object and purpose of the treaty required a different result. . . .

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It belongs exclusively to the President to interpret and execute treaties. This is a direct corollary of his constitutional responsibility to “take Care” that the laws are faithfully executed. *Goldwater v. Carter* (1979). . . .

The responsibility to interpret and carry out a treaty necessarily includes the power to determine whether, and how far, the treaty remains in force. . . . “[T]here is clear judicial recognition that the President may without consulting Congress validly determine the question whether specific treaty provisions have lapsed.” *Charlton v. Kelly* (1913). . . .

Accordingly, in circumstances in which a State that was a party to a bilateral treaty with the United States has been dissolved, the President must determine, in executing the treaty, whether and how far it remains in force, whether another State or States have succeeded to it, and whether their actions do or do not con­stitute compliance with its terms. In this instance, the President has determined that the ABM Treaty’s obligations should be imputed to the Soviet Union’s suc­cessor States, including Russia. Congress may not interfere with or direct the President’s interpretation and execution of a treaty any more than it may do so in the case o f a statute. Under the proposed legislation, however, Congress appears to be impermissibly interfering in the President’s discharge of those responsibil­ities with respect to the ABM Treaty, thus violating separation of powers prin­ciples.

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The Senate Foreign Relations Committee also maintained that it is constitu­tionally required that “[t]he President may not amend a treaty without the agree­ment of the parties and the advice and consent of the Senate.” Section 233(a) appears to be designed to apply this principle to the ABM Treaty, by deeming “any agreement that would add one or more countries as signatories to the treaty or [that] would otherwise convert the treaty from a bilat­eral treaty to a multilateral treaty” to constitute a “ substantive[ ] modif[ication]” of the treaty.

We would take issue with the proposition that the inclusion of other Soviet successor States along with the United States and Russia as parties to the ABM Treaty would necessarily comprise a substantive modification of that treaty, such as to require Senate advice and consent. . . . Thus, although some changes in the administration of the ABM Treaty may be entailed by the inclusion of other successor States as parties, we do not see why their inclusion must be considered a matter of “substantively modifying,” as distinct from “interpreting” and “implementing,” the treaty. If the changes do not rise to the level of substantive modifications, then to insist that the proposed executive agreements be submitted to the Senate for its advice and consent would appear to intrude on the President’s exclusive authority to interpret and implement treaties.

Section 233(a) also raises a serious constitutional question with respect to the President’s recognition power.

It is by now firmly established that the power of recognition is exclusively Exec­utive in character. *Banco Nacional de Cuba v. Sabbatino* (1964). It is also established that the Executive’s recognition authority “includes the power to determine the policy which is to govern the question of recognition.” Thus, incident to the recognition of a foreign State, the President may “without the consent of the Senate, . . . deter­mine the public policy of the United States with respect to the [previously unrec­ognized government’s] nationalization decrees,” or he may unilaterally abro­gate a mutual defense treaty with a government that he is derecognizing while recognizing another in its stead. A presidential decision to recognize, or not to recognize, a foreign State or government is binding upon the other organs of the Federal Gov­ernment. . . . In sum, the President’s recognition authority is not only exclusive, but broad.

The question of determining which States are the “successors” to a State that, like the former Soviet Union, has been completely dissolved, is a matter for the President alone to determine in the exercise of his recognition authority. Moreover, we believe, in determining which States are the successors of a dissolved State, the President may also determine which of the successors are bound by the former State’s treaty obligations towards the United States, and the extent to which they are so bound. The power to recognize newly emergent States formed from a State’s dissolution thus encompasses the power to determine the treaty con­sequences of their successorship to the parent State.

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1. Excerpt taken from Walter Dellinger, “Constitutionality of Legislative Provision Regarding ABM Treaty” 20 *Op. O.L.C*. 246 (1996) [↑](#footnote-ref-1)