TREATY INTERPRETATION BY THE EXECUTIVE BRANCH: THE ABM TREATY AND “STAR WARS” TESTING AND DEVELOPMENT

By Kevin C. Kennedy*

In the latest interpretation of the 13-year-old Anti-Ballistic Missile Treaty (ABM Treaty)—one that stunned the arms control community—the Reagan administration announced on October 6, 1985, that the United States is authorized under the Treaty to develop and test advanced technology, space-based weapons systems such as lasers and particle beam weapons. According to the administration, the ABM Treaty places no restrictions, short of actual deployment, on the Strategic Defense Initiative (SDI), the so-called Star Wars program. Although Secretary of State George Shultz has stated that the United States will continue to exercise restraint in the SDI program by limiting the development and testing of weapons according to a “restrictive”...

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1 Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, 23 UST 3435, TIAS No. 7503 [hereinafter cited as ABM Treaty].

2 N.Y. Times, Oct. 17, 1985, at A6, col. 1; Christian Sci. Monitor, Oct. 17, 1985, at 1, col. 2; Miami Herald, Oct. 21, 1985, at 13A, col. 1.

3 See Weinberger, U.S. Defense Strategy, 64 FOREIGN AFF. 675, 679 (1986). The announcement came through then National Security Adviser Robert C. McFarlane on the NBC television program “Meet the Press.” ECONOMIST, Nov. 2, 1985, at 21, col. 1.

4 For a description of the types of advanced technology weapons being considered under the Strategic Defense Initiative program (SDI), see Grier & Armstrong, Star Wars, Will It Work? (six-part series), Christian Sci. Monitor, Nov. 4, 1985, at 28–30; Nov. 5, 1985, at 20–21; Nov. 6, 1985, at 20–22; Nov. 7, 1985, at 20–21; Nov. 8, 1985, at 18–20; Nov. 12, 1985, at 30–32. For a discussion of the potential effectiveness of SDI, see Guertner, What Is “Proof”?, FOREIGN POL’Y, No. 59, Summer 1985, at 73; Bennett, “Star Wars”: The Battle Intensifies, Christian Sci. Monitor, Nov. 4, 1985, at 26, col. 2. See also Weinberger, SDI: Realities and misconceptions, Christian Sci. Monitor, Oct. 17, 1985, at 16, col. 2. For a discussion of the Soviet Union’s response to SDI, see Rivkin, What Does Moscow Think?, FOREIGN POL’Y, No. 59, Summer 1985, at 85.

5 ECONOMIST, Nov. 2, 1985, at 21; Christian Sci. Monitor, Oct. 17, 1985, at 36, col. 1. For example, Assistant Secretary of Defense Richard N. Perle stated on Oct. 16, 1985: “In my judgment there is one correct view of what the [ABM] treaty provides.” He continued:

After one wades through all the ambiguities and reads carefully the text of the treaty itself and the negotiating record . . . with respect to systems based on “other physical principles” [such as lasers and directed-energy weapons], we have the legal right under the treaty to conduct research and development and testing unlimited by the terms of the treaty . . .

Id. For an excellent analysis of the legality of the SDI program vis-à-vis the ABM Treaty, see A. SHERR, LEGAL ISSUES OF THE “STAR WARS” DEFENSE PROGRAM (Lawyers Alliance for Nuclear Arms Control Monograph, 1984).
interpretation\(^6\) of the ABM Treaty, the question remains whether a legally sound basis exists for the administration's "permissive" interpretation of the Treaty.\(^7\)

This article examines two interrelated questions raised by the Reagan administration's October 6 announcement. The first is whether the administration's permissive reading of the ABM Treaty squares with the consenting Senate's understanding of that Treaty. To what exactly did the Senate give its advice and consent when it advised ratification of the ABM Treaty in 1972? As a corollary, this article discusses the fundamental constitutional question posed when a treaty interpretation by the executive branch is arguably at odds with the consenting Senate's understanding of the treaty.\(^8\)

We begin with a brief overview of the SDI program, followed by a background discussion of the ABM Treaty.

I. THE STRATEGIC DEFENSE INITIATIVE PROGRAM

In a nationally televised speech on March 23, 1983, President Reagan launched the Strategic Defense Initiative program, an ostensibly defensive weapons system intended to replace the 25-year-old nuclear regime of mutual assured destruction or MAD.\(^9\) As the President asked rhetorically in his March 23 address, "What if free people could live secure in the knowledge that their security did not rest upon the threat of instant U.S. retaliation to deter a Soviet attack, that we could intercept and destroy strategic ballistic missiles before they reached our own soil or that of our allies?"\(^10\) The Pres-

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6 Christian Sci. Monitor, Oct. 17, 1985, at 36, col. 1. At the same time, Secretary Shultz did not reject the new interpretation of the ABM Treaty. Id.

7 For an excellent background discussion of SDI and the ABM Treaty, see A. SHERR, supra note 5; Note, Star Wars Meets the ABM Treaty: The Treaty Termination Controversy, 10 N.C.J. INT'L L. & COM. REG. 701 (1985). For a history of the strategic arms negotiating record of the Reagan administration through 1984, see S. TALBOTT, DEADLY GAMBITS: THE REAGAN ADMINISTRATION AND THE STALEMATE IN NUCLEAR ARMS CONTROL (1984). See generally C. GRAY, AMERICAN MILITARY SPACE POLICY (1982); P. STARES, THE MILITARIZATION OF SPACE, U.S. POLICY, 1945–1984 (1985).

8 The question whether the Reagan administration's reading of the ABM Treaty is consistent with the international law of treaty interpretation is beyond the scope of this article. For a background discussion on this subject, see Note, supra note 7, at 720–25. See generally I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 623–30 (1979); A. MCNAIR, THE LAW OF TREATIES (1961).

9 Address to the Nation on Defense and National Security, 19 WEEKLY COMP. PRES. DOC. 437 (Mar. 28, 1983) [hereinafter cited as President's Address].

10 Id. at 442–43. See Weinberger, supra note 2, at 680–81. For a general discussion of nuclear deterrence theory, see P. GREEN, DEADLY LOGIC: THE THEORY OF NUCLEAR DETERRENCE (1966); Keeny & Panofsky, MAD versus NUTS, 60 FOREIGN AFF. 287 (1981–82); Kennedy, A Critique of United States Nuclear Deterrence Theory, 9 BROOKLYN J. INT'L L. 35 (1983).

11 President's Address, supra note 9, at 442. The Reagan administration's SDI program contemplates a "layered" defense system that would intercept incoming Soviet missiles at various phases of their flight path, from boost to terminal phase. For an overview of the weapons systems under consideration, see U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, BALLISTIC MISSILE DEFENSE TECHNOLOGIES (1985); U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, DIRECTED ENERGY MISSILE DEFENSE IN SPACE—A BACKGROUND PAPER (1984); Bethe, Garwin, Gottfried & Kendall, SPACE-BASED BALLISTIC-MISSILE DEFENSE, 251 SCI. AM., No. 4, October
ident concluded his remarks by expressly assuring listeners that SDI would be conducted consistently with U.S. obligations under the ABM Treaty. 12

The SDI program's focus is on "the whole spectrum of offensive nuclear ballistic missiles, not just long-range missiles aimed at the U.S." 13 Research is being conducted in the basic areas of directed-energy weapons such as lasers and particle beam weapons, and kinetic-energy weapons such as rail guns that can launch objects at enormous velocities. 14 The mission and near-term goals of SDI have been publicly elaborated on by representatives of the Reagan administration on various occasions. For example, in hearings before the House Subcommittee on Defense Appropriations held on May 7, 1985, Lieutenant General James A. Abrahamson, Director of the Strategic Defense Initiative Organization, explained the goals of the SDI program:

The goal of the SDI is to conduct a program of vigorous research focused on advanced technologies that could provide a basis for a future decision to further develop and deploy strategic defenses . . . . The driving force behind [the President's] concept is to render nuclear ballistic missiles impotent and obsolete . . . . SDI is a research program that seeks to provide the technical knowledge required to support a

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12 President's Address, supra note 9, at 443. Although the Strategic Defense Initiative ultimately envisions the militarization of space once it advances beyond the research phase and enters the development and testing phases, President Reagan made no mention of the possible impact SDI would have, for example, on the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 UST 2410, TIAS No. 6347, 610 UNTS 205 (entered into force Oct. 10, 1967), popularly known as the Outer Space Treaty. Article III of the Outer Space Treaty obligates parties to carry on their activities in space in accordance with international law, "in the interest of maintaining peace and security and promoting international cooperation and understanding." Article IV of the Outer Space Treaty forbids the stationing or placing in orbit around the Earth of "any objects carrying nuclear weapons or any other kinds of weapons of mass destruction." Article IV also bans the testing of any type of weapon on the moon and other celestial bodies. In the effort to capture the high frontier of outer space, it is not inconceivable that SDI could eventually entail the development and testing of weapons platforms that are moon based. However, at least insofar as the public declarations on the SDI program are concerned, to date no mention has been made of moon-based activities. For a discussion of conformity of SDI with other treaty obligations of the United States (such as the Limited Test Ban Treaty), see Note, supra note 7, at 706–09.

For additional administration views and testimony on SDI and U.S. compliance with the ABM Treaty, see Senate Hearings, supra note 11, at 4139–47.

13 Weinberger, supra note 4, at 16, col. 2. For additional administration views and testimony on SDI, see Senate Hearings, supra note 11, at 3437–5525, 3972–4008.

14 See Department of Defense Appropriations for 1986: Hearings Before the Subcomm. on Defense Appropriations of the House Comm. on Appropriations, 99th Cong., 1st Sess. 584–85 (1985) [hereinafter cited as House Hearings]; Grier & Armstrong, supra note 4, Nov. 4, 1985, at 28–30.
decision on whether to develop and later deploy advanced defensive systems. It is not a program to deploy those systems.\(^\text{15}\)

General Abrahamson went on to express his views on how SDI squares with the ABM Treaty, presenting what has come to be considered the "restrictive" interpretation of the Treaty:

The ABM Treaty prohibits the development, testing, and deployment of ABM systems and components that are space-based, air-based, sea-based, or mobile land-based. However, as Gerard Smith, chief U.S. negotiator of the ABM Treaty, reported to the Senate Armed Services Committee in 1972, that agreement does permit research short of field testing of a prototype ABM system or breadboard model. Our research under the SDI program will be within those limits.\(^\text{16}\)

Thus, so long as it is limited to research, the SDI program arguably does not breach the ABM Treaty even under the "restrictive" interpretation of the Treaty. As is explained below,\(^\text{17}\) it is universally agreed that antiballistic missile research in any basing mode is not prohibited under the Treaty. Nevertheless, assurances by the Reagan administration of Treaty compliance notwithstanding, the SDI program is planned to evolve through four progressively more sophisticated phases, the first of which is limited to research through the 1990s. Thereafter, the program will enter the development and deployment phases, depending on the progress of the research phase.\(^\text{18}\)

Until then, the question whether SDI violates the ABM Treaty will be academic. If and when these later development phases of the SDI program are entered, however, SDI will threaten to breach the ABM Treaty in its present form. For, as the next two sections explain, it is far from clear that the ABM Treaty permits development, let alone deployment, of SDI technologies.

### II. The ABM Treaty

The ABM Treaty was the product of the Strategic Arms Limitation Talks (SALT), a process formally begun in November 1969,\(^\text{19}\) but whose genesis may be traced back 5 years earlier. In 1964, President Johnson delivered a message to the Eighteen-Nation Disarmament Conference in Geneva in

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\(^{15}\) *House Hearings*, supra note 14, at 568–69. The price tag on SDI research through fiscal year 1989 has been placed at $26 billion. *Id.* at 569. Congress approved 74% of the Defense Department’s FY 1986 budget request for SDI research. Weinberger, *supra* note 2, at 682.

\(^{16}\) *House Hearings*, supra note 14, at 569. Secretary of Defense Caspar Weinberger has expressed a similar sensitivity to compliance with the ABM Treaty, stating that "SDI is a research program . . . and is in complete accord with the ABM Treaty." Weinberger, *supra* note 4, at 16, col. 3. A breadboard model is an experimental arrangement to test feasibility. WEBSTER’S NEW COLLEGIATE DICTIONARY 134 (1981).

\(^{17}\) See *infra* notes 43–45 and accompanying text.

\(^{18}\) *House Hearings*, supra note 14, at 581–82.

\(^{19}\) See T. WOLFE, THE SALT EXPERIENCE 1–3 (1979); UNITED STATES ARMS CONTROL AND DISARMAMENT AGENCY, ARMS CONTROL AND DISARMAMENT AGREEMENTS 182–33 (1980) [hereinafter cited as ACDA AGREEMENTS].
which he proposed that Washington and Moscow explore a verified freeze on strategic offensive and defensive weapons. It was not until October 1969, however, that the White House and the Kremlin announced that SALT would begin in Helsinki on November 17, 1969.20

Following 2 1/2 years of negotiations,21 the first round of SALT was concluded on May 26, 1972, when President Nixon and General Secretary Brezhnev signed22 the ABM Treaty and the Interim Agreement on strategic offensive arms.23 The Senate advised ratification of the ABM Treaty on August 3, 1972; President Nixon ratified the Treaty on September 30, 1972; and it entered into force on October 3, 1972, following a formal exchange of ratification instruments.24 The Treaty is of unlimited duration.25 The parties agreed to a protocol to the Treaty in 1974.26

In broad outline, the ABM Treaty, together with the protocol, limits the United States and the Soviet Union each to one ABM deployment area,27 so restricted and so located that it cannot provide a nationwide ABM defense or become the basis for developing one.28 At the ABM site, there may be no more than one hundred interceptor missiles and one hundred launchers.29

20 T. WOLFE, supra note 19, at 1-3.
21 For a brief history of those negotiations, see id. at 8-14; S. TALBOTT, ENDGAME: THE INSIDE STORY OF SALT II 19-24 (1980).
22 See ACDA AGREEMENTS, supra note 19, at 135.
23 Interim Agreement between the United States of America and the Union of Soviet Socialist Republics on Certain Measures with Respect to the Limitation of Strategic Offensive Arms, May 26, 1972, 23 UST 3462, TIAS No. 7504. For the etymology of “SALT,” see S. TALBOTT, supra note 21, at 19 n.*.
24 ABM Treaty, supra note 1, 23 UST 3435.
25 Id., Art. XV, para. 1, 23 UST at 3446.
26 Protocol to the Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, July 3, 1974, 27 UST 1645, TIAS No. 8276 [hereinafter cited as ABM Protocol].
27 Id., Art. I, 27 UST at 1646. The Soviet Union has in place an ABM system defending Moscow. The ABM system at Grand Forks, North Dakota, was dismantled by the United States in the mid-1970s. See T. WOLFE, supra note 19, at 13 n.75; ACDA AGREEMENTS, supra note 19, at 161.
28 ABM Treaty, supra note 1, Art. I, 23 UST at 3436.
29 Id., Art. III, 23 UST at 3440. Article III provides:

Each Party undertakes not to deploy ABM systems or their components except that:

(a) within one ABM system deployment area having a radius of one hundred and fifty kilometers and centered on the Party's national capital, a Party may deploy: (1) no more than one hundred ABM launchers and no more than one hundred ABM interceptor missiles at launch sites, and (2) ABM radars within no more than six ABM radar complexes, the area of each complex being circular and having a diameter of no more than three kilometers; and

(b) within one ABM system deployment area having a radius of one hundred and fifty kilometers and containing ICBM silo launchers, a Party may deploy: (1) no more than one hundred ABM launchers and no more than one hundred ABM interceptor missiles at launch sites, (2) two large phased-array ABM radars comparable in potential to corresponding ABM radars operational or under construction on the date of signature of the Treaty in an ABM system deployment area containing ICBM silo launchers, and (3) no more than eighteen ABM radars each having a potential less than the potential of the smaller of the above-mentioned two large phased-array ABM radars.

Quantitative restrictions have thus been placed on radars as well. Id.
In addition to these quantitative restrictions, technological improvements are likewise limited; for example, both parties are prohibited from developing, testing or deploying ABM launchers capable of launching more than one interceptor missile at a time.

As concerns permissible basing modes, the Treaty permits deployment of an ABM system that is fixed and land based. While Article III of the Treaty describes in some detail the permissible basing mode of an ABM system, it does not state in haec verba that the ABM system shall be fixed and land based. However, Article V, paragraph 1 of the Treaty indicates that this was the parties' intention: "Each party undertakes not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based." If Article III is read in conjunction with Article V, the ABM Treaty permits only a fixed, land-based deployment mode of ABM systems or components. This conclusion is buttressed by one of the several "Common Understandings" that were reached between the U.S. and Soviet delegations during the Treaty negotiations. Common Understanding C provides:

On January 29, 1972, the U.S. Delegation made the following statement:

Article V(1) of the Joint Draft Text of the ABM Treaty includes an undertaking not to develop, test, or deploy mobile land-based ABM systems and their components. On May 5, 1971, the U.S. side indicated that, in its view, a prohibition on deployment of mobile ABM systems and components would rule out the deployment of ABM launchers and radars which were not permanent fixed types. At that time, we asked for the Soviet view of this interpretation. Does the Soviet side agree with the U.S. side's interpretation put forward on May 5, 1971?

On April 13, 1972, the Soviet Delegation said there is a general common understanding on this matter.

The Reagan administration has not challenged this understanding that the ABM Treaty, together with the ABM Protocol, permits each side to deploy only one fixed, land-based ABM system; rather, the current debate centers on the permissibility of developing and testing advanced technology weapons systems based in space. The debate over what the ABM Treaty permits vis-à-vis SDI is fueled by Article V, paragraph 1 of the Treaty and Agreed Statement D, also a part of the Treaty, which are discussed below.

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\(^{50}\) Id., Art. V, para. 2, 25 UST at 3441.

\(^{51}\) See id., Art. III, 23 UST at 3440.

\(^{52}\) Id., Art. V, para. 1, 25 UST at 3441.

\(^{53}\) As part of the ABM Treaty, several Agreed Statements, Common Understandings and Unilateral Statements were appended to the Treaty. See Agreed Statements, Common Understandings, and Unilateral Statements Regarding the Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missiles, May 26, 1972, 23 UST 3456, TIAS No. 7504.

\(^{54}\) Id., Common Understanding C, 25 UST at 3458.

\(^{55}\) See infra note 46 and accompanying text.

\(^{56}\) Gerard Smith, chief negotiator for the United States in the SALT I negotiations, has written:
As has been noted, Article V prohibits each party from developing, testing or deploying an ABM system or component other than one that is fixed and land based. While deployment means putting a fully operational ABM system or component into service, what "developing and testing" a prohibited ABM system or component consists of has not been entirely free of doubt. Given the technological limitations on verification, the consensus is that, at a minimum, laboratory research is permitted in connection with any type of ABM basing mode. Allowing all types of ABM research essentially amounts to recognizing that verification by "national technical means," the only method of verification permitted under the ABM Treaty, is practically impossible. Attempting to ban by treaty conduct that cannot be verified is considered naive in the highly sensitive area of arms control. Since "research" thus constitutes activities short of "development" as contemplated under the Treaty, so long as the SDI program is limited to research, it does not violate the Treaty.

As for what constitutes "development," during the SALT I negotiations the parties never reached agreement on a definition of that term, intentionally leaving it ambiguous. At the 1972 Senate hearings on the ABM Treaty, Dr. John S. Foster, Director of Defense Research and Engineering, offered the following explanation of "development": "[A] prohibition on development . . . would begin only at the stage where laboratory testing ended on ABM components, on either a prototype or bread-board model." Gerard Smith, the chief U.S. negotiator for the ABM Treaty, echoed Dr. Foster's explanation when he testified before the Senate Armed Services Committee in 1972. Ambassador Smith stated that the prohibitions on development contained in the ABM Treaty "would start at that part of the development process where field testing is initiated on either a prototype or breadboard model." Although these two statements furnish less than a "bright line" definition of the term "development," they do suggest that, at the least, certain kinds of development that can be detected by national

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G. Smith, Doubletalk: The Story of the First Strategic Arms Limitation Talks 344 (1980).

See supra note 32 and accompanying text.

Christian Sci. Monitor, Oct. 4, 1985, at 5, col. 3 ("The treaty, for instance, allows research on all types of ABM systems and components").

"National technical means of verification" is a euphemism for satellite reconnaissance, radar and other information collection techniques short of espionage and on-site inspection.

ACDA Agreements, supra note 19, at 155; T. Wolfe, supra note 19, at 13–14.

ABM Treaty, supra note 1, Art. XII, 23 UST at 3443.

Christian Sci. Monitor, Oct. 4, 1985, at 4, col. 3.

Military Implications of the Treaty on the Limitation of Anti-Ballistic Missile Systems and the Interim Agreement on Limitation of Strategic Offensive Arms: Hearings Before the Senate Comm. on Armed Services, 92d Cong., 2d Sess. 275 (1972) [hereinafter cited as Military Implications].

Id. at 977.
technical means—e.g., rudimentary field testing, as opposed to laboratory testing—may come within the prohibitory ambit of the ABM Treaty.

In any event, the crux of the argument made by the Reagan administration is not that SDI "development and testing" somehow differs from "development and testing" as used in the prohibitory provisions of the ABM Treaty. Rather, its contention, far from being built on such semantics, has as its cornerstone Agreed Statement D, which, the administration maintains, specifically permits all SDI development and testing in any basing mode, short of actual deployment. If new ABM systems or components are created that, in the language of Agreed Statement D, are "based on other physical principles," then, according to the administration, any limitation on their development and testing would be subject to further discussion and agreement between the United States and the Soviet Union.

Does Agreed Statement D, when read in the context of the ABM Treaty considered as a whole, support the administration's view? Agreed Statement D provides:

In order to insure fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III of the Treaty, the Parties agree that in the event ABM systems based on other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars are created in the future, specific limitations on such systems and their components would be subject to discussion in accordance with Article XIII and agreement in accordance with Article XIV of the Treaty.

Richard N. Perle, Assistant Secretary of Defense for International Security Policy and one of the chief architects of the Reagan administration's permissive interpretation of the ABM Treaty, has stated that the development and testing of exotic space-based weapons employing "other physical principles" such as lasers and particle beams is permitted under Agreed Statement D. In his view, if new ABM systems "based on other physical principles" are created, limitations on them would be subject to further negotiation and agreement between the United States and the Soviet Union.

Another representative of the Reagan administration, Paul H. Nitze, a veteran arms control negotiator and senior arms control adviser to the President, has argued that the negotiating record of the ABM Treaty shows that the United States attempted to close the door on all new defensive weapons but that the Soviet Union would not agree to such a proposal.

44 See supra note 5.
45 Christian Sci. Monitor, Oct. 17, 1985, at 36, col. 2; Prognosis for an Ex-Virgin, ECONOMIST, Nov. 2, 1985, at 14; N.Y. Times, Oct. 17, 1985, at A6, col. 1.
46 ABM Treaty, supra note 1, Agreed Statement D, 23 UST at 3456. For a comment on the purpose of such Agreed Statements, see infra note 63.
47 Christian Sci. Monitor, Oct. 17, 1985, at 36, cols. 1–3; N.Y. Times, Oct. 17, 1985, at A6, cols. 5–6.
48 Id.
49 Id., Oct. 24, 1985, at 5, col. 1; N.Y. Times, Oct. 17, 1985, at 6, col. 5.
50 Id., Oct. 24, 1985, at 5, col. 1; N.Y. Times, Oct. 17, 1985, at 6, col. 5.
Hence, Agreed Statement D was appended to the Treaty to take account of the Soviet position that the ABM Treaty should not rule out the possibility of developing and testing future technologies based on other physical principles. In addition, Abraham D. Sofaer, Legal Adviser of the State Department, has also taken the position that the ABM Treaty, when read in the light of Agreed Statement D, only prohibits the actual deployment of new systems based on "other physical principles," not their development or testing.

In short, in the view of several key persons within the Reagan administration, Agreed Statement D on exotic technologies is to be read in conjunction with and as an expansion of Article V of the Treaty, not as a limitation on the basing modes and systems permitted under Article III.

Critics of the administration's interpretation of Agreed Statement D—whose numbers include the chief negotiator of the ABM Treaty, Gerard Smith—counter that Agreed Statement D was meant to supplement Article III of the Treaty, which permits a fixed, land-based ABM system of intercepter missiles and radars, not an ABM system of space-based lasers and particle beam weapons. Agreed Statement D was not meant to qualify Article V, paragraph 1, they maintain, which prohibits the development and testing of ABM weapons in all other basing modes. Accordingly, in their view, Agreed Statement D only allows the development and testing of new technologies that are introduced to replace fixed, land-based ABM systems or their components.

Agreed Statement D is not the most happily drafted of provisions, nor is it free of ambiguity, reading as though meant to be the international lawyer's answer to the Internal Revenue Code. Moreover, throughout this debate scant attention has been paid to how the Senate viewed the ABM Treaty at the time it gave its advice and consent to ratification. A review of the legislative history is illuminating, for it supports the position of those critics who have challenged the Reagan administration's permissive interpretation of the ABM Treaty.

III. THE SENATE ABM TREATY HEARINGS

During the summer of 1972, the Senate Committee on Foreign Relations and the Senate Committee on Armed Services held extensive hearings on

52 Christian Sci. Monitor, Oct. 17, 1985, at 36, col. 3.
53 N.Y. Times, Oct. 17, 1985, at 6, col. 4. The terms "ABM systems or components" found throughout the Treaty are not defined, which thus gives rise to an ambiguity over what constitutes prohibited systems or components under the Treaty. The SDI technologies being contemplated have been characterized by the Reagan administration as ABM "subcomponents" or "adjuncts," and therefore as not being prohibited under the Treaty. Id.
54 Id.
55 ECONOMIST, Nov. 2, 1985, at 21; Christian Sci. Monitor, Oct. 17, 1985, at 36, col. 2.
56 See sources cited in note 47 supra.
57 See sources cited in note 47 supra. In addition, Article I of the Treaty prohibits deployment of a nationwide antiballistic missile defense. See supra note 28 and accompanying text.
58 See Christian Sci. Monitor, Oct. 17, 1985, at 36, col. 3.
the ABM Treaty,\textsuperscript{59} pursuant to the Senate's constitutional advise-and-consent role.\textsuperscript{60} The Foreign Relations Committee conducted 7 days of hearings, beginning on June 19, 1972.\textsuperscript{61} The first witness called was Secretary of State William P. Rogers, who gave the following testimony about the qualitative restrictions imposed by the Treaty: "Perhaps of even greater importance as a qualitative limitation is that the parties have agreed that future exotic types of ABM systems, i.e., systems depending on such devices as lasers, may not be deployed, even in permitted areas."\textsuperscript{62} Later in his testimony, Rogers reiterated the point: "Under the agreement we provide that exotic ABM systems may not be deployed and that would include, of course, [an] ABM system based on the laser principle."\textsuperscript{63}

The next witness to appear before the committee was Ambassador Gerard Smith, at that time the Director of the U.S. Arms Control and Disarmament Agency and the chief U.S. negotiator of the ABM Treaty. He echoed Secretary Rogers's views on the deployment of exotic weapons: "[W]e have covered the concern of yours in this treaty by prohibiting the deployment of future type technology. . . . [T]he laser concern was considered and both sides have agreed that they will not deploy future type ABM technology unless the treaty is amended."\textsuperscript{64}

These statements are far from unambiguous as regards basing modes and the scope of the prohibition on development and testing. Neither Secretary Rogers nor Ambassador Smith specifically testified that development and testing were prohibited in basing modes other than a fixed, land-based one, which leaves open the possibility that all types of development and testing are permitted short of actual deployment.

\textsuperscript{59} Strategic Arms Limitation Agreements: Hearings Before the Senate Comm. on Foreign Relations, 92d Cong., 2d Sess. (1972) [hereinafter cited as Strategic Arms Limitation Agreements]; Military Implications, supra note 42.

\textsuperscript{60} U.S. CONST, art. II, §2.

\textsuperscript{61} Strategic Arms Limitation Agreements, supra note 59, at 1.

\textsuperscript{62} Id. at 6.

\textsuperscript{63} Id. at 20. In response to questions by Senator Charles Percy regarding potential misunderstandings caused by the Agreed Statements and Common Understandings, Secretary Rogers gave the following answers:

\begin{enumerate}
\item Question. . . . What will prevent differing interpretations of these "clauses" [understandings, interpretations, and unilateral statements] from causing a major misunderstanding and hindering the successful implementation of the agreements?

Answer. These materials were intended to avoid misunderstanding of the underlying agreements and to facilitate successful implementation of such agreements. The clarification provided by these interpretations and statements is believed to far outweigh whatever risk there may be that they, in turn, might become subject to differing interpretations [emphasis in original].

\item Question. Would it be safe to say that these clauses are really another form of safeguard particularly since they deal with such crucial areas as concealment, ABM technology advances, and missile modernization?

Answer. Yes, they do constitute a form of safeguard against misunderstandings in these crucial areas.
\end{enumerate}

\textsuperscript{64} Id. at 53.
What was the Senate's understanding regarding the development and testing of exotic weapons in a space-based mode under the Treaty? Senator James Buckley, one of two senators who voted against the ABM Treaty, made the following highly instructive remarks before the Foreign Relations Committee during the hearings:

I challenge the morality of precluding the possibility of developing at some future date new approaches to antiballistic missile defenses which could offer protection to substantial numbers of our people.

This clause, in Article V of the ABM Treaty, would have the effect, for example[,] of prohibiting the development and testing of a laser-type system based in space . . . . The technological possibility has been formally excluded by this agreement.

There is no law of nature that I know of that makes it impossible to create defense systems that would make the prevailing theories obsolete. Why, then, should we by treaty deny ourselves the kind of development that could possibly create a reliable technique for the defense of civilians against ballistic missile attack?

No senator on the committee and no subsequent witness challenged Senator Buckley's analysis.

Senator Buckley's statement not only sheds enormous light on what at least one senator understood the ABM Treaty to prohibit, but also was fully corroborated by Secretary of Defense Melvin Laird. In testimony before the Senate Armed Services Committee on June 6, 1972, Secretary Laird gave the following response to a question from Senator Goldwater regarding advanced technology ABM systems:

With reference to development of a boost-phase intercept capability or lasers, there is no specific provision in the ABM treaty which prohibits development of such systems.

There is, however, a prohibition on the development, testing, or deployment of ABM systems which are space-based, as well as sea-based, air-based, or mobile land-based. The U.S. side understands this prohibition not to apply to basic and advanced research and exploratory development of technology which could be associated with such systems, or their components.

There are no restrictions on the development of lasers for fixed, land-based ABM systems . . . . Space-based ABM systems are prohibited by Article V of the ABM treaty . . . .

Thus, in Secretary Laird's view, the development and testing of advanced technology weapons systems in any mode other than a fixed, land-based mode is prohibited by the Treaty. However, basic research, as commonly understood within the arms control community, could proceed in all basing modes.

65 Christian Sci. Monitor, Oct. 17, 1985, at 36, col. 3.
66 Strategic Arms Limitation Agreements, supra note 59, at 257–58 (emphasis added).
67 Id. passim.
68 Military Implications, supra note 42, at 40–41.
Dr. John Foster, Director of Defense Research and Engineering, also appeared before the Senate Armed Services Committee. Dr. Foster underscored that the development and testing of exotic ABM weapons is permitted, but only in conjunction with a fixed, land-based ABM system as envisaged in Article III of the Treaty. In this connection, the following colloquy took place between Senator Henry Jackson and Dr. Foster:

**SEN. JACKSON.** . . . [I]s there anything in these agreements that impinge[s] on our right to research those areas that bear on both our defense and on defense capability? Specifically, there is a limitation on lasers, as I recall, in the agreement and does the SAL agreement prohibit land-based laser development?

**DR. FOSTER.** No, sir; it does not. . . . What is affected by the treaty would be the development of laser ABM systems capable of substituting for current ABM components.

... 

You can develop and test up to the deployment phase of future ABM system components which are fixed and land based.69

In a similar exchange between Senator Margaret Chase Smith and Gerard Smith, it was strongly suggested that developing and testing exotic ABM systems in any mode other than a fixed, land-based one would be prohibited under the ABM Treaty:

**SEN. SMITH.** Mr. Ambassador, you say that the treaty prohibits the development of other ABM systems. Would this affect a development of a laser ABM system by the United States?

**MR. SMITH.** . . . [O]ne of the agreed understandings says that if ABM technology is created based on different physical principles, an ABM system or component based on them can only be deployed if the treaty is amended. . . . [D]eployment of systems using those new principles in substitution for radars, launchers or interceptors, would not be permitted unless both parties agree by amending the treaty.70

Finally, General Bruce Palmer, Acting Army Chief of Staff, answered the following question posed by Senator Jackson:

**SEN. JACKSON.** . . . [S]o the [Joint] Chiefs went along with the concept here involved—

**GEN'L PALMER.** A concept that does not prohibit the development in the fixed, land-based ABM system. We can look at futuristic systems as long as they are fixed and land based.

**SEN. JACKSON.** I understand.71

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69 *Id.* at 274 (emphasis added).
70 *Id.* at 295. The same point was made by General W. P. Leber, Safeguard System Manager:

The only limitation in the [ABM] treaty . . . is that either side . . . would not use a laser device to substitute for any other component part of the ABM system. . . . [I]f you propose to substitute, for example, a laser device for the interceptor, that would be prohibited, an amendment to the treaty would be required for deployment.

*Id.* at 439.
71 *Id.* at 443.
It was on the basis of this understanding that Senator Jackson, together with an overwhelming majority of his fellow senators, advised and gave his consent to ratification of the ABM Treaty.

Considering this legislative history as a whole, the Reagan administration's permissive interpretation of the ABM Treaty appears to differ substantially from the consenting Senate's understanding of the Treaty. A fair reading of the Senate hearings strongly suggests two conclusions about the meaning of the ABM Treaty: first, that when Article III, paragraph 1 of Article V and Agreed Statement D are read together, their import is that the development and testing of "Star Wars" technology in any basing mode other than a fixed, land-based mode is prohibited; and, second, that the deployment of such technology in even the fixed, land-based mode is prohibited under the Treaty.

These seemingly divergent views of the ABM Treaty raise two crucial issues: (1) whether the President is free to reach an interpretation of a treaty that varies with the consenting Senate's understanding of that treaty; and (2) if he is not, how such conflicts in treaty interpretation are to be resolved. The following section explores these fundamental constitutional issues.

IV. EXECUTIVE BRANCH–SENATE CONFLICTS OVER TREATY INTERPRETATION

Professor Louis Henkin has observed that "the obligation and authority to implement or enforce a treaty involves also the obligation and authority to interpret what the treaty requires." In Henkin's view, the President, as the person who speaks for the United States in international affairs, determines the position of the United States as to the meaning of a treaty vis-à-vis the other parties to the treaty. Nevertheless, the President's determination is subject to any understanding, reservation or declaration issued by the Senate when it gave its consent to ratification. In this connection, the words of Justice Story in The Amiable Isabella are instructive: "[T]he obligations of a treaty could not be changed or varied, but by the same formalities with which they were introduced; or, at least, by some act of as high an import, and of as unequivocal an authority." 76

There can be no serious disagreement that in the conduct of foreign affairs the President requires wide latitude. Although this political fact of life has been recognized by the Supreme Court, the Court has been unreceptive to claims by the executive branch to virtually unlimited powers in

72 Christian Sci. Monitor, Oct. 17, 1985, at 56, col. 3.
73 L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 167 (1972).
74 Id.
75 Id. Treaty interpretations by the President following Senate consent do not, of course, have the consent of the Senate. Id.
76 The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 75 (1821).
77 See, e.g., United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–20 (1936) (where the Court noted the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations").
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this field. Indeed, both Congress and the courts have claimed the independent right to interpret treaties. The President’s interpretation of a treaty may be accorded considerable weight domestically by the other branches of government. A distinction must be drawn, however, between a treaty interpretation by the executive branch, which may be accorded weight by the courts, and a treaty reinterpretation by the President, which is tantamount to a treaty revision. Treaty reinterpretation involves defining ambiguous terms and filling in interstices. Absent a reservation or declaration by the consenting Senate, or other clear evidence of the consenting Senate’s understanding of a treaty, the President is free to reach reasonable interpretations of a treaty, subject to possible review by an international forum or a domestic court. Reinterpretation or revision, on the other hand, involves making a new, amended version of a treaty. Not only is such a reinterpretation subject to possible review by an international tribunal or a domestic court, but, as a matter of U.S. constitutional law, there can be no interpretation of a treaty different from that which the consenting Senate clearly gave it.

Although Agreed Statement D, Article III and Article V of the ABM Treaty may contain ambiguities, the Senate hearings on the ABM Treaty plainly suggest that the Senate’s understanding of the Treaty accords with the “restrictive” interpretation of that Treaty regarding the SDI program. The issue is not simply an interpretation of an ambiguous treaty provision by the executive branch, but a rewriting of a treaty by the Executive with neither the advice nor the consent of the Senate. Such an arguably bold reinterpretation of a U.S. treaty obligation by the executive branch is unique.

Where could this issue be resolved? There are at least four forums in which the ABM-SDI controversy could be addressed, two international and two domestic: an international tribunal such as the International Court of Justice; the Standing Consultative Commission created under the ABM Treaty; the U.S. courts; and the Senate.

78 See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 641 (1951) (Jackson, J., concurring). See also L. HENKIN, supra note 73, at 45–65.
79 See L. HENKIN, supra note 73, at 416 n.128.
80 See, e.g., Factor v. Laubenheimer, 290 U.S. 276, 295 (1933).
81 See L. HENKIN, supra note 73, at 167.
82 Article XIII of the ABM Treaty provides:

1. To promote the objectives and implementation of the provisions of this Treaty, the Parties shall establish promptly a Standing Consultative Commission, within the framework of which they will:

(a) consider questions concerning compliance with the obligations assumed and related situations which may be considered ambiguous;
(b) provide on a voluntary basis such information as either Party considers necessary to assure confidence in compliance with the obligations assumed;
(c) consider questions involving unintended interference with national technical means of verification;
(d) consider possible changes in the strategic situation which have a bearing on the provisions of this Treaty;
(e) agree upon procedures and dates for destruction or dismantling of ABM systems or their components in cases provided by the provisions of this Treaty;
On the international level, while the World Court might be competent to decide questions of treaty interpretation,\footnote{Statute of the International Court of Justice, Arts. 35–36, 59 Stat. 1055, TS No. 993, 3 Bevans 1153, 1179.} it obviously lacks the authority to decide the domestic constitutional question of the meaning of the ABM Treaty in light of the Senate ratification hearings. More importantly, however, it is improbable in the extreme that the United States would ask the Court to decide whether SDI complies with the ABM Treaty,\footnote{On Oct. 9, 1985, the State Department announced that the United States had terminated its Declaration of Aug. 26, 1946, submitting to the compulsory jurisdiction of the International Court of Justice. \textit{See Chayes, Nicaragua, the United States, and the World Court}, 85 \textit{COLUM. L. REV.} 1445 (1985).} considering the recent U.S. experience in the Court concerning U.S. military involvement in Nicaragua,\footnote{See id.} as well as the national security implications of the SDI program. In addition, the Soviet Union would probably not agree to this method of resolving the dispute. Rather, it seems far more likely that if and when SDI reaches the development and testing phases, the United States either will seek modification of the ABM Treaty to accommodate SDI or will withdraw from the Treaty altogether under Article XV, paragraph 2.\footnote{Article XV, paragraph 2 of the ABM Treaty provides: Each Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests. It shall give notice of its decision to the other Party six months prior to withdrawal from the Treaty. Such notice shall include a statement of the extraordinary events the notifying Party regards as having jeopardized its supreme interests. ABM Treaty, \textit{supra} note 1, 23 UST at 3446.} A more promising forum for reconciling the Treaty and the SDI program is the Standing Consultative Commission (SCC), the bilateral U.S.-Soviet review panel established to implement the provisions of the ABM Treaty and the Interim Agreement.\footnote{See \textit{supra} notes 23 and 82. For a discussion of the many disputes that the Standing Consultative Commission has been called upon to resolve, see T. Wolfe, \textit{supra} note 19, at 35–37; S. Talbott, \textit{supra} note 21, at 116, 143–44, 197–98; S. Talbott, \textit{supra} note 7, at 320.} Because misunderstandings can be aired privately in the SCC, it is not only an important confidence-building measure, but also an invaluable forum in which questions of possible treaty violations can be resolved without causing international embarrassment to either side.

Of course, whether the Reagan administration’s permissive interpretation
of the Treaty comports with the Senate’s understanding can only be settled indirectly by the SCC. From the perspective of crisis stability, however, the SCC represents the most promising forum for resolving the SDI-ABM controversy between the two superpowers. It is a forum in which the military, intelligence and diplomatic communities from both sides can meet, exchange information and share concerns over developments affecting the Treaty. The SCC has proven invaluable in the past and should be seriously considered as a mechanism for resolving the SDI controversy through quiet diplomacy. Although the SCC had held regular biannual sessions lasting 4 to 6 weeks since shortly after its inception in 1972, that routine regrettably broke down soon after the Soviet Union terminated the Intermediate-Range Nuclear Force talks in Geneva in 1983.

Of the domestic forums in which the ABM-SDI controversy could be resolved, the courts immediately suggest themselves. The Supreme Court has had several occasions to consider the treaty-making power under Article II, section 2 of the Constitution. It has not, however, considered the precise issue of an executive branch interpretation of a treaty being at odds with the consenting Senate’s understanding of the treaty. The closest the Supreme Court has come to addressing this issue was in Goldwater v. Carter.

In that case, the Court considered and rejected a claim that the Constitution requires a two-thirds vote of the Senate before the President may terminate a treaty. Nine senators and 16 members of the House of Representatives sought declaratory and injunctive relief against President Carter following his announcement that the defense treaty between the United States and the Republic of China would be terminated. A sharply divided Court vacated the judgment of the court of appeals and remanded the case with directions to dismiss the complaint. Several Justices filed opinions stating their separate views.

Justice Powell would have dismissed the congressional complaint as not ripe for judicial review. In his view, until such time as the President and Congress reach a “constitutional impasse,” the judicial branch should not decide issues affecting the allocation of power between Congress and the President. “Otherwise,” Justice Powell continued, “we would encourage

88 T. WOLFE, supra note 19, at 36. 89 S. TALBOTT, supra note 21, at 3–4.
90 See, e.g., Reid v. Covert, 354 U.S. 1, 16 (1957); Missouri v. Holland, 252 U.S. 416, 433 (1920); Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304, 360 (1816).
91 444 U.S. 996 (1979). See Berger, The President’s Unilateral Termination of the Taiwan Treaty, 75 Nw. U. L. Rev. 577 (1980–81); Note, Executive Action, Goldwater v. Carter, and the Allocation of Treaty Termination Power, 15 Ga. L. Rev. 176 (1980–81); Note, Unilateral Presidential Treaty Termination Power by Default: An Analysis of Goldwater v. Carter, 15 Tex. Int’l L.J. 317 (1980); Note, The Constitutional Twilight Zone of Treaty Termination: Goldwater v. Carter, 20 Va. J. Int’l L. 147 (1979–80).
92 See Goldwater v. Carter, 481 F.Supp. 949 (D.D.C.), rev’d, 617 F.2d 697 (D.C. Cir.), vacated, 444 U.S. 996 (1979).
93 Mutual Defense Treaty between the United States of America and the Republic of China, Dec. 2, 1954, 6 UST 433, TIAS No. 3178, 248 UNTS 213 (entered into force Mar. 3, 1955).
94 444 U.S. 996. 95 Id. at 997 (Powell, J., concurring).
small groups or even individual Members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict. Since Congress as a body had not taken any official action rejecting President Carter's claim of unilateral power to terminate the treaty, Justice Powell did not believe it was the Court's task to do so.

Justice Rehnquist, joined by three other Justices, concluded that the case presented a nonjusticiable political question. As set forth in Baker v. Carr, the political question doctrine incorporates three inquiries. The first is whether the text of the Constitution commits resolution of the issue to one of the coordinate branches of government. The second is whether resolution of the issue would require a court to move beyond areas of judicial expertise. The third is whether prudence counsels against judicial intervention.

In his opinion, Justice Rehnquist wrote that the basic question presented was a political one and therefore nonjusticiable. That question, Justice Rehnquist stated, "involves the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President." As a practical matter, Justice Rehnquist added, Congress has resources at its disposal to protect and assert its interests, such as the power to regulate foreign commerce, to raise armies and to declare war.

In a dissenting opinion, Justice Brennan would have affirmed the decision of the court of appeals on the ground that treaty termination in this instance was tantamount to withdrawing recognition from a foreign government, a power committed by the Constitution to the President alone.

Goldwater v. Carter raises a host of questions about alleged treaty reinterpretation by the President and whether the judiciary may intervene in such a case. First, is the President required to consult the Senate in matters of treaty interpretation? If he is but fails to do so, can he be compelled to do so by the judiciary? Must the Senate, if it is not the same Senate that approved the particular treaty, reach an impasse with the President before the judiciary will intervene? Does a member of the Senate have standing to challenge the Executive's interpretation of a treaty? Are questions of treaty interpretation by the President essentially political in nature and therefore nonjusticiable?

On its face, the question of the meaning of a treaty—the supreme law of the land—is perfectly suited for judicial resolution. Federal judicial power encompasses cases involving treaties made under the authority of the federal

97 Id.
98 Id. at 998.
99 Justice Rehnquist wrote a separate opinion in which Chief Justice Burger, Justice Stevens and Justice Stewart joined. Id. at 1002.
100 Id. (Rehnquist, J., concurring).
101 Baker v. Carr, 369 U.S. 186, 217 (1962).
102 Id. Had the case been ripe for review, Justice Powell would have answered all three questions in the negative. 444 U.S. at 998-1001.
103 444 U.S. at 1002 (Rehnquist, J., concurring).
104 Id.
105 Id. at 1006 (Brennan, J., dissenting).
106 U.S. CONST. art. VI.
Government. Since 1803, when Chief Justice John Marshall first announced the doctrine in the landmark decision of Marbury v. Madison, judicial review—the power of the courts to determine the validity of acts of the other branches of government—has been a fixed star in American jurisprudence. As noted by Justice Powell in Goldwater, the duty of the Supreme Court is to say what the law is. While every treaty by definition necessarily touches upon the conduct of foreign relations, a sphere traditionally reserved for the political branches of government, the Court in Baker v. Carr explicitly rejected the contention that anything touching upon foreign affairs is immune from judicial review. As far back as 1899, the Supreme Court stated that the construction of treaties "is the peculiar province of the judiciary," not of Congress or the executive branch.

Given that the courts are not excluded from treaty interpretation, does the SDI-ABM controversy nevertheless present a nonjusticiable political question? Turning to an analysis of the three-pronged test in Baker v. Carr, we must first ask whether the Constitution commits treaty interpretation to one particular branch of government. While no constitutional provision explicitly confers the power to interpret treaties upon the President, neither does any provision of the Constitution confer such power exclusively on the Senate. Article II, section 2 of the Constitution does authorize the President to make treaties, but only with the advice and consent of the Senate, which supports the view that the power to interpret treaties is the President’s in the first instance, but is subject to any declaration on, reservation to or understanding of the treaty by the consenting Senate.

Should the President be required, then, to consult with the Senate on such questions? Arguably, he should. But for the Senate’s approval, no treaty would ever take domestic legal effect in the first place. However, as is discussed below, there appears to be no constitutional requirement that the President consult with the Senate on matters of treaty interpretation. That conclusion, of course, does not mean that the President has an unfettered hand in such matters.

109 U.S. CONST. art. III, §2, cl. 1. 110 5 U.S. (1 Cranch) 137 (1803).
111 See Van Alstyne, A Critical Guide to Marbury v. Madison, 1969 DUKE L.J. 1; Frankfurter, John Marshall and the Judicial Function, 69 HARV. L. REV. 217, 219 (1955); Corwin, Marbury v. Madison and the Doctrine of Judicial Review, 12 MICH. L. REV. 538 (1914).
112 444 U.S. at 1001.
113 369 U.S. at 211 ("it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance").
114 Jones v. Meehan, 175 U.S. 1, 75 (1899). Compare Factor v. Laubenheimer, 290 U.S. 276, 295 (1933) ("the construction of a treaty by the political department of the government, while not conclusive upon courts called upon to construe it, is nevertheless of weight").
115 See supra notes 101–102 and accompanying text.
116 However, an interpretation of a treaty that would be tantamount to a termination of that treaty would raise a question quite similar to the one presented in Goldwater v. Carter. See supra notes 90–107 and accompanying text. But see Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) ("In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker").
117 See infra notes 147–150 and accompanying text.
As for the second prong of the *Baker v. Carr* test, would resolution of this issue require a federal court to move beyond areas of its expertise? While the arms control field is fraught with jargon, often unintelligible to the lay public, the courts are frequently called upon to interpret highly complex laws. In connection with the ABM Treaty, the task that the judiciary would be called upon to perform would be closely analogous to a “garden variety” problem of statutory interpretation, requiring no “special competence or information.” More importantly, the interpretation of a treaty should not present an inherently daunting task for the federal courts; it is one that they perform regularly.

If the first two prongs of the three-pronged test of *Baker v. Carr* can be met—that treaty interpretation is not committed to one of the other coordinate branches and that resolution of the issue would not require the courts to move into an area beyond judicial expertise—does prudence counsel against judicial intervention? A ruling by the Court that the President has not misinterpreted the ABM Treaty in light of the Senate hearings would obviously not cause any embarrassment to the President, although such a conclusion would certainly be unpalatable to any senator who had brought suit. On the other hand, while the President may have the responsibility for carrying out treaty obligations, and the incidental responsibility for interpreting those obligations, that does not mean that the President has the power to rewrite treaty provisions. If the Court entertained a lawsuit brought by members of the Senate challenging the President’s interpretation of the ABM Treaty, the conclusion that certain SDI development and testing is illegal under the ABM Treaty—contrary to the opinion of the administration—while vindicating the Senate, would be a source of embarrassment to the President, internationally and domestically.

Nevertheless, these consequences are all a question of degree. Considering the serious constitutional issue implicated when the executive branch’s interpretation of a treaty is at odds with the consenting Senate’s understanding of that treaty, any attendant embarrassment to the Executive pales in comparison. Such a setback would arguably be no more embarrassing to the executive branch than other major setbacks that Presidents have met with

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118 See *supra* notes 101–102 and accompanying text.
119 See *Goldwater v. Carter*, 444 U.S. at 1000 (Powell, J., concurring) (if “an inquiry demands special competence or information beyond the reach of the Judiciary,” then it is one best left for another branch).
120 Examples include patent cases (see, e.g., *Diamond v. Chakrabarty*, 447 U.S. 303 (1980)), antitrust cases (see, e.g., *Catalano, Inc. v. Target Stores*, 446 U.S. 643 (1980)) and securities cases (see, e.g., *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582 (1973)).
121 *Goldwater*, 444 U.S. at 1000 (Powell, J., concurring).
122 See, e.g., *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982) (interpretation of the Treaty of Friendship, Commerce, and Navigation with Japan); American Ass’n of Exporters & Importers—Textile & Apparel Group v. United States, 751 F.2d 1239 (Fed. Cir. 1985) (interpretation of the Multifiber Arrangement); *Mast Industries, Inc. v. Regan*, 596 F.Supp. 1567 (Ct. Int’l Trade 1984) (interpretation of the Multifiber Arrangement).
123 *Baker v. Carr*, 369 U.S. at 217. See *supra* notes 116–121 and accompanying text.
in the courts in the past. Moreover, it should come as no surprise to the President that his treaty interpretation, if tantamount to a treaty reinterpretation in light of the consenting Senate’s understanding of the treaty, would run the risk of being invalidated by a reviewing court. In short, prudence does not clearly counsel against judicial intervention in the SDI-ABM controversy.

Assuming that a political question is not presented by this particular treaty interpretation, would the Senate have to pass a resolution rejecting the Reagan administration’s permissive interpretation of the ABM Treaty, and thus directly confront the executive branch, before the judiciary would deem the matter ripe for review? Arguably, the answer to this question is no. As is noted below, the ABM Treaty ought to be interpreted in light of the legislative history of the Senate that approved it, not in light of the views of a subsequent Senate. A useful analogy can be found in statutory interpretation. The Supreme Court has stated that the views of a subsequent Congress as to the meaning of a given statute cannot override the unmistakable intent of the enacting one; it is the intent of the enacting Congress that controls. As shown in the foregoing discussion, the record of the Senate hearings leaves little doubt that the Senate thought it was consenting to a specific reading of the Treaty. In short, the views of the approving Senate should be equally binding on the current President, the current Senate and the courts. No official act by the current Senate designed to create a constitutional impasse should be required for the matter to be considered ripe for judicial review, since the views of that body have no legally binding effect regarding the meaning of a provision of the ABM Treaty.

If a group of senators did file a lawsuit against President Reagan seeking a declaration of the meaning of the ABM Treaty vis-à-vis SDI, would those senators have standing to bring such an action? Over the years, several congressional-plaintiff lawsuits have been filed against the executive branch, challenging alleged executive encroachment on the constitutional prerog-

124 See, e.g., United States v. Nixon, 418 U.S. 683 (1974).

125 Considering the penchant of the judiciary for invoking the political question doctrine to avoid exercising its jurisdiction in cases involving national defense, it is perhaps unrealistic to believe that a legal challenge by the Senate in this connection would succeed.

Nevertheless, the Reagan administration’s revised interpretation of the ABM Treaty is quite arguably not a “political question.” See Baker v. Carr, 369 U.S. at 212 (“if there has been no conclusive governmental action” then a court can construe a treaty and may find it provides the answer”). When compared to the Carter administration’s decision to terminate the defense treaty with Taiwan in order to normalize relations with the People’s Republic of China—a paradigm of a political decision—a treaty interpretation that certain weapons systems may be developed and tested pursuant to the ABM Treaty has fewer political overtones.

126 See infra notes 147–150 and accompanying text.

127 Teamsters v. United States, 431 U.S. 324, 354 n.39 (1977). The Court has in fact given the views of a subsequent Congress some weight generally only when the precise intent of the enacting Congress was obscure. Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596 (1980).

128 Private citizens would clearly be unable to bring such an action because the ABM Treaty is not self-executing. See Diggs v. Richardson, 555 F.2d 848, 850–51 (D.C. Cir. 1976).
atives of Congress. These cases have not always been ringing successes for the members of Congress who have brought them, having often been dismissed for lack of standing or on the ground that such actions present a nonjusticiable political question. It seems doubtful that in their capacity as private citizens, senators would not have standing. While the Supreme Court has not definitively ruled on the question, lower federal courts have split on the issue; in some instances, they have found standing for members of Congress, but in others they have failed to find it.

Arguably, however, members of the Senate qua senators should have standing to bring an action challenging the President's interpretation of a treaty. The nature of their complaint would be that the Executive's interpretation, being at odds with the consenting Senate's understanding of that treaty, so seriously erodes the Senate's constitutional advise-and-consent role as to render it void. If the focus is on whether the President's interpretation of the ABM Treaty is consistent with that of the Senate that approved it, then institutional action by the current Senate should not be a precondition to ripeness. Moreover, regarding standing, any senator qua senator ought to have standing to bring an action to resolve such a serious

129 See, e.g., Goldwater v. Carter, 444 U.S. 996 (1979); Holtzman v. Schlesinger, 414 U.S. 1304 (Marshall, Circuit Justice 1975); Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974). See generally McGowan, Congressmen in Court: The New Plaintiffs, 15 GA. L. REV. 241 (1981); Note, Congressional Access to the Federal Courts, 90 HARV. L. REV. 1632 (1977).

130 See, e.g., Holtzman v. Schlesinger, 484 F.2d 1307, 1315 (2d Cir. 1973) (Congresswoman Holtzman did not have standing qua member of Congress to attack the constitutionality of the Vietnam War). But see Kennedy v. Sampson, 511 F.2d 430, 435–36 (D.C. Cir. 1974) (Senator Kennedy had standing to seek declaratory judgment that presidential pocket veto of a bill was ineffective). See generally Note, Congressional Standing to Challenge Executive Action, 122 U. PA. L. REV. 1566 (1974).

131 See, e.g., Goldwater, 444 U.S. at 1002 (Rehnquist, J., concurring). But see Baker v. Carr, 369 U.S. at 211 (rejecting idea that anything touching foreign affairs is immune from judicial review). See generally Note, The Justiciability of Congressional-Plaintiff Suits, 82 COLUM. L. REV. 526 (1982). For an excellent overview of the case law dealing with the political question doctrine, see Atlee v. Laird, 347 F.Supp. 689 (E.D. Pa. 1972) (three-judge court), aff'd sub nom. Atlee v. Richardson, 411 U.S. 911 (1973).

132 See supra notes 128 and 130.

133 The issue of standing by members of Congress as such was raised in the district court but not reached by the Supreme Court in Mink v. EPA, 410 U.S. 73, 75 n.2 (1973).

134 See, e.g., Kennedy v. Sampson, 511 F.2d 430, 435–36 (D.C. Cir. 1974).

135 See, e.g., Holtzman v. Schlesinger, 484 F.2d 1307, 1315 (2d Cir. 1973).

136 See generally Note, Standing to Sue for Members of Congress, 85 YALE L.J. 1665 (1974); Note, supra note 130.

137 Compare Kennedy v. Sampson, 511 F.2d at 435–36 (Senator Kennedy had standing to challenge the validity of a presidential pocket veto on the ground that it deprived him "of the effectiveness of his vote" in favor of the bill), with Goldwater v. Carter, 617 F.2d 697, 714–15 (D.C. Cir.) (Senator Goldwater lacked standing to challenge treaty termination by the President absent legislative action in conflict with the Executive), vacated, 444 U.S. 996 (1979); and Diggs v. Richardson, 555 F.2d 848, 851 (D.C. Cir. 1976) (members of Congress have no judicially enforceable rights under treaty that is not self-executing).

138 Still, under Justice Powell's view of ripeness as stated in Goldwater, a Senate resolution challenging the President's interpretation might still be a necessary precondition to any such action. 444 U.S. at 996-1002.
constitutional question, which trenches so heavily upon the Senate's role in treaty making.159 If any complaining senators happen also to have voted on the ABM Treaty itself, a further argument could be made that they have been denied their vote under Article II, section 2 of the Constitution, which would confer standing upon them to challenge the President's permissive interpretation of the ABM Treaty.140

Besides the question whether SDI development and testing is permitted under the ABM Treaty, major domestic environmental concerns are potentially implicated if huge outlays of federal funds are expended on such weapons development.141 National defense can be a supremely domestic concern in this connection,142 only incidentally touching upon foreign affairs.143 Thus, in addition to legal action by members of the Senate challenging the President's latest interpretation of the ABM Treaty, a lawsuit could conceivably be brought by private citizens challenging the SDI program once it enters the development and testing phases.

For example, a challenge could be made that such development and testing contravenes the National Environmental Policy Act (NEPA), which bans federally funded projects that have a potentially adverse effect on the environment unless an environmental impact statement is first prepared and published for public comment.144 It is not entirely inconceivable that in the course of such litigation a court would be presented with an opportunity to consider whether the administration's permissive interpretation of the Treaty is consistent with the consenting Senate's understanding, particularly if the

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159 See Kennedy v. Sampson, 511 F.2d at 434, where the court noted in a related context:

The provision under discussion [Art. I, §7 of the Constitution] allocates to the executive and legislative branches their respective roles in the law-making process. When either branch perceives an intrusion upon its legislative power by the other, this clause is appropriately invoked. The gist of appellee's complaint is that such an intrusion has occurred as a result of the President's misinterpretation of this clause . . . .

140 See Kennedy v. Sampson, 511 F.2d at 434; compare Holtzman v. Schlesinger, 484 F.2d at 1315.

141 See Guertner, supra note 4, at 74 ($26 billion for SDI research through fiscal year 1989); Will Reagan's Star Wars Plan Fly?, Miami Herald, Nov. 6, 1985, at 2E, cols. 1-4 ("SDI officials say an informal decision about whether these problems can be solved can be made by the early 1990s, after research costing some $30 billion").

142 See, e.g., Jackson County v. Jones, 571 F.2d 1004, 1007 (8th Cir. 1978) (Department of Defense not excepted from the requirements of the National Environmental Policy Act); Concerned About Trident v. Rumsfeld, 555 F.2d 817 (D.C. Cir. 1976).

143 See, e.g., Youngstown, 343 U.S. at 587 (rejecting notion that President has inherent power as commander-in-chief to seize domestic steel mills as part of the Korean War effort).

144 42 U.S.C. §§4331-4335 (1982). See supra note 142 and cases cited therein. But see Weinberger v. Catholic Action of Hawaii, 454 U.S. 139 (1981) (national security exception to NEPA allows Department of the Navy to keep secret whether it stores nuclear weapons in Honolulu). Since the ABM Treaty is not self-executing, it is doubtful that a direct challenge could be made by a private citizen to the President's permissive interpretation of the Treaty. Compare Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1298 (3d Cir. 1979); Diggs v. Richardson, 555 F.2d 848 (D.C. Cir. 1976).
court finds an apparently conflict between that interpretation and NEPA.\textsuperscript{145} If the court also finds that SDI development and testing run afoul of NEPA, it could resolve the conflict by concluding that such SDI programs are in violation of the consenting Senate’s understanding of the Treaty, thus construing the Treaty and NEPA so as to give effect to both.\textsuperscript{146} Nevertheless, the prospects for success of a court challenge to the SDI program by private individuals do not appear to be bright.

A fourth forum in which the question of treaty interpretation could be resolved is the Senate itself. As a threshold question, is the President obligated to consult with the Senate on a matter of treaty interpretation? Considering that the President is responsible under his foreign affairs powers for carrying out treaty obligations,\textsuperscript{147} the President ordinarily would appear to have no constitutional duty to consult with the Senate on such matters—although failure to do so could be political suicide. Moreover, even if the Senate involved happened to be the Senate that gave its consent to the particular treaty, the answer would still appear to be no. Nearly 85 years ago the Supreme Court considered the legal effect of a Senate resolution purporting to interpret a treaty between Spain and the United States that ceded the Philippines to the United States.\textsuperscript{148} The Senate resolution was adopted by a majority of those senators present and voting.\textsuperscript{149} The Court held that in any event, despite the lack of a two-thirds majority, “[t]he meaning of the treaty cannot be controlled by subsequent explanations of some of those who may have voted to ratify it.”\textsuperscript{150}

Although the President may thus have no constitutional duty to consult with the Senate on a matter of treaty interpretation, the Senate has the power to compel such consultation if it can muster the political will to challenge the President by threatening to or actually withholding defense appropriations for SDI research. As Justice Rehnquist suggested in \textit{Goldwater v. Carter},\textsuperscript{151} the power of the purse can be a potent weapon in the area of treaty interpretation.

\textbf{V. Conclusion}

A serious constitutional question is posed by a treaty interpretation of the executive branch that appears to be fundamentally at odds with that of the consenting Senate. If the Senate’s advise-and-consent role is to be meaningful and not a mere formality to treaty making, the advise-and-consent clause must have teeth. It would do violence to that clause to say that the executive branch may present a treaty for approval by the Senate, tell the

\textsuperscript{145} See Whitney v. Robertson, 124 U.S. 190, 194 (1888) (“the courts will always endeavor to construe them [a treaty and legislation] so as to give effect to both, if that can be done without violating the language of either”).

\textsuperscript{146} \textit{Id.}

\textsuperscript{147} L. Henkin, supra note 73, at 164.

\textsuperscript{148} Fourteen Diamond Rings v. United States, 183 U.S. 176 (1899).

\textsuperscript{149} \textit{Id.} at 180.

\textsuperscript{150} \textit{Id.}

\textsuperscript{151} See supra note 105 and accompanying text.
Senate that it has a specific meaning, and then turn around after the Senate has given its consent and say that the treaty now means something entirely different. To so conclude would make a mockery of the Senate’s role in treaty making.

As the foregoing has shown, the President is bound by what the consenting Senate’s understanding of a particular treaty was at the time it gave its consent to ratification. The President is not free to advance a contrary interpretation, in either an international or a domestic forum. Conversely, if the consenting Senate expressed no particular understanding of a treaty provision, or if it passed no reservations or declarations respecting a treaty, the President should have wide latitude, within the bounds of reason, to interpret that treaty. If the Senate’s consent was unconditional, a subsequent Senate cannot add its own gloss on a given treaty.

In a case where the consenting Senate clearly expressed its understanding as to the meaning of a treaty at the time it gave its consent to ratification, the difficulties of forcing conformance by the executive branch to that understanding are formidable. In the final analysis, indirect resolution of the controversy over SDI and the ABM Treaty by an international forum such as the World Court is impractical, absent willingness on the part of the executive branch to submit to an international tribunal’s jurisdiction and to abide by its determination. The same holds true for indirect resolution of this controversy in a bilateral forum such as the SCC, unless the executive branch shows some willingness to make concessions. Moreover, whereas the interpretative conflict between the Senate and the executive branch could be directly addressed in federal court, considering the genuine obstacles posed by the political question doctrine, the doctrine of ripeness and the doctrine of standing, the prospects for resolving this issue in a domestic judicial forum also appear dim, though not as futile as in the international forums.

The one forum that does hold out the prospect of a satisfactory resolution of the SDI-ABM question is the Senate itself. For there the question of an executive branch treaty interpretation at variance with the consenting Senate’s understanding can be brought to the fore through the Senate’s control over defense appropriations.155 However, the power of the purse will only represent a marginally more attractive alternative to litigation unless the Senate dares to resist the President by withholding funds for SDI research. While threats to withhold funds arguably are a more effective vehicle for Congress to shape the contours of national defense policy, in a world of pluralistic politics consensus is at a premium. In the end, however, the Senate may amount to little more than a highly visible forum where debate on the meaning of the ABM Treaty can be aired and conflicting opinions on that question weighed.

155 U.S. CONST. art. I, §9, cl. 7.