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### Prospective Advice and Consent

Jean Galbraith

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# Article

## Prospective Advice and Consent

Jean Galbraith<sup>†</sup>

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### I. INTRODUCTION

The Treaty Clause of the Constitution gives the President the “Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two

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<sup>†</sup> Sharswood Fellow, University of Pennsylvania Law School. I presented drafts of this paper at the Junior International Law Scholars conference at Yale Law School and at a faculty workshop at the University of Pennsylvania Law School. I thank the participants for their comments. I also thank Matt Adler, Elena Baylis, Stephanos Bibas, Bill Burke-White, Sarah Cameron, David Caron, Trey Childress, Meg deGuzman, Gabriela Femenia, Greg Hall, Duncan Hollis, Sophia Lee, Craig Martin, Milan Markovic, Theodor Meron, Ralf Michaels, Stephen Morse, Jaya Ramji-Nogales, Amy Wax, and David Zaring, and the editors of *YJIL*, especially Giselle Barcia and Sally Pei. All views and any errors are of course my own.

thirds of the Senators present concur.”<sup>1</sup> In theory, treaty-making traditionally proceeds in three steps: First, the President or his agents negotiate and sign the treaty; second, the Senate gives its advice and consent by a two-thirds vote; and third, the President ratifies the treaty. In practice, however, the Senate has earned its reputation as the “graveyard of treaties.”<sup>2</sup> While minor treaties usually clear the Senate eventually, significant treaties—particularly multilateral ones—are often the subject of lengthy or endless delay. The Senate’s present backlog goes back decades (the oldest treaty pending before it is from 1949) and includes major treaties like the United Nations Convention on the Law of the Sea, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Stockholm Convention on Persistent Organic Pollutants.<sup>3</sup>

The specter of death in the Senate in turn limits U.S. bargaining power. If other nations believe that the United States will never become a party to a multilateral treaty under negotiation, then their incentives to listen to U.S. negotiators are greatly reduced. A former Legal Adviser to the State Department has recently described this as a “real problem in treaty negotiation,” explaining that “our negotiating partners have no confidence that the executive branch will necessarily be able to get a potentially controversial treaty through the Senate. That does undermine the negotiating effectiveness of our State Department and other negotiators.”<sup>4</sup>

The Senate’s failure to advise and consent to important treaties has received substantial attention from academics over the last twenty years, including contributions from Bruce Ackerman, David Golove, Laurence Tribe, John Yoo, Peter Spiro, Steve Charnovitz, and, most recently, Oona Hathaway. But these scholars have all focused on one particular issue, namely, the extent to which treaties can or should be approved as congressional-executive agreements by a majority of both houses and the President rather than through the Treaty Clause.<sup>5</sup> Little has been written about whether the Treaty Clause itself could be applied in a more efficient or effective manner.<sup>6</sup> By contrast, this

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1. U.S. CONST. art. 2, § 2, cl. 2.

2. This phrase has a long history, see *The Graveyard of Good Treaties*, NATION, Mar. 15, 1900, at 199, and is often linked in particular to the failure of the Treaty of Versailles. See, for example, LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 178 (1996).

3. *Treaties Pending in the Senate*, U.S. DEP’T OF STATE, <http://www.state.gov/s/l/treaty/pending/> (last visited Mar. 5, 2012).

4. Interview by Toni Johnson with John B. Bellinger III, Adjunct Senior Fellow for Int’l and Nat’l Sec. Law, Council on Foreign Relations and Former Legal Adviser, U.S. Dep’t of State (July 9, 2010), available at [http://www.cfr.org/publication/22614/us\\_trouble\\_with\\_start\\_and\\_other\\_treaties.html](http://www.cfr.org/publication/22614/us_trouble_with_start_and_other_treaties.html).

5. See generally Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995); Steve Charnovitz, *Using Framework Statutes to Facilitate U.S. Treaty Making*, 98 AM. J. INT’L L. 696 (2004); David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791 (1998); Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236 (2008); Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961 (2001); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995); John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757 (2001).

6. For a rare exception, see Ronald A. Lehmann, Note, *Reinterpreting Advice and Consent: A*

Article argues that the Treaty Clause provides the President and the Senate with considerably more flexibility than the conventional wisdom suggests—flexibility that can strengthen the prospects for treatymaking under the Treaty Clause.

Specifically, I argue that the Senate can, and in many circumstances should, give its advice and consent prior to treaties' final negotiation, an approach that I term *prospective advice and consent*. The Senate would give prospective advice and consent through the passage of a resolution that, by a two-thirds vote, authorizes the President to make a treaty or multiple treaties that conform to whatever conditions are set out in the resolution. Provided that the negotiated treaty or treaties then conform to these conditions, the President could ratify without further action by the Senate.

This approach would reverse the longstanding and almost entirely unquestioned presumption that the Senate's advice and consent must follow the President's submission of a final treaty text, an approach that I call *subsequent advice and consent*.<sup>7</sup> As I show, however, this presumption stems from historical practice rather than from a constitutional mandate. In the nineteenth century, this presumption made good sense: the United States entered into a sufficiently low number of international agreements that the Senate could reasonably take them up one by one; the most important agreements tended to be bilateral rather than multilateral, so renegotiation to accommodate Senate changes was more feasible; and the Senate had not then developed its practice of delaying certain treaties for decades. As the preconditions have changed, however, it is time—indeed long past time—to rethink how the Treaty Clause is applied. Prospective advice and consent could considerably improve the processing of minor treaties. For major multilateral treaties, the use of prospective advice and consent would be more challenging but also more rewarding. I argue that for many such treaties, prospective advice and consent pegged to key U.S. negotiating objectives would both further U.S. negotiating power and have greater appeal for the Senate than does the present regime of subsequent advice and consent.

Part I shows that prospective advice and consent is permissible as a matter of constitutional law. I examine the text of the Constitution, evidence of original intent, and evolving practice and argue that prospective advice and consent is constitutional, or at least as constitutional as are the present practices of subsequent advice and consent under the Treaty Clause and of congressional delegations to the executive through ordinary legislation.<sup>8</sup> The briefly worded

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*Congressional Fast Track for Arms Control Treaties*, 98 YALE L.J. 885, 896-97 (1989) (proposing that certain treaties be approved through a fast-track process).

7. One further note on terminology: as I discuss *infra* Section I.A, historically, the Senate sometimes advised and consented to treaties *both* before and after their negotiation. With regard to these treaties, I will use the terms *pre-negotiation advice and consent* and *post-negotiation advice and consent*.

8. See *infra* Part I. I use the phrase "at least as constitutional" to acknowledge that scholars who doubt the constitutionality of subsequent advice and consent and of congressional delegations to the President might also doubt the constitutionality of my proposal. See, e.g., *infra* note 25 (describing the doubts expressed by historian Arthur Bestor as to the constitutionality of subsequent advice and consent).

Treaty Clause leaves great flexibility to the President and the Senate to work out their interactions—a flexibility broad enough to permit the Senate to give its advice and consent in advance of a treaty’s negotiation as a matter of timing, and to do so in broad-brush strokes rather than by approving the specific words that will make up the treaty. Indeed, as I will show, the Senate has given prospective advice and consent on rare occasions in the past, although these precedents are now almost entirely forgotten.<sup>9</sup>

Part II argues that prospective advice and consent could significantly improve the treaty-making process for minor treaties. Around half of the treaties submitted to the Senate for advice and consent are what I call *repetitive bilateral treaties*—treaties that are made bilaterally with many separate nations that all closely resemble each other—for example, tax treaties aimed at preventing the double taxation of income or mutual legal assistance treaties designed to further cooperation in criminal investigations. The Senate’s present, individualized review of these treaties takes up Senate Foreign Relations Committee resources, slows the adoption of the treaties, and adds little value (particularly since the Senate approves virtually all of these treaties). Prospective advice and consent would eliminate these problems while giving the Senate a role in forming U.S. negotiating objectives: Rather than approving these treaties one by one after their negotiation, the Senate would instead give advice and consent in advance to any such treaties, provided that these treaties satisfy whatever conditions are set out by the Senate in its resolution of advice and consent. Perhaps even more importantly, the Senate could use prospective advice and consent to create an alternative to what are known as *ex ante* congressional-executive agreements, or international agreements authorized in broad terms by prior congressional legislation. *Ex ante* congressional-executive agreements are common—the United States enters into well over a hundred each year—but once Congress has authorized these agreements in general terms, it retains little power to object to any particular agreement in light of the Supreme Court’s decision in *INS v. Chadha*.<sup>10</sup> As I show, however, *Chadha* does not apply to the Treaty Clause. Prospective advice and consent thus has a key advantage over congressional authorizations for *ex ante* congressional-executive agreements: the Senate can prospectively advise and consent to a treaty conditional on its retaining a post-negotiation and pre-ratification right to “veto” the treaty later if the end result is objectionable.

Part III considers the important role that prospective advice and consent could play in major multilateral treaty-making. At the international level, prospective advice and consent would strengthen U.S. credibility at the

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9. For example, David Golove observes that while “it may be the case that the Senate could give its *ex ante* consent authorizing the President to conclude treaties on particular subjects in accordance with its stipulated requirements,” nonetheless “[t]o my knowledge, it has never done so.” Golove, *supra* note 5, at 1798 n.20.

10. *INS v. Chadha*, 462 U.S. 919 (1983) (striking down the one-house legislative veto); see also Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 *YALE L.J.* 140, 145 (2009) (“[T]he authority to make such international agreements has proven to be nearly impossible to revoke once granted—not least because any effort to revoke or even amend a delegation can be vetoed by the President. Moreover, Congress retains strikingly meager power to oversee the agreements that are made.”).

bargaining table, thus potentially allowing the United States to obtain more favorable treaty terms. As a matter of the domestic allocation of power between the Senate and the President, prospective advice and consent would give the Senate its long-desired formal role at the negotiations stage and would likely lead to inter-branch interactions that are more collaborative and less critical than they currently are. Moreover, as it can with minor treaties, the Senate could structure its resolution of prospective advice and consent to reserve the right to review and reject the treaty after negotiation. I conclude by exploring examples of how prospective advice and consent might work in practice drawn from three of the most significant areas of public international law today: the law of the sea, climate change, and trade.

## II. THE CONSTITUTIONALITY OF PROSPECTIVE ADVICE AND CONSENT

In the fall of 1943, the Senate considered the Connally Resolution, which called for the establishment of an international authority dedicated to maintaining world peace.<sup>11</sup> A few days into the floor debate, Senator Millikin from Colorado warned that the resolution could be read as advice and consent to a future treaty establishing such an authority.<sup>12</sup> The very concept of prospective advice and consent startled his colleagues and triggered energetic debate. Some Senators thought that advice and consent could never constitutionally be completed until after a treaty was finalized;<sup>13</sup> others thought that prospective advice and consent would be constitutional only if the subsequent treaty used the exact language considered by the Senate;<sup>14</sup> and still others concluded that prospective advice and consent would be constitutional, at least as long as the terms of the advice and consent had a reasonable degree of particularity.<sup>15</sup> The issue came up again and again over the following week

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11. S. 192, 78th Cong., 89 CONG. REC. 9222 (1943). For the text of the Connally Resolution as it was first introduced on the floor, see 89 CONG. REC. 8620 (1943). For more background, see PHILIP J. BRIGGS, MAKING AMERICAN FOREIGN POLICY 24-34 (1991); and Ackerman & Golove, *supra* note 5, at 881-83. See also RANDALL BENNETT WOODS, FULBRIGHT: A BIOGRAPHY 80-84 (1995) (describing the earlier and similar Fulbright Resolution in the House, which Senator Tom Connally, the Chair of the Senate Foreign Relations Committee, viewed as impinging on the Senate's constitutional prerogatives).

12. 89 CONG. REC. 8744-46 (1943) (statement of Sen. Millikin).

13. The most sophisticated proponents of this view distinguished between "advice" and "consent," and asserted that "consent" had to come after a treaty's negotiation. *Id.* at 8998-99, 9001 (statement of Sen. Thomas); see also *id.* at 9205 (statement of Sen. Wherry) (distinguishing between "advice" and "consent" and concluding that "[o]nly is consent given a treaty when it is brought to the Senate for ratification"); *id.* at 9001 (statement of Sen. Murdock) (asserting that "advice" and "consent" are separate functions and that even after advice has been given by a two-thirds margin, "any proposed treaty must come back for the Senate's consent before it becomes effective").

14. *Id.* at 8803 (statement of Sen. Burton) ("I can recognize the possibility of a legal argument that our action was so specific and concrete that someone might interpret it as advice and consent before the document was before us, that it so clearly describes the document that it might just as well have been before us."); see also *id.* at 8897 (statement of Sen. Connally) ("I quite readily agree that if the Senate now or at any time should set forth in a resolution specific terms, and quote the exact language of a treaty, and say to the President, 'You are authorized to negotiate this treaty,' that would be consent, and consent in advance . . . [T]hat is the only instance in which the Senate could agree in advance").

15. *Id.* at 8744 (statement of Sen. Pepper) (considering that prospective advice and consent might be constitutional if "it may have particularized before the act itself, as to what was to be done, sufficiently so that a person might fairly say that the Senate advised and consented to it"); see also *id.* at 8899 (statement of Sen. Bushfield) ("Nothing in the Constitution instructs us as to whether that advice

of debate, until Senator Connally introduced an amendment clarifying that the Senate would need to give advice and consent down the road to “any treaty made to effect the purposes of this resolution.”<sup>16</sup>

Now almost entirely forgotten, this debate showcases the two key issues regarding the constitutionality of prospective advice and consent. The first is a formalistic question of ordering: Does the Treaty Clause require that the Senate consider a treaty after its negotiation and before its ratification, or do the President and the Senate instead have flexibility as to when the Senate plays its role? The second is functional: Does the Constitution require the Senate to approve the precise text of a treaty, or can the Senate give its advice and consent to the President in more general terms (and if so, how general can these terms be)?

In this Part, I address these two issues, which I call timing and specificity, and defend the broader positions on each. Importantly, I do not seek to ground my argument in any single theory of constitutional interpretation, such as some variant of textualism, original intent, or the living Constitution. Rather, my aim is to show that whatever the theory, prospective advice and consent is either constitutional or at least as constitutional as are widely accepted current practices—such as the President’s right to negotiate treaties without consulting the Senate beforehand and Congress’s ability to delegate substantial authority to the President. To this end, I draw from a range of materials, including the text of the Constitution, sources relating to its drafting and ratification, the international law of treatymaking at the time of the Framing, and subsequent practice.

#### A. *Timing*

In this Section, I show that the Treaty Clause entrusts the President and the Senate with discretion to work out the whens and hows of their interactions, and this discretion is broad enough to permit the Senate’s advice and consent before the negotiation of a treaty. This broad discretion stems primarily from the flexibly worded text of the Treaty Clause. It is further confirmed by the pragmatic approach taken by the Washington Administration, which employed either prospective or subsequent advice and consent, and sometimes both.

The Senate’s “advice and consent” is now taken as a matter of course to refer to a post-negotiation, pre-ratification vote.<sup>17</sup> This is true as a matter of

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[and consent] shall be given before or after making of the treaty . . . [And the Connally Resolution] standing alone asks us to direct the President to make whatever treaty he sees fit without further advice or consent of the Senate to accomplish the things stated in the resolution.”); *id.* at 9002 (statement of Sen. Wheeler) (“[I]f we adopt the resolution by a two-thirds majority, then in my judgment it can be held to be not only advice to the President, but both advice and consent, because there is no question that we consent in general terms . . .”).

16. *Id.* at 9066 (statement of Sen. Connally); *cf.* Ackerman & Golove, *supra* note 5, at 882-83 (discussing how this amendment relates to the contentious issue of whether a congressional-executive agreement could be used as an alternative to the Treaty Clause).

17. *E.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 reporter’s note 3 (1987); CONG. RESEARCH SERV., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 2 (2001) [hereinafter CRS REPORT]; CURTIS BRADLEY & JACK GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS 337 (2003);

longstanding practice, but some commentators go further and describe the timing of the Senate's role as constitutionally mandated, so that, as Senator Orrice Murdock asserted during the debates over the Connally Resolution, "any proposed treaty must come back for the Senate's consent before it becomes effective."<sup>18</sup> (Some even refer to the Senate's constitutional role as one of ratification,<sup>19</sup> even though the President is responsible for ratification and has sometimes declined to ratify treaties to which the Senate has advised and consented.<sup>20</sup>) As this Section shows, however, this position is wrong: There are no persuasive grounds for treating the timing of advice and consent as constitutionally determined. Indeed, traces of prospective advice and consent can be found throughout the history of U.S. treaty-making.

### 1. Two Textual Meanings of "Advice and Consent"

The twenty-five words of the Treaty Clause leave open significant questions of process and therefore power. The Framers did not embellish the Clause with the degree of detail used for the Bicameralism and Presentment Clause, which identifies the precise actions to be taken by each political branch, specifies the order of these actions, and provides an elaborate contingency tree.<sup>21</sup> Instead, they simply gave the President the power to "make treaties"—a phrase whose breadth seems to allocate the dominant role to him—and the Senate the obligation of "advice and consent" by a two-thirds vote.

As a textual matter, "advice and consent" can be read in two main ways, one of which contains an implicit timing scheme and the other of which does not. The first way is to treat "advice" and "consent" as two separate stages, with advice occurring at least once and possibly continuously before or during a treaty's negotiation and consent occurring after the treaty has been finalized.<sup>22</sup>

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HENKIN, *supra* note 2, at 177-78. Commentators typically do not even consider the possibility of prospective advice and consent. The only modern exception I have come across is David Golove, who notes the possibility in a footnote. Golove, *supra* note 5, at 1798 n.20.

18. 89 CONG. REC. 9001 (1943); *see also, e.g.*, 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1517 (1833) (suggesting that while pre-negotiation consultation is optional, "the exercise of the power of advice and consent . . . after the treaty was formed" is obligatory); Lawrence J. Block et al., *The Senate's Pie-in-the-Sky Treaty Interpretation: Power and the Quest for Legislative Supremacy*, 137 U. PA. L. REV. 1481, 1485-86 (1989) (asserting that the "constitutional solution" was to give the President the negotiating role and the Senate a reviewing role); sources cited *supra* note 13.

19. The Supreme Court sometimes makes this mistake in dicta. *E.g.*, *INS v. Chadha*, 462 U.S. 919, 955 (1983) ("The Senate alone was given unreviewable power [under the Constitution] to ratify treaties negotiated by the President."); *B. Altman & Co. v. United States*, 224 U.S. 583, 596 (1912) ("[U]nder the Constitution . . . a treaty must be ratified by a two-thirds vote of [the Senate.]").

20. ROYDEN J. DANGERFIELD, IN DEFENSE OF THE SENATE: A STUDY IN TREATY MAKING 184, 349-50 (1933). I use "ratification" loosely throughout to cover both the signing and sealing of the instrument of ratification and the exchange or deposit of this instrument.

21. U.S. CONST. art. I, § 7, cl. 2.

22. One could also treat "advice" and "consent" as separate things that *can* be satisfied at the same time—i.e., the Senate "advises" the President to negotiate for certain terms and "consents" conditional on these terms being satisfied; or the Senate "consents" to a prepared treaty and "advises" the President on whether and how to ratify it. *See* Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1167 (2000) (suggesting the latter); *see also infra* note 33. As a practical matter, this reading would have the same effect as the second reading that I discuss in the main text, and so I do not discuss it further.



Various senators embraced this two-stage approach during the debates over the Connally Resolution, and more recently it can be found in the work of luminaries such as Louis Henkin.<sup>23</sup> This interpretation draws heavily from the canon against superfluities—as Raoul Berger once argued, “[u]nless ‘advice’ is . . . understood [to refer to pre-negotiation consultation with the Senate], it is superfluous; it would have sufficed to require only Senate ‘consent’ for the ‘making’ of a treaty.”<sup>24</sup> For those who accept this interpretation, prospective advice and consent will be incompatible with the text of the Treaty Clause—but *no more incompatible than is the present practice of subsequent advice and consent*. There is no textual basis for treating “advice” as optional but “consent” as mandatory. If a textualist is willing to overlook “advice” provided “consent” is given, she should be equally willing to overlook “consent” provided “advice” is given.

The second reading of “advice and consent” is to treat it as a unitary phrase rather than as two separate nouns implying two distinct stages. This reading does not link “advice and consent” to a particular stage of the treaty-making process and thus is compatible with either prospective or subsequent advice and consent. In my view, this reading is the better one for three reasons.

First, historian Arthur Bestor has persuasively shown that “advice and consent” was often used as a single phrase in English and American eighteenth-century governance.<sup>25</sup> English statutes at the time began with the language “be

23. See Louis Henkin, *Treaties in a Constitutional Democracy*, 10 MICH. J. INT'L L. 406, 409 (1989) (treating “advice” and “consent” separately); sources cited *supra* note 13; see also, e.g., Ackerman & Golove, *supra* note 5, at 904 (treating “advice” and “consent” as separate concepts); Louis Fisher, *Congressional Participation in the Treaty Process*, 137 U. PA. L. REV. 1511, 1512 (1989) (considering that the term “advice” would be superfluous if the Senate was only intended to have a post-negotiation role); John Norton Moore, *Treaty Interpretation, the Constitution and the Rule of Law*, 42 VA. J. INT'L L. 163, 198 (2001) (discussing the “consent portion” of the Treaty Clause as distinct from an advice portion). Early in the twentieth century, the influential Senator Henry Cabot Lodge and his colleague Augustus Bacon advocated this view in their writings. See Henry Cabot Lodge, *The Treaty-Making Power of the Senate*, in A FIGHTING FRIGATE AND OTHER ESSAYS AND ADDRESSES 219, 231-32 (1902); Augustus O. Bacon, *The Treaty-Making Power of the President and Senate*, 182 N. AM. REV. 502, 506 (1906).

24. RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 123 (1974). Although I have not seen it made, the drafting history of the Constitution suggests a further possible argument in favor of the two-stage position. As reported out by the Committee on Postponed Parts on September 4, 1787, and debated and agreed to by the delegates as a whole, the draft Treaty Clause read: “The President by and with the advice and Consent of the Senate, shall have power to make Treaties . . . But no Treaty shall be made without the consent of two thirds of the members present.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 498-99 (Max Farrand ed., 1966) [hereinafter RECORDS OF THE FEDERAL CONVENTION]. Only later, through the work of the Committee on Style, was the last clause changed to its present form of “provided two-thirds of the senators present concur.” *Id.* at 599. The earlier version references “consent” twice but “advice” only once, and thus suggests a difference between “advice” and “consent.” But it is difficult to gauge the significance of this point, especially since, in substituting “concur” for the second “consent,” the Committee on Style might have sought to eliminate that difference.

25. Arthur Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined*, 5 SETON HALL L. REV. 527, 543, 545 (1974) [hereinafter Bestor, *Separation of Powers*]. Oddly, despite this showing, Bestor was a firm proponent of the two-stage approach, arguing that “[i]f language is used rationally, ‘advice’ means counsel offered *before* a decision is reached; ‘consent’ means acceptance of a proposed course of action *after* plans have been worked out in detail and are ready to be carried out.” *Id.* at 540; see also Arthur Bestor, “*Advice*” from the Very Beginning, “*Consent*” When the End Is Achieved, 83 AM. J. INT'L L. 718, 726 (1989) (making a similar

it enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and the Commons, in the present Parliament assembled."<sup>26</sup> In the American colonies and later states, the words were also used as a phrase, typically to describe the interactions between governors and their executive councils.<sup>27</sup> The common use of "advice and consent" as a single phrase undermines the likelihood that the words were endowed with separate meanings.

Second, the text of the Appointments Clause, which immediately follows the Treaty Clause, suggests that the Framers consciously viewed "advice and consent" as a single act. That clause provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" officers of the United States.<sup>28</sup> It is hard to interpret "advice and consent" here as anything except a unitary act. The wording makes clear that the Senate plays a part only in confirming appointments, not in making nominations, and there is thus no meaningful role for advice separate from consent. Of course, as Berger and others have pointed out, while the Appointments Clause distinguishes between nominations and appointments, the Treaty Clause does not separate out treaty negotiation and ratification but instead only speaks in general terms of "mak[ing] treaties"—a phrase that encompasses the entire process.<sup>29</sup> The most textually consistent interpretation of this difference, however, is not to read "advice and consent" as meaning two stages for treaty purposes and one stage for appointments purposes, as Berger would do,<sup>30</sup> but rather to read it as referring to a single stage for purposes of both clauses, a stage that can be fulfilled at any time during treatymaking but only after nominations in the appointments context.

Third, "advice and consent" was frequently used as a unitary phrase in

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point regarding advice). Eager for all arguments in favor of a dominant Senate role in treatymaking, Bestor emphasized that "advice and consent" was a term of art in arguing that the Senate was supposed to act more as a powerful executive council than as a legislative body with regard to treatymaking, *see id.* at 725-26, but then ignored how the phrase's term-of-art status undercuts the canon against superfluities.

26. Bestor, *Separation of Powers*, *supra* note 25, at 541-42; *see also id.* at 542-44 (discussing the phrase's use in the Privy Council). During the debate over the Connally Resolution, Senator Thomas acknowledged this point, observing that "[a]dvice and consent have been deemed by practically all our Executives to be a single act . . . . Very likely they were a single act when the words were taken from British constitutional law and incorporated into our law." 89 CONG. REC. 8998 (1943). He nonetheless preferred a two-stage interpretation. *See id.* at 9000.

27. *See* Bestor, *Separation of Powers*, *supra* note 25, at 545-46; Howard R. Sklamberg, *The Meaning of "Advice and Consent": The Senate's Constitutional Role in Treatymaking*, 18 MICH. J. INT'L L. 445, 447-50 (1997); *see, e.g.*, 17 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 636 (Gaillard Hunt ed., 1910) [hereinafter JCC]; Adam J. White, *Towards the Framers' Understanding of "Advice and Consent": A Historical and Textual Inquiry*, 29 HARV. J.L. & PUB. POL'Y 103, 137-38 (2006) (examining uses of the phrase "advice and consent" by the Massachusetts Council in the appointments context in 1780-1781 and 1786-1787 and finding that the Council consistently used this unitary phrase in approving nominations).

28. U.S. CONST. art. II, § 2, cl. 2.

29. BERGER, *supra* note 24, at 122-23; Arthur Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties—The Original Intent of the Framers of the Constitution Historically Examined*, 55 WASH. L. REV. 1, 117 (1979) [hereinafter Bestor, *Respective Roles*]; Lodge, *supra* note 23, at 231-32.

30. BERGER, *supra* note 24, at 122-24; *see also* Bestor, *Respective Roles*, *supra* note 29, at 117-18; Lodge, *supra* note 23, at 231-32.

early references to the Treaty Clause. John Jay used it this way in Federalist No. 64, when he observed that

For [preparatory decisions during negotiations] the President will find no difficulty to provide; and should any circumstance occur which requires the advice and consent of the Senate, he may at any time convene them. Thus we see that the constitution provides that our negotiations for treaties shall have every advantage which can be derived from talents, information, integrity, and deliberate investigations, on the one hand, and from secrecy and dispatch on the other.<sup>31</sup>

Here, Jay applied the phrase “advice and consent” to refer to a single act to be taken by the Senate—in this case, to be taken during treaty negotiations rather than after the completion of negotiations. Similarly, the Senate Executive Journal entries during the Washington Administration frequently employed “advice and consent” or “advise and consent” as a single phrase in relation to treaties. With regard to the first treaty negotiated during the Washington Administration, for example, the Journal used this phrase three times during the Senate’s pre-negotiation treaty deliberations<sup>32</sup> and once during its post-negotiation deliberations.<sup>33</sup> This unitary use has continued over history and remains the practice today.<sup>34</sup>

Although context and structure thus favor the unitary phrase interpretation over the two-stage interpretation, as I show in the next Section, the Framers probably anticipated that “advice and consent” would be given more than once over the process of treatymaking, in a manner functionally akin to the two-stage “advice” and “consent” interpretation. This expectation proved inconvenient to put into practice, however, and by the end of the Washington Administration, treatymaking tended to involve the Senate’s “advice and consent” only after a treaty’s negotiation.

## 2. *From the Framers’ Intent to Subsequent Advice and Consent*

The notes from the Constitutional Convention provide no clear evidence concerning how the President and Senate were intended to interact in treatymaking. While there was considerable debate about the exclusion of the

31. THE FEDERALIST NO. 64, at 393 (John Jay) (Clinton Rossiter ed., 1961).

32. S. EXEC. JOURNAL, 1st Cong., 1st Sess. 20 (entry of Aug. 22, 1789) (describing the President as coming to the Senate “for their advice and consent” with regard to negotiating instructions for a treaty with the Creek Indians); *id.* at 22 (stating “[w]hereupon the Senate proceeded to give their advice and consent”); *id.* at 24 (describing the Senate as having “agreed to advise and consent” to a particular pay-off to the Indians). *But see id.* at 21 (recording that the President requested only the “advice” of the Senate).

33. *Id.* at 61-62 (entry of Aug. 12, 1790) (describing the Senate as acting on the question of whether “to advise and consent to the ratification” of the Indian treaty and resolving that “the Senate do consent to the aforesaid treaty, and do advise the President of the United States to ratify the same”); *see also id.* at 58 (entry of Aug. 7, 1790) (containing Washington’s letter requesting further Senate advice and consent). For other uses of “advice and consent” or “advise and consent” in relation to treaties, see *id.* at 61 (entry of Aug. 11, 1790); *id.* at 116 (entry of Mar. 26, 1792); and *id.* at 170 (entry of Jan. 9, 1795).

34. In current practice, Senate resolutions of advice and consent typically begin with the language “*Resolved* (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification.” BETSY PALMER, CONG. RES. SERV., SENATE CONSIDERATION OF TREATIES 1 (2009).

House of Representatives and about the two-thirds requirement, the Framers engaged in little recorded discussion over how the President and Senate should fulfill their respective roles.<sup>35</sup> It was not until the debates over the Constitution's ratification that the intended interplay between the President and the Senate was discussed in any detail. Even here, the evidence leaves room for what historian Jack Rakove has described as "an exemplary constitutional puzzle,"<sup>36</sup> but it does provide strong indications that the Senate was intended to give "advice and consent" to negotiating objectives and probably also to sign off on finalized treaties.

Although rarely cited in this context, Federalist No. 84 contains perhaps the clearest view of how the Treaty Clause was projected to work in practice. In a brief aside, Alexander Hamilton described the President as conducting "foreign negotiations . . . according to general principles concerted with the Senate, and subject to their final concurrence."<sup>37</sup> His position that the Senate was to be consulted at the negotiating stage was widely shared, as reflected in Jay's view in Federalist No. 64<sup>38</sup> and in speeches made at various ratification conventions. In one example, Chancellor Robert Livingston defended the Senate's six-year terms at the New York Convention by observing that "[t]hey are to form treaties with foreign nations: This requires a comprehensive knowledge of foreign politics, and an extensive acquaintance with characters, whom, in this capacity, they have to negotiate [sic] with."<sup>39</sup> Hamilton's further view that the Senate should play a role after a treaty's negotiation was also voiced by several convention participants, including William Davie, who spoke in passing at the inconclusive North Carolina Convention of the Senate having

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35. For detailed discussions of the Treaty Clause's drafting over the summer of 1787, see W. TAYLOR REVELEY III, *WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH* 74-99 (1981); Bestor, *Separation of Powers*, *supra* note 25, at 574-660; Bestor, *Respective Roles*, *supra* note 29, at 73-132; Jack N. Rakove, *Solving a Constitutional Puzzle: The Treatymaking Clause as a Case Study*, in 1 *PERSPECTIVES IN AMERICAN HISTORY* 233, 236-50 (Bernard Bailyn, Donald Fleming & Stephen Thernstrom eds., 1984). Remarks by Nathaniel Gorham and William Johnson on August 23, 1787 did emphasize the importance of making sure that the responsible branch at the ratification stage had also signed off earlier on the instructions given to negotiators. *RECORDS OF THE FEDERAL CONVENTION*, *supra* note 24, at 392-93. Although these remarks were made before the President was given a role in treatymaking, they suggest an intent to have the pre- and post-negotiation roles go together. REVELEY, *supra*, at 89.

36. Rakove, *supra* note 35, at 236. Aspects of this puzzle include (1) how dominant a role the Senate was to play vis-à-vis the President in setting the agenda for treaty negotiations; and (2) to what extent the Senate's role (and indeed the entire treatymaking process) could be considered executive or legislative. For the debate on the former question, compare Bestor, *Respective Roles*, *supra* note 29, at 113-24 (arguing for Senate dominance), with Swaine, *supra* note 22, at 1162-93 (finding the evidence equivocal and arguing for a reading that gives a stronger role to the President). For more on the latter question, see *infra* notes 78-82 and accompanying text.

37. THE FEDERALIST NO. 84, *supra* note 31, at 519 (Alexander Hamilton).

38. THE FEDERALIST NO. 64, *supra* note 31, at 391-92 (John Jay); see also THE FEDERALIST NO. 75, *supra* note 31, at 450-51 (Alexander Hamilton) (appearing to assume a Senate role in negotiations).

39. 22 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1844 (John P. Kaminski et al. eds., 2008) [hereinafter *RATIFICATION DOCUMENTARY HISTORY*]; see also 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1326 (John P. Kaminski & Gaspare J. Saladino eds., 2000) (recording the statement of a delegate at the Massachusetts Convention that the Senate was intended to act "in their executive capacity, in making treaties and conducting the national negotiations [sic]").

“the power of making, or rather ratifying, treaties.”<sup>40</sup> As between the pre-negotiation and post-negotiation roles of the Senate, there are no explicit statements as to which the Framers deemed more important. If anything, though, the evidence probably favors the greater importance of the pre-negotiation stage, since the Senate’s role before negotiations received slightly more attention in the debates and, as I discuss later, the law of nations in relation to treaty-making at the time treated post-negotiation review as a mostly pro forma action.<sup>41</sup>

The initial practice under the Washington Administration mirrored the approach sketched by Hamilton in Federalist No. 84. For the first treaties negotiated during his administration, Washington sought the Senate’s “advice and consent” both in drawing up instructions for the negotiators and prior to ratification. As is often recounted, Washington visited the Senate in person in August 1789 to consult on the very first treaty his administration sought to negotiate, one with the Creek Indians in the south.<sup>42</sup> The encounter was by all accounts a disaster—the Senate was intimidated by Washington’s presence and sought to refer the matter to committee, while Washington went into a “violent fret”<sup>43</sup> and gossip later put him as saying he “would be damned if he ever went there again.”<sup>44</sup>

Dramatic as this story is, however, its use as a shorthand for the abandonment of the Senate’s role in treaty negotiations is vastly exaggerated.<sup>45</sup> As careful accounts acknowledge, Washington returned in person several days later for a more amicable follow-up visit and received the Senate’s “advice and consent” regarding the questions he had posed to it.<sup>46</sup> While Washington did not visit the Senate in person for any other treaties, he asked the Senate for pre-

40. 4 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 120 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott & Co. 1861) [hereinafter DEBATES IN THE SEVERAL STATE CONVENTIONS]. James Wilson at the Pennsylvania Convention and Charles Pinckney at the South Carolina Convention (like Davie, both delegates from the Constitutional Convention) also discussed a role at the ratification stage for the Senate, and both made remarks implying that the Senate was to be involved in the negotiation stage as well. See 2 RATIFICATION DOCUMENTARY HISTORY, *supra* note 39, at 480, 491, 562-63 (Wilson); 4 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra*, at 230, 625 (Pinckney). Like Pinckney and others, Wilson also emphasized that “[n]either the President nor the Senate solely can complete a treaty; they are checks upon each other and are so balanced, as to produce security to the people.” 2 RATIFICATION DOCUMENTARY HISTORY, *supra* note 39, at 563 (Wilson); see also 4 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra*, at 265 (Pinckney); THE FEDERALIST NO. 66, *supra* note 31, at 404 (Alexander Hamilton); 9 RATIFICATION DOCUMENTARY HISTORY, *supra* note 39, at 808 (Madison in a letter).

41. See *infra* Subsection II.B.2.

42. RALSTON HAYDEN, THE SENATE AND TREATIES: 1789-1817, at 18-21 (1970).

43. JOURNAL OF WILLIAM MACLAY 131 (Edgar S. Maclay ed., New York, D. Appelton & Co. 1891).

44. HAYDEN, *supra* note 42, at 23 n.4 (quoting an 1824 entry from John Quincy Adams’s *Memoirs*).

45. E.g., Kevin C. Kennedy, *Conditional Approval of Treaties by the U.S. Senate*, 19 LOY. L.A. INT’L & COMP. L. REV. 89, 93 (1996); Ron Chernow, *The Founding Fathers Versus the Tea Party*, N.Y. TIMES, Sept. 24, 2010, at A29, available at <http://www.nytimes.com/2010/09/24/opinion/24chernow.html?pagewanted=all> (suggesting that Washington went back to the Senate just “one more time before dispensing with the Senate’s advice altogether, henceforth seeking only its consent”).

46. E.g., BERGER, *supra* note 24, at 131; SAMUEL B. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT 55-56 (1904).

negotiation advice and consent in the early 1790s regarding a treaty with the Cherokees, a treaty with Spain, and a treaty with Algiers.<sup>47</sup> With these treaties (as with the Creek Indian treaty), Washington returned again to the Senate for post-negotiation advice and consent, but the wording of at least some of the Senate resolutions giving pre-negotiation advice and consent made clear that this was merely a formality to the extent that the treaties complied with the prior advice and consent. In approving the negotiating instructions for the Spanish treaty, for example, the Senate unconditionally committed that it “will advise and consent to the ratification of such treaty as the said Commissioners shall enter into . . . in conformity to [the] instructions.”<sup>48</sup>

In what must be one of the earliest departures from original intent, however, practical considerations caused Washington to cease viewing pre-negotiation advice and consent as necessary for Indian treaties by 1793.<sup>49</sup> His cabinet unanimously counseled against consulting with the Senate before negotiating the Treaty of Greenville with the Indians of Ohio, since they feared that the results of this consultation would leak out and “we would lose all chance of saving anything more at the treaty than our ultimatum.”<sup>50</sup> In 1794, Washington made a similar decision with regard to a European treaty, consulting only with select Federalist senators rather than with the Senate as a whole on his instructions to John Jay for negotiating the controversial commercial agreement with Great Britain that became known as Jay’s Treaty. The trigger here was not merely frustration at the consultation process or concern about secrecy, but also fear that the Senate would not agree to any instructions at all.<sup>51</sup> For these treaties, Washington simply sought subsequent advice and consent. The Senate, for its part, acquiesced in this practice by not rejecting these treaties outright on the grounds that they had been negotiated without its pre-negotiation advice and consent.

During the nineteenth century, Presidents would occasionally consult

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47. HAYDEN, *supra* note 42, at 31-34 (discussing the Cherokee treaty); *id.* at 40-57 (discussing the two European treaties).

48. S. EXEC. JOURNAL, 2d Cong., 1st Sess. 115 (entry of Mar. 16, 1792) (Spanish treaty); *see also* S. EXEC. JOURNAL, 1st Cong., 2d Sess. 61 (entry of Aug. 11, 1790) (stating that if a new boundary were to be drawn with the Cherokees, “the Senate do advise and consent solemnly to guarantee the same”).

49. In effect, this is a very early example of what Keith Whittington calls constitutional construction between the political branches. *See* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION 1-19 (1999).

50. Thomas Jefferson, Notes on Cabinet Meeting Proceedings (Feb. 26, 1793), *available at* <http://hdl.loc.gov/loc.mss/mjtj.mtjbib007113>; *see also* Memorandum from Thomas Jefferson, Alexander Hamilton, Henry Knox & Edmund Randolph, Cabinet, to George Washington (Feb. 25, 1793), *available at* <http://memory.loc.gov/cgi-bin/ampage?collId=mgw4&fileName=gwpage103.db&recNum=240> (recording unanimous agreement on this issue).

51. HAYDEN, *supra* note 42, at 70-72. An attempt in the Senate to force consultation on Jay’s instructions was voted down. S. EXEC. JOURNAL, 3d Cong., 8th Sess. 151 (entry of Apr. 17, 1794). For more background on Jay’s Treaty and the role of the Senate, *see* JERALD A. COMBS, THE JAY TREATY: POLITICAL BATTLEGROUND OF THE FOUNDING FATHERS 125-34, 159-66 (1970). According to John Marshall, after Jay’s Treaty was negotiated and its terms made public, some of its opponents attacked Washington as having “violated the constitution in negotiating a treaty without the previous advice of the senate, . . . [an act] for which an impeachment was publicly suggested . . .” 5 JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON 229 (1926).

formally with the Senate prior to negotiating or signing treaties.<sup>52</sup> But Presidents rarely consulted formally with the Senate, and the Senate rarely sought to weigh in unsolicited, at the negotiation stage.<sup>53</sup> As Edwin Corwin later observed, a change in the “working constitution” had been effected,<sup>54</sup> and by 1936, Justice Sutherland would state for the Court in sweeping dicta that, although the President “makes treaties with the advice and consent of the Senate . . . he alone negotiates [and] [i]nto the field of negotiation the Senate cannot intrude . . . .”<sup>55</sup>

The privileging of subsequent advice and consent that occurred during the Washington Administration came about for the practical reasons of secrecy and expediency. That practice is thus best understood not as fixing subsequent advice and consent as the sole constitutional process, but rather as establishing that the minimalist language of the Treaty Clause leaves the political branches with considerable room for maneuvering. As Ralston Hayden stated:

[w]ith that elasticity in details which calls forth the admiration of the most discerning critic of our commonwealth, the Constitution left to successive Senates and to successive Presidents the problem and the privilege of determining under the stress of actual government the precise manner in which they were to make the treaties of the nation.<sup>56</sup>

Indeed, as the next Section shows, the same pragmatism that led the Washington Administration to favor subsequent advice and consent in some circumstances also led it to favor prospective advice and consent in others.

### 3. *Prospective Advice and Consent in the Washington Administration*

The conventional story line of the Washington Administration and treaty-making is the one given in the prior Subsection: A tale of pragmatic abandonment of pre-negotiation consultation with the Senate in favor of seeking advice and consent only after treaties were finalized. But there is a

52. Among others, Andrew Jackson did so prior to negotiating a treaty with the Choctaw Indians, and James Polk did so prior to signing a treaty with Great Britain over the Oregon boundary. See Charles C. Tansill, *The Treaty-Making Powers of the Senate*, 18 AM. J. INT'L L. 459, 473-77 (1924) (identifying other examples); see also DANGERFIELD, *supra* note 20, at 328-48 (identifying ten non-Indian treaties in the nineteenth century where the President formally sought Senate input before or during the negotiations). For all these treaties, the President returned the treaty to the Senate for subsequent advice and consent as well. See *id.*

53. In 1816, the recently formed Senate Foreign Relations Committee recommended against a resolution providing President Monroe with unsolicited suggestions for possible negotiations with Great Britain, since the Committee was concerned that it might interfere with the President's ability to ably manage foreign affairs. See Tansill, *supra* note 52, at 471-72. As a matter of practice then and since, the executive branch frequently consults with key senators and their staff (especially on the Foreign Relations Committee) prior to or during treaty negotiations, see HENKIN, *supra* note 2, at 177-78, but that practice is not considered mandatory and cannot seriously be considered “advice” in a constitutional sense.

54. EDWARD S. CORWIN, *THE CONSTITUTION AND WORLD ORGANIZATION* 37 (1944) (emphasis omitted); cf. Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 626 (2004) (“This deviation from original understanding became common practice and remains the practice today.”).

55. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (emphasis omitted).

56. HAYDEN, *supra* note 42, at 2.

counter story as well, more muted and rarely remembered, of pragmatic abandonment of post-negotiation advice and consent in favor of prospective advice and consent. As with the other account, it begins with Indian treaties and, in this case, more specifically with amendments to Indian treaties.

In 1790, for example, Washington received pre-negotiation advice and consent from the Senate to negotiate a treaty whereby the Cherokees would surrender more land to already encroaching white settlers, and the United States would provide the Cherokees with an annual payment of as much as one thousand dollars.<sup>57</sup> The treaty was duly negotiated, and the Senate gave its post-negotiation advice and consent in late 1791.<sup>58</sup> Then, in January of 1792, Washington wrote to the Senate “request[ing] your advice, whether an additional article shall be made to the Cherokee treaty,” namely, whether the annual payment should be increased to \$1500.<sup>59</sup> The Senate then “*Resolved*, (two-thirds of the Senate concurring therein,) That they do advise” increasing the amount to \$1500.<sup>60</sup> Washington never returned to the Senate for post-negotiation advice and consent with regard to this additional article.<sup>61</sup> Instead, on February 17, 1792, he simply ratified the additional article, stating that he did so “by and with the advice and consent of the Senate.”<sup>62</sup> It is unclear why Washington did not resubmit the amendment to the Senate for another round of advice and consent. Whatever the reason, the amendment became valid without ever receiving post-negotiation advice and consent, and thus stands as a strong precedent that, as a matter of timing, the Senate’s advice and consent need not necessarily follow negotiation and signature.<sup>63</sup>

Washington later took a similar approach to Jay’s Treaty, a much more

57. S. EXEC. JOURNAL, 1st Cong., 2d Sess. 61 (entry of Aug. 11, 1790).

58. S. EXEC. JOURNAL, 2d Cong., 1st Sess. 89 (entry of Nov. 10, 1791).

59. *Id.* at 98 (entry of Jan. 18, 1792).

60. *Id.* at 99 (entry of Jan. 20, 1792).

61. J. Reuben Clark, Jr., et al., *Solicitor’s Opinion of August 5, 1911*, in DEP’T OF STATE, LETTERING FOR SOLICITOR’S OPINIONS, PART 2, at 1, 27 (1911) (on file with author) [hereinafter *Clark Opinion*].

62. Statement of Ratification Accompanying Additional Article to the July 2, 1791 Treaty with the Cherokee (Ratified Indian Treaty No. 18, Apr. 1792); see also *Clark Opinion*, *supra* note 61, at 27 (noting further that the Senate did not meet in executive session between the article’s signing and proclamation).

63. Washington seems to have sought prospective advice and consent from the Senate for amendments to two other Indian treaties, and then, after these amendments were negotiated and signed, simply ratified them without resubmitting them to the Senate. One of the other two instances involved a secret article added to the treaty with the Creek Indians. Washington received prospective advice and consent from the Senate in relation to this article. He apparently did not send it back to the Senate for post-negotiation advice and consent and instead simply proclaimed that he was ratifying it “by and with the advice and consent of the Senate.” See S. EXEC. JOURNAL, 1st Cong., 2d Sess. 55-56 (entry of Aug. 4, 1790); *Clark Opinion*, *supra* note 61, at 24-26. The other instance involved a stipulation to provide the Iroquois with \$1500 a year and was effectively an amendment to a treaty that had been negotiated under the Continental Congress and ratified following advice and consent under the Washington Administration. See Additional Article of April 23, 1792, to the Agreement with the Five Nations, 1 AM. STATE PAPERS: INDIAN AFF. 232 (Ratified Indian Treaty #19); S. EXEC. JOURNAL, 2d Cong., 1st Sess. 116 (entry of Mar. 26, 1792); HAYDEN, *supra* note 42, at 39. In the first instance, the language of the Senate Executive Journal records the Senate giving its advice and consent but does not specify that it was by a two-thirds majority, see S. EXEC. JOURNAL, 1st Cong., 2d Sess. 55-56 (entry of Aug. 4, 1790), while in the second instance the Senate “Resolved, (two-thirds of the Senate concurring therein.) That they advise and consent to the stipulation above recited,” S. EXEC. JOURNAL, 2d Cong., 1st Sess. 116 (entry of Mar. 26, 1792).



controversial matter. The Federalists and anti-Federalists in the Senate had engaged in a bitter struggle over whether to give subsequent advice and consent to it. At last, the Senate did advise and consent to the treaty, but it conditioned this advice and consent on a change to one term of the treaty.<sup>64</sup> Washington then faced the question of whether, assuming the British agreed to the change, he could simply ratify the treaty or instead would have to send it back to the Senate for advice and consent on the post-amendment version—thus effectively giving the anti-Federalists a second bite at the apple.<sup>65</sup> He consulted his Cabinet, and its members advised that he need not do so.<sup>66</sup> In a detailed memorandum, Secretary of State Edmund Randolph pointed out that the wording of the Senate's resolution did not require resubmission and then went on to explain why he considered there to be no constitutional requirement of resubmission:

It was possible, that some people might hesitate upon the constitutionality of the Senate leaving to the President alone, to see, that their condition was complied with. In answer to this it may be said, the Senate are to advise and consent that the President make the treaty: they are not to make the treaty themselves. When they advise and consent unconstitutionally [unconditionally], they rely on the integrity of the President, that he will not suffer any words to be inserted in the paper, or omitted from it. In this case they rely, that he will strictly follow their advice. If he ratifies without again consulting them, he undertakes for the accuracy with which that advice has been followed. If he ratifies what they did not agree to, their security consists of this; that the treaty will, for that cause, not be the supreme law of the Land; and it cannot be concealed from the world by any official forms, since he must set forth the whole truth of the case in the ratification . . . . Consequently the Senate may give their advice and consent without the very treaty, which is to be ratified being before them.<sup>67</sup>

Randolph's position carried the day. After the British agreed to the treaty amendment, Washington did not return to the Senate but simply went ahead with the exchange of ratifications.<sup>68</sup> In doing so, he set a precedent that the Senate itself came to embrace—when Thomas Jefferson sought a “second advice and consent” after renegotiating a treaty in conformity with the Senate's conditional advice and consent, the Senate indicated that its further advice and consent was unnecessary.<sup>69</sup> The most recent use of this approach occurred in the 1970s, when the Senate conditioned its advice and consent to the Panama

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64. S. EXEC. JOURNAL, 4th Cong., Special Sess. 186 (entry of June 24, 1795) (“Resolved, (two-thirds of the Senate concurring therein,) That they do consent to, and advise the President of the United States, to ratify the treaty . . . on condition that there be added to the said treaty an article, whereby it shall be agreed to suspend the operation of so much of the 12th article, as respects the trade which his said Majesty thereby consents may be carried on, between the United States and his islands in the West Indies . . .”).

65. See HAYDEN, *supra* note 42, at 85 (discussing how Thomas Jefferson expressed the hope that Washington would resubmit the treaty and that the anti-Federalists would then prevail).

66. *Id.* at 83-85.

67. Edmund Randolph on the British Treaty, 1795, 12 AM. HIST. REV. 587, 591 (1907) (alteration in original) (emphasis added). Interestingly, Randolph did not raise the amendments to the Indian treaties as precedents.

68. HAYDEN, *supra* note 42, at 86-88.

69. S. EXEC. JOURNAL, 7th Cong., 2d Sess. 397-98 (entry of Dec. 11, 1801); HAYDEN, *supra* note 42, at 123-24.

Canal Neutrality Treaty on the renegotiation of two provisions in the treaty.<sup>70</sup>

As with the Indian treaties, Washington's decision to ratify Jay's Treaty without submitting the finalized version again to the Senate powerfully demonstrates that, as a matter of timing, prospective advice and consent is constitutional. While these instances involved amendments to already negotiated (and sometimes already ratified) treaties, the same logic would justify prospective advice and consent to entire treaties. Indeed, under the law of nations that developed in relation to the Senate's practice of conditionally approving treaties, a proposed amendment to a negotiated but not ratified treaty amounted to the refusal of the treaty and an offer to negotiate an entirely new treaty.<sup>71</sup> And even today, amendments to already ratified treaties are treated as requiring the same constitutional processes as new treaties.<sup>72</sup> The Washington Administration precedents thus provide strong support for the proposition that the Treaty Clause does not dictate the timing of the Senate's advice and consent.

#### B. *Specificity*

The precedents for prospective advice and consent in the Washington Administration involved issues of timing rather than specificity. In those cases, the Senate gave its advice and consent in advance of negotiation, but did so in specific terms that left essentially no negotiating discretion to the President. This fact mattered, at least to Edmund Randolph. In the memo quoted earlier in which he argued that Washington need not return the renegotiated Jay's Treaty to the Senate for another round of advice and consent, he went on to consider whether "the Senate may *now* advise and consent to the general matter of a treaty which may not be formed for years to come."<sup>73</sup> He thought that such conduct would probably be unconstitutional, distinguishing it from the situation at hand because the precision of the Senate's proposed amendment to Jay's Treaty gave "certainty that the sense of the Senate will be expressed."<sup>74</sup>

In this Section, I address these concerns about specificity and show that, within broad limits, prospective advice and consent is constitutional, or at least as constitutional as are other commonly accepted practices. Once again, I begin with the text of the Constitution, which offers no bar to broad-brush advice and consent. I then argue that, despite Randolph's concerns, such broad-brush advice and consent finds support in the international legal norms at the time of the Framing, which effectively required nations to delegate substantial power to their negotiators. Lastly and most importantly, as a matter of practice, delegation from Congress to the President has become the norm. This is true

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70. See 124 CONG. REC. 7187-88 (1978) (recording the Senate's vote to advise and consent to the Panama Canal Neutrality Treaty conditional on two particular amendments to the text of that treaty).

71. I L. OPPENHEIM, INTERNATIONAL LAW 537-38 (1905); see also *Clark Opinion*, *supra* note 61, at 30-34. The practice of using treaty reservations rather than amendments that has since developed has largely negated the relevance of this rule. See Vienna Convention on the Law of Treaties, May 23, 1969, arts. 17, 19-23, 1155 U.N.T.S. 331.

72. CRS REPORT, *supra* note 17, at 178-79.

73. *Edmund Randolph on the British Treaty, 1795*, *supra* note 67, at 591.

74. *Id.* at 592.

not only in administrative law, but also in international law, where the President frequently enters into specific international agreements based on broadly phrased congressional acts or resolutions. If such generalized grants are permissible in the context of ordinary legislation, they should be at least as permissible under the flexibly worded Treaty Clause. Indeed, as an examination of a series of now-forgotten treaties reveals, the Senate has given prospective advice and consent in broad-brush strokes at least three times in the past.

1. *Text, Separation of Powers, and Ditch-Digging*

As a textual matter, the Treaty Clause leaves it to the President and the Senate to determine whether the Senate's advice and consent shall be given with regard to broad objectives or exact treaty provisions. The phrase "advice and consent" does not require one or the other, and in practice the first Senate used this phrase flexibly, sometimes with regard to exact terms and sometimes at a higher level of generality.<sup>75</sup> Similarly, the phrase does not require that "advice and consent" be given one treaty at a time or that the precise identity of the treating parties be before the Senate.<sup>76</sup> Indeed, a close reading of the phrase "advice and consent" shows that it does not even modify "treaties" in the first place. The President is to "have power, by and with the advice and consent of the Senate, to make treaties." *Thus, the "advice and consent" modifies the President's "power" to enter into treaties, rather than the treaties themselves.* The phrase does imply some meaningful check on the President—otherwise, it would be a nullity—but it does not require review of every specific treaty provision.

So far, I have consciously avoided using the term "delegation" in favor of "specificity" in framing the constitutional question. "Delegation" is associated with the formal principle of separation of powers and usually more particularly with the extent to which legislative power can be transferred from Congress to the executive or sometimes judicial branches.<sup>77</sup> One can look at the Senate's role in treaty-making as an act of legislative power, in which case, as David Golove has suggested, the constitutionality of broad-brush prospective advice and consent must pass muster under the non-delegation doctrine.<sup>78</sup> Later on in

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75. For uses of this phrase regarding bottom lines in negotiations rather than precise terms, see S. EXEC. JOURNAL, 1st Cong., 1st Sess. 24 (Aug. 24, 1789) (agreeing "to advise and consent" to using up to \$20,000 in a treaty with the Creeks "if necessary"); S. EXEC. JOURNAL, 1st Cong., 2d Sess. 61 (Aug. 11, 1790) (recording that the Senate "advise[d] and consent[ed]" to the President negotiating a new boundary with the Cherokees without specifying what that boundary would be and to his offering the Cherokees up to \$1000 annually in compensation).

76. Multilateral treaty-making already depends on these points in practice, since a multilateral treaty is akin to a collection of bilateral treaties, and since the Senate often gives advice and consent to multilateral treaties without certainty as to which other countries will join these treaties. For example, the Senate advised and consented to the Charter of the United Nations at a time when many countries that would join eventually (such as Japan, with whom the United States was still at war) were not even signatories. See STEPHEN C. SCHLESINGER, *ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS* 274 (2003).

77. See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) ("In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency.").

78. Golove, *supra* note 5, at 1798-99 n.20, 1871-76.

this Article, I argue that it does, but—at a more fundamental level—such an argument may be unnecessary. It is far from clear that the Senate is acting as a legislative body in treaty-making. During the debates over the Constitution’s ratification, the Senate was sometimes described as acting as an executive council for treaty-making purposes,<sup>79</sup> and even today the Senate goes into “executive session” when considering treaties.<sup>80</sup> Similarly, there is good reason to doubt that the structural concerns about the separation of powers, which underlie much of the non-delegation doctrine, apply to treaty-making. The Framers quite consciously departed from their usual emphasis on separation of powers in crafting the Treaty Clause, as suggested by the fact that the Clause appears in Article II, but the Supremacy Clause provides that treaties are the law of the land.<sup>81</sup> When the Treaty Clause was attacked for improperly blending legislative and executive powers, Alexander Hamilton and others strongly defended this “intermixture” as appropriate in light of the special nature of treaty-making.<sup>82</sup>

The Treaty Clause thus preserves the idea of checks in requiring both the President and a supermajority of the Senate to authorize treaties, but it does not clearly separate out their roles as executive or legislative. Unlike in legislating, the Senate stands to one side in treaty-making in comparison with the President—a Solicitor for the State Department once described their respective roles with the “homely observation” that there is a “vast difference between digging a ditch and advising and consenting to such a performance.”<sup>83</sup> Accordingly, the constitutional issue is best cast not in terms of a formal transfer of power from the Senate to the President, but rather in terms of identifying the minimum that the Senate must do to fulfill its own constitutional role. Within limits that I discuss later on, broad-brush advice and consent satisfies this minimum.

## 2. *The Doctrine of Obligatory Ratification*

Like the text of the Constitution, the practice of treaty-making at the time of the Framing suggests that the Senate can give its advice and consent to broad negotiating objectives rather than precise terms. At the time of the

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79. *E.g.*, 2 RATIFICATION DOCUMENTARY HISTORY, *supra* note 39, at 459-61 (recording the debates at the Pennsylvania Convention about whether treaty-making was legislative or executive, where James Wilson asserted that “[t]he President and the Council in this Constitution makes the treaty ministerially”); 6 RATIFICATION DOCUMENTARY HISTORY, *supra* note 39, at 1326 (recounting that a delegate to the Massachusetts Convention referred to the Senate acting in its executive capacity for treaty-making).

80. STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, R. XXIX, at 38 (2000); *id.*, R. XXX, at 39.

81. *See* U.S. CONST. art. VI, cl. 2.

82. THE FEDERALIST NO. 75, *supra* note 31, at 449 (Alexander Hamilton) (further arguing that “if we attend carefully to [the Treaty Clause’s] operation it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them”); 2 RATIFICATION DOCUMENTARY HISTORY, *supra* note 39, at 561-62 (recording Wilson’s responses at the Pennsylvania Convention to claims that the Treaty Clause blended powers). For other primary sources on whether treaty-making was executive, legislative, or a blend, see those collected by Rakove, *supra* note 35, at 263-67, and Golove, *supra* note 5, at 1871-76.

83. *Clark Opinion*, *supra* note 61, at 19.

Constitutional Convention, international law effectively required nations to delegate substantial power to their ministers in the course of treaty-making. More specifically, nations had an obligation to ratify treaties negotiated by their ministers, provided that these ministers had full powers to negotiate the treaties and the treaties' terms fell within the scope of the private instructions that the sovereigns had given these ministers. As explained by Emer de Vattel in his widely regarded eighteenth-century treatise,

the rights of the [minister] are determined by the instructions that are given him: he must not deviate from them; but every promise he makes in the terms of his commission, and within the extent of his powers, is binding on his constituent.

. . . [B]efore a prince can honorably refuse to ratify a compact made in virtue of such plenipotentiary commission, he should be able to allege strong and substantial reasons, and, in particular, to prove that his minister has deviated from his instructions.<sup>84</sup>

Like all principles of international law, this doctrine was not always scrupulously honored, but it cast a powerful shadow on the practice.

The Continental Congress had practiced treaty-making in accordance with this doctrine, which smoothed the course of treaty-making over long distances. It would privately give its chosen plenipotentiaries instructions about negotiating objectives, often casting these in broad terms. Following the practice of the times, it would also give them public commissions containing language like the following:

whatsoever shall be agreed and concluded for us and in our name. . . [shall have] the same effect as if we were personally present and acted therein: herein promising, in good faith, that we will accept, ratify, fulfil [sic] and execute whatever shall be agreed, concluded and signed by our ministers plenipotentiary.<sup>85</sup>

In reviewing signed treaties sent to Congress for ratification, congressional committees would focus on whether these treaties fell within the scope of the instructions. By way of example, in reviewing a treaty of amity and commerce negotiated by John Adams with the Netherlands, a committee consisting of James Madison, Alexander Hamilton, and Oliver Ellsworth concluded that “on a comparison of the [treaty] with the instructions given to [Adams], on that

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84. EMER DE VATTEL, *THE LAW OF NATIONS* 339-40 (Bela Kapossy & Richard Whatmore eds., 2008) (1758); *see also, e.g.*, J. MERVYN JONES, *FULL POWERS AND RATIFICATION: A STUDY IN THE DEVELOPMENT OF TREATY-MAKING PROCEDURE* 66-73 (1946) (surveying practice and theory from the time and finding that Vattel's position represented the general view in both); 5 JOHN BASSETT MOORE, *A DIGEST OF INTERNATIONAL LAW* 184-93 (1906) (including excerpts on the issue from other scholars at the time); *cf.* Theodor Meron, *The Authority to Make Treaties in the Late Middle Ages*, 89 AM. J. INT'L L. 1, 15-16 (1995) (discussing full powers in the context of medieval treaties). For discussion of Vattel's influence in the late eighteenth century, including among the Framers, *see, for example*, Duncan Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 774 (2010).

85. 20 JCC, *supra* note 27, at 654 (entry of June 15, 1781) (commission for a peace treaty with Great Britain). For additional examples, *see, for example*, 23 JCC, *supra* note 27, at 621-22 (entry of Sept. 28, 1782); 15 JCC, *supra* note 27, at 1235 (entry of Nov. 1, 1779); *cf.* JONES, *supra* note 84, at 11-12, 18 (discussing the standard inclusion of such clauses in European full powers in the eighteenth century). The Continental Congress sometimes sought to retain an additional check on its negotiators by instructing them to consult with it before signing treaties, but it came to recognize the practical difficulties of this approach. *See* CRANDALL, *supra* note 46, at 24-25, 30-31.

subject they find that no variations have taken place which affect the substance of the plan proposed by Congress” and recommended its ratification.<sup>86</sup> The only signed treaty that the Continental Congress sent back for renegotiation rather than ratifying—a consular treaty with France negotiated by Benjamin Franklin—was one that John Jay, then Secretary of Foreign Affairs, considered to be outside the scope of Franklin’s instructions, thus giving the Continental Congress a “Right to refuse the Ratification in Question.”<sup>87</sup>

This doctrine received little specific attention during the Constitution’s drafting and ratification,<sup>88</sup> but its influence is easily seen in the Senate’s early practice. In reviewing the first treaty presented to it for “advice and consent”—the consular treaty with France as renegotiated by Jefferson following instructions from the Continental Congress—the Senate unanimously gave advice and consent after consulting with Jay and receiving his opinion that, even though the treaty was not particularly desirable, the United States was obligated as a matter of good faith to ratify it.<sup>89</sup> The Senate viewed itself as effectively bound by the actions of the U.S. negotiators where those negotiators had acted in accordance with the instructions given to them. Indeed, that fact

86. 24 JCC, *supra* note 27, at 65 (entry of Jan 23, 1783). Even where the Continental Congress had concerns about a treaty, as long as that treaty fell materially within the instructions, it would ratify the treaty and then seek amendments of the terms. See CRANDALL, *supra* note 46, at 24-25 (discussing how Congress ratified a commercial treaty with France but requested amendments that would remove one U.S. concession and one French concession); *id.* at 33-34 (discussing how Congress ratified a commercial treaty with Sweden but requested that Benjamin Franklin seek amendments making typographic changes).

87. 29 JCC, *supra* note 27, at 500-15 (entry of July 6, 1785) (containing Jay’s report of July 4, 1785). In his report to the Continental Congress, Jay explained that there were only two reasons a sovereign could refuse to ratify a treaty, namely: “either that their Ministers have exceeded the Powers delegated to them by their Commission, or departed from the Instructions given them to limit and regulate the Exercise and use of those Powers.” *Id.* at 508.

88. I have seen only a few references to this doctrine during the Convention and in the ratifying conventions. At the Convention, delegates Gorham and Johnson drew implicitly on this doctrine in arguing against a proposal to give the House a role in treaty ratification. RECORDS OF THE FEDERAL CONVENTION, *supra* note 24, at 392-93. During the ratification debates, similar proposals were made but ultimately failed. *E.g.*, 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 843, 969, 1152 (Bernard Schwartz ed., 1971) (describing some unsuccessful attempts). Another clear reference occurred during the Virginia Convention, where anti-Federalist James Monroe noted in passing that “[t]he instruction is the foundation of the treaty; for if it is formed agreeable thereto, good faith requires that it be ratified. The practice of Congress hath also been always, I believe, in conformity to this idea.” 10 RATIFICATION DOCUMENTARY HISTORY, *supra* note 39, at 1232; *see also id.* at 1236 (recording another delegate’s observation that failure to ratify a properly negotiated treaty is a cause for war). An interest in honoring the doctrine of obligatory ratification would have been consistent with the Framers’ strong interest in having the United States appear respectable in the eyes of other states. See David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 935 (2010) (arguing that “[t]he fundamental purpose of the Federal Constitution was to create a nation-state that the European powers would recognize, in the practical and legal sense, as a ‘civilized state’ worthy of equal respect in the international community”).

89. HAYDEN, *supra* note 42, at 4-10; *see also id.* at 13 (discussing how a Senate committee considering Indian treaties that had been negotiated under instructions from the Continental Congress similarly focused on whether these treaties fell within the negotiators’ instructions). Some commentators have suggested that in his message to the Senate accompanying these Indian treaties George Washington urged a move away from the doctrine of obligatory ratification. See JONES, *supra* note 84, at 74; Swaine, *supra* note 22, at 1185-86 & nn.208-09. It seems more likely, however, that Washington simply wanted these Indian treaties reviewed to ensure that they complied with the negotiators’ instructions in the same way done with European treaties. Prior to that point Indian treaties had been deemed complete upon signature without the need for any ratification. See Rakove, *supra* note 35, at 266 n.47.

caused Edmund Randolph to believe that Jay's Treaty could not be negotiated constitutionally without prior advice and consent from the Senate. He argued to Washington that failing to consult the Senate on the negotiating instructions would unconstitutionally "abridge the power of the senate to judge of [the treaty's] merits," since the doctrine of obligatory ratification would force the Senate to accept the treaty post-negotiation.<sup>90</sup> Randolph was quickly proved wrong. Faced with a choice between the doctrine of obligatory ratification and playing a meaningful role, the Senate unhesitatingly chose the latter, and its amendment to Jay's Treaty helped bring about the end of the doctrine in international law.<sup>91</sup>

The doctrine of obligatory ratification suggests that, at the time of the Framing, the Senate's role in crafting the often-broad negotiating instructions mattered more than its role as a post-negotiation reviewer. Broadly phrased prospective advice and consent thus likely comes closer to satisfying the Framers' original vision of the Senate's role than does the present scheme of subsequent advice and consent.

### 3. *Broad Mandates in Practice*

However specific the Senate's advice and consent was meant to be at the time of the Framing, the last hundred years of U.S. legal history has seen the explosion of delegation in both administrative and international law—an explosion that should bury concerns about specificity and make clear that the Senate can constitutionally give its advice and consent in broad-brush strokes.

In administrative law, the Supreme Court has sanctioned the de facto delegation of legislative power from Congress to the executive branch, provided that Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform."<sup>92</sup>

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90. Letter from Edmund Randolph to George Washington (May 6, 1794), available at <http://memory.loc.gov/mss/mgw/mgw4/105/0800/0808.jpg> (explaining further that "according to the rules of good faith, a treaty, which is stipulated to be ratified, ought to be so, unless the conduct of the minister be disavowed and punished"); see also 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 24, at 424-25 (recording Framers Rufus King making a similar argument some years later in the Senate). The full powers given to Jay, however, did not promise ratification but observed that Jay was to transmit the treaty to the President "for his final ratification, by and with the advice and consent of the Senate." 1 AMERICAN STATE PAPERS: DOCUMENTS, LEGISLATIVE AND EXECUTIVE, OF THE CONGRESS OF THE UNITED STATES 471 (1833). Randolph did not approve of this approach, observing that if Jay "be permitted to sign a treaty of commerce, no form of attestation can be devised to be inserted in it which will not be tantamount to a stipulation to ratify, or leave the matter as much at large as if he had no such power." Letter from Edmund Randolph to George Washington, *supra*.

91. The British did not object to this amendment, and when they tried to object to similar practices down the road, the United States would simply cite the amendment to Jay's Treaty as a precedent. See HAYDEN, *supra* note 42, at 150. In a treaty negotiated with Spain over the cessation of Florida, the United States went even further: Secretary of State John Quincy Adams asserted with admirable chutzpah that, on the one hand, the King of Spain was violating the doctrine of obligatory ratification when he hesitated to ratify the negotiated treaty, while, on the other hand, the United States' precedent and constitutional structure made the doctrine inapplicable to the United States. 5 MOORE, *supra* note 84, at 188-91 (also quoting statements by President Monroe). The United States could not long maintain this double-edged approach, however, and over the nineteenth century the legal power of the doctrine waned in Europe as well. See JONES, *supra* note 84, at 12-15.

92. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (second alteration in original)). While *Whitman* pays lip

Congress can authorize the Federal Power Commission (now the Federal Energy Regulatory Commission) to set “just and reasonable rates,”<sup>93</sup> the Federal Communications Commission to regulate radio communications as required by “public interest, convenience, or necessity,”<sup>94</sup> and the EPA to set “ambient air quality standards . . . [that] protect the public health.”<sup>95</sup> In the context of treaties passed under the Treaty Clause, the Senate has sometimes surrendered power to the executive branch as well, such as when the treaty creates a venue for action in which the President but not the Senate plays a role (e.g., the Security Council of the United Nations) or when the treaty itself authorizes further international agreements that require the assent of the President but not the Senate.<sup>96</sup> The implementation of the North Atlantic Treaty Organization (NATO) Treaty, for example, gave rise to thousands of such agreements.<sup>97</sup> As a formal matter, these authorizations are not prospective advice and consent, since the Senate’s release of control comes from the use of broad authorizing language in the text of negotiated treaties. As a practical matter, however, if the Senate can constitutionally cede control over details to the President through the use of broad language in treaties, then it is difficult to understand why the Treaty Clause would not also permit the Senate to cede control over details to the President through prospective advice and consent.

Indeed, Congress has already done something similar to prospective advice and consent in the making of international agreements outside the Treaty Clause. Today, the vast majority of international agreements entered into by the United States are *ex ante* congressional-executive agreements, or international agreements entered into under the authority of prior congressional

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service to the non-delegation doctrine and thus does not describe the intelligible-principle standard as a delegation, in practice, this standard amounts to a delegation. *See, e.g., id.* at 488-89 (Stevens, J., concurring in the judgment); Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 756 (2010).

93. *See* Federal Power Comm. v. Hope Natural Gas Co., 320 U.S. 591, 600 (1944).

94. Nat’l Broad. Co. v. United States, 319 U.S. 190, 216 (1943).

95. *Whitman*, 531 U.S. at 472.

96. There is a further constitutional issue of the extent to which the United States can delegate authority to other international actors by treaty without reserving a certain veto. *See generally* Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557 (2003) (arguing that federalism concerns and problems raised by domestic delegations of power between branches are also relevant to understanding international delegations); Kristina Daugirdas, *International Delegations and Administrative Law*, 66 MD. L. REV. 707 (2007) (calling for more precise analysis of different institutional frameworks for international delegations to identify and isolate those that pose greater constitutional problems). Since this is not an issue of the allocation of authority between the Senate and the President, I do not discuss it further.

97. CRS REPORT, *supra* note 17, at 86 n.116; *cf. Wilson v. Girard*, 354 U.S. 524 (1957) (upholding President’s authority to enter into an agreement related to armed forces pursuant to a security treaty with Japan); Hannah Chang, *International Executive Agreements on Climate Change*, 35 COLUM. J. ENVTL. L. 337, 361-62 (2010) (discussing such agreements in the aviation context); Donna Coleman Gregg, *Lessons Learned from the Spectrum Wars*, 17 COMMLAW CONSPECTUS 377, 412 (2009) (discussing how, in 2008, the Senate Foreign Relations Committee instructed the executive branch to consider certain telecommunications agreements to be executive agreements made pursuant to an earlier treaty rather than separate treaties requiring Senate approval). The Senate has, on occasion, resisted treaties that authorize the President to enter into further agreements, perhaps most notably with regard to certain arbitral treaties negotiated early in the twentieth century. *See* W. STULL HOLT, *TREATIES DEFEATED BY THE SENATE: A STUDY OF THE STRUGGLE BETWEEN PRESIDENT AND SENATE OVER THE CONDUCT OF FOREIGN RELATIONS 204-11* (1933).



statutes. The constitutional footing of these agreements (and of their cousins ex post congressional-executive agreements, where congressional approval is given after an agreement is negotiated), is somewhat murky in theory but well-established in practice.<sup>98</sup> In 1792, as part of an act establishing post offices, Congress authorized the Postmaster General to arrange with his counterparts in other countries for reciprocal mail delivery.<sup>99</sup> As Oona Hathaway has painstakingly documented, over time this modest precedent blossomed, with an immense expansion beginning during the New Deal, until today around eighty percent of U.S. international agreements are made pursuant to ex ante congressional authorizations.<sup>100</sup> The authorizing statutes typically specify the purpose of the agreements and sometimes identify criteria for selecting the partner nations, but they also leave broad discretion to the executive branch.<sup>101</sup> For example, a statute emphasizing the importance of international cooperation to control the drug trade simply provides that “the President is authorized to conclude agreements, including reciprocal maritime agreements, with other countries to facilitate control of the production, processing, transportation, and distribution of narcotics analgesics.”<sup>102</sup> While the Supreme Court has never ruled on the constitutionality of ex ante congressional-executive agreements in relation to the non-delegation doctrine, in *Field v. Clark* it rejected a delegation challenge in the related context of Congress’s ability to authorize the President to suspend the application of a trade act against countries he deemed protectionist.<sup>103</sup>

The prevalence of ex ante congressional-executive agreements serves both as a strong precedent for the constitutionality of broad-brush prospective advice and consent and as a likely reason why prospective advice and consent has not developed in practice. As a constitutional matter, if Congress can authorize congressional-executive agreements by broad-brush statutes that give

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98. The sources cited *supra* note 5 cover these issues extensively. See also Rosalind Dixon, *Updating Constitutional Rules*, 2009 SUP. CT. REV. 319 (describing this development as an example of informal constitutional updating). According to the Restatement, congressional-executive agreements are interchangeable with treaties. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(2) cmt. It is likely, however, that international agreements that exceed the enumerated powers of Congress or the President must be done through the Treaty Clause. See *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (holding that a treaty made under the Treaty Clause could address subjects outside the reach of Congress’s powers). For more minor agreements, at least, some classic constitutional footing for congressional-executive agreements can be found based on the Constitution’s distinction between “agreements” and “compacts” on the one hand and “treaties” on the other in the context of powers prohibited to the states. See U.S. CONST. art. 1, § 10; see also Golove, *supra* note 5, at 1810 (noting how this distinction supports the constitutionality of congressional-executive agreements); Hollis, *supra* note 84, at 773-79 (discussing possible interpretations of this distinction).

99. An Act to establish the Post-Office and Post Roads within the United States, ch. 7 § 26, 1 Stat. 232, 239 (1792).

100. Hathaway, *supra* note 10, at 145, 167-205. For an argument using rational choice models to explain why congressional-executive agreements are used under certain circumstances and treaties under others, see John K. Setear, *The President’s Rational Choice of a Treaty’s Preratification Pathway: Article II, Congressional-Executive Agreement, or Executive Agreement?*, 31 J. LEGAL STUD. S5 (2002); John Yoo, *Rational Treaties: Article II, Congressional-Executive Agreements, and International Bargaining*, 97 CORNELL L. REV. 1 (2011).

101. See Hathaway, *supra* note 10, at 157-67 (identifying many examples and discussing common features).

102. 22 U.S.C. § 2291(a)(2) (2006).

103. 143 U.S. 649, 680-94 (1892).

the President significant discretion in setting the terms of these agreements and identifying the negotiating partners, then the Senate should be able to do the same under the flexibly worded Treaty Clause. As a practical matter, however, the rise of ex ante congressional-executive agreements may have reduced the need for the President and the Senate to consider the option of prospective advice and consent—even though, as I discuss in Part II, they are a worse solution in many respects. Because the political branches could and did use ex ante congressional-executive agreements to deal with the increasing demands of twentieth-century globalism, there was less pressure to search for a mechanism for meeting these same demands via the Treaty Clause.

Although broad-brush prospective advice and consent did not take off in the twentieth century, it did have some fascinating near misses and at least three applications. In August of 1911, J. Reuben Clark, the Solicitor of the State Department, issued a thirty-five page opinion arguing that broad-brush prospective advice and consent would be constitutional.<sup>104</sup> This opinion asserted that “Senatorial ‘advise and consent’ may be given to a general treaty plan and that the President conforming to such plan in his negotiation of a treaty, such treaty may be legally proclaimed by him” without returning to the Senate.<sup>105</sup> This opinion did not give rise to prospective advice and consent in practice, but it did seed the ground for the issue to return another day. It was later excerpted at length in the *Digest of International Law* prepared by Green Hackworth, the Legal Advisor at the Department of State before and during World War II,<sup>106</sup> and these excerpts in turn sparked the Senate’s debate over prospective advice and consent during consideration of the Connally Resolution.<sup>107</sup>

Although Senators expressed skepticism at the concept of prospective advice and consent during the debates over the Connally Resolution, in practice the Senate had already given broad-brush prospective advice and consent to a series of minor treaties with Mexico in the preceding two decades. In 1924, a treaty entered into force between the United States and Mexico that provided that certain claims of U.S. citizens against Mexico and of Mexican citizens against the United States would be submitted to and resolved by either a General Claims Commission, which was to resolve all claims within three years, or a Special Claims Commission, which was to resolve all claims within five years.<sup>108</sup> In February 1927, as the lifetime of the General Claims Commission was running out, the Senate passed a resolution authorizing the President to negotiate a treaty with Mexico that would extend this

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104. *Clark Opinion*, *supra* note 61, at 1. This opinion addressed the specific question of whether the President could submit a treaty to the Senate where the treaty copy available for submission had been signed only by the American negotiator, but it went out of its way to defend broad-brush prospective advice and consent. *See id.* at 22-23, 27.

105. *Clark Opinion*, *supra* note 61, at 22; *see also id.* at 23, 27.

106. 5 GREEN HAYWOOD HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 58-60 (1943).

107. 89 CONG. REC. 8744, 8890, 8899, 8902, 9002 (1943).

108. For more details about these Commissions, see A.H. FELLER, *THE MEXICAN CLAIMS COMMISSIONS 1923-1934*, at 20-22, 56-69 (1935).

Commission's existence.<sup>109</sup> Based on this resolution, the President then negotiated and ratified such a treaty *without* returning to the Senate for subsequent advice and consent.<sup>110</sup> Two years later, the Senate passed a resolution authorizing the President to negotiate yet another extension to this Commission, and also to negotiate an extension to the Special Claims Commission, and both such treaties were then negotiated and ratified without further Senate involvement.<sup>111</sup> A few years later, the Senate prospectively authorized yet another extension.<sup>112</sup> Notably, rather than calling for any specific extensions, these Senate resolutions gave the President broad authority: they "requested" him "in his discretion, to negotiate and conclude with the Mexican Government such agreement as may be necessary and appropriate for the extension of the life of the . . . Claims Commission . . . and to make such further arrangement as in his judgment may be deemed appropriate for the expeditious adjudication of said claims."<sup>113</sup>

The treaties were minor ones, and the Senate passed its resolutions without any floor debate and indeed without using the phrase "advice and consent."<sup>114</sup> It is thus unsurprising that they have been overlooked—so much so, in fact, that despite his extraordinary knowledge of U.S. treaty history, David Golove has observed that "to [his] knowledge" the Senate has never

109. 68 CONG. REC. 4021 (1927) (showing that Senator Borah, the Chair of the Foreign Relations Committee and no internationalist, asked that the resolution be passed without floor debate). Hackworth's *Digest* references this and one other of the extensions, and it suggests that the Senate's prospective advice and consent occurred so that the new treaties could be finalized during the Senate's recess. 5 HACKWORTH, *supra* note 106, at 58 (excerpting Department of State correspondence of June 25, 1931).

110. 9 CHARLES I. BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949, at 957 (1972) (describing a signature date of August 17, 1929 and a ratification "by the President of the United States September 25, 1929, pursuant to Senate Resolution of May 25, 1929").

111. 71 CONG. REC. 1899 (1929); 9 BEVANS, *supra* note 110, at 963, 965. On the basis of the single 1929 resolution, the President negotiated and ratified two separate treaties with Mexico, one dealing with the General Claims Commission and the other dealing with the Special Claims Commission. *Id.* at 963, 965.

112. 74 CONG. REC. 6410 (1931); *see also* 9 BEVANS, *supra* note 110, at 970 (recording that a treaty was subsequently negotiated and ratified under this authority without identifying any subsequent advice and consent).

113. 68 CONG. REC. 4021 (1927); *see also* 74 CONG. REC. 6410 (1931); 71 CONG. REC. 1899 (1929). It could be argued that these agreements were done under the President's independent power to arrange for the settlement of claims by U.S. citizens against foreign sovereigns. Whatever the contours of that power at the time, however, *see* Ingrid Brunk Wuerth, *The Dangers of Deference: International Claim Settlement by the President*, 44 HARV. INT'L. L.J. 1, 19-38 (2003) (surveying the history of this power and noting its growth over time), I do not think the President was acting under it with regard to these agreements. To begin with, the original agreements setting up the Claims Commissions were done through the Treaty Clause, *see* 9 BEVANS, *supra* note 110, at 935, 941, and the same process would thus presumably have been applicable for amendment, *see* CRS REPORT, *supra* note 17, at 178-79. In addition, had the President acted under his sole executive authority, he would not have needed to seek the Senate resolutions in the first place. Finally, Department of State correspondence from after two of the extensions and before the third treats these extensions as treaties effected through the Treaty Clause. *See* 5 HACKWORTH, *supra* note 106, at 58.

114. 74 CONG. REC. 6410 (1931); 71 CONG. REC. 1899 (1929); 68 CONG. REC. 4021 (1927). The executive branch treated these resolutions as functionally equivalent to "advice and consent," however, *see* 9 BEVANS, *supra* note 110, at 957-70, and the Senate implicitly acquiesced in this treatment by granting the later renewals without having ever given subsequent advice and consent to the earlier ones.

given prospective advice and consent to a treaty.<sup>115</sup> Nonetheless, they form a precedent the Senate can point to if it uses broad-brush prospective advice and consent in the future.

#### 4. *Limits on Breadth*

It is hard to determine exactly when broad-brush advice and consent would be so general that it amounted to an unconstitutional abdication of the Senate's treaty-making role. Obviously, the Senate could not pass a blanket resolution advising and consenting to all future treaties made by the President, but what if the Senate had in fact intended the Connally Resolution to constitute prospective "advice and consent" to what would become the Charter of the United Nations? In practice, there is little need to draw the line because the Senate will probably never come near it. While two-thirds of the Senate may be willing to trust the President with negotiating discretion, they are unlikely to write blank checks on matters of great importance. The debates over the Connally Resolution make this plain. The Senate that passed the Connally Resolution was deeply internationalist by today's standards, yet not a single Senator expressed a wish for the Connally Resolution to constitute prospective advice and consent.<sup>116</sup>

To the extent that constitutional line-drawing is desired, however, I propose two general principles to guide it. First, the Senate, the President, and (should it come to them) the courts should import the intelligible-principle doctrine from the legislative delegation context. This sensible doctrine allows for workable solutions while retaining some level of checks and balances, and its wealth of case law offers guidance as to the appropriate limits on generality.<sup>117</sup> This doctrine is already relevant to the making of international agreements—as it arguably applies to congressional delegations for ex ante congressional-executive agreements—and it thus seems reasonable to similarly consider its use for prospective advice and consent. Second, as a matter of interpretation, the President and the courts should construe the discretion granted by the Senate narrowly rather than broadly. For example, drawing from canons of construction developed in the intelligible-principle context, the President should consider that the Senate, like Congress generally, does not "hide elephants in mouseholes."<sup>118</sup> Similarly, analogizing to the canon against implied repeal, the President should not treat prospective advice and consent as authorizing him to enter into treaty terms that conflict with existing laws unless

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115. Golove, *supra* note 5, at 1798 n.20.

116. *See generally* 89 CONG. REC. 8610-9223 (1943) (encompassing the entire floor debate over the Connally Resolution).

117. Given the lessened concern for separation of powers in the context of the Treaty Clause, *see supra* Subsection II.B.1, and the President's significant foreign affairs powers, *see United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319-22 (1936), the Treaty Clause may well require less specificity from the Senate than Article I requires of Congress. Applying the intelligible-principle doctrine to the Treaty Clause thus may draw a line that is more conservative than the actual constitutional boundary. It is still a generous boundary, however, and so the benefits of familiarity that accompany the intelligible-principle doctrine seem to me to outweigh any gains that might come from trying to delineate a new, more permissive principle in the Treaty Clause context.

118. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

the Senate specifically signals its approval to those kinds of terms.<sup>119</sup>

In sum, as this Part has demonstrated, the Senate's advice and consent can be given at any time and in broad strokes. Prospective advice and consent is textually permissible, as it is as consistent with the Framers' intent as is the current practice of subsequent advice and consent, supported by strong if infrequent precedents under the Treaty Clause, and in harmony with Congress's widely accepted delegations to the President in administrative and international law.

### III. MULTI-TREATY PROSPECTIVE ADVICE AND CONSENT

As the previous Part explained, the Treaty Clause gives the political branches great flexibility as to when and how the Senate gives its advice and consent. Notably, however, this flexibility was exercised most in the decade immediately after the Founding. Even by the early nineteenth century, and certainly during the twentieth, with only rare exceptions, treaty-making under the Treaty Clause hewed to a path of negotiation and signature by the President or his agents, followed by Senate advice and consent, followed by the President's ratification.<sup>120</sup> All through the rise in multilateral treaty-making, the growth of the administrative state, and the explosion in international interconnectedness, the domestic process of treaty-making has remained largely the same.

My argument in the remaining two Parts is that this stagnation has been costly, and that the use of prospective advice and consent would dramatically improve the treaty-making process. In this Part, I focus on prospective advice and consent as a way to facilitate making the many straightforward bilateral agreements that underlie ordinary international relations. International agreements requiring congressional authorization typically go through one of two processes: first, a handful each year are submitted for subsequent advice and consent under the Treaty Clause; and second, well over a hundred each year are entered into as *ex ante* congressional-executive agreements authorized by prior congressional legislation. Between them, these processes do succeed in generating routine international agreements, but they do so in ways that leave significant ground for improvement. Individualized subsequent advice and consent is overly cumbersome for routine bilateral treaties. Congressional authorizations for *ex ante* congressional-executive agreements have the opposite problem: they cede too much control to the President without leaving Congress with any meaningful supervisory control. Prospective advice and consent would be a valuable improvement on both processes. As discussed below, it would prove far more convenient than subsequent advice and consent, while at the same time allowing the Senate to retain far more supervisory

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119. This approach would limit the possibility of conflict between existing legislation and treaty terms that only the President has specifically contemplated. Such conflicts currently arise where executive agreements ancillary to treaties conflict with domestic law, in which case, according to the Restatement (Third), the last-in-time rule applies. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 cmt. c (1987).

120. For the intricacies of this process, see CRS REPORT, *supra* note 17, at 9-10.

authority than is the case with ex ante congressional-executive agreements.

A. *Prospective Advice and Consent for Repetitive Bilateral Treaties*

Treaties submitted to the Senate differ vastly in subject matter, number of treaty parties, and importance. Each year, the President typically sends between five and twenty-five treaties to the Senate, a number that far exceeds what the Framers imagined and yet has changed astonishingly little over the last century.<sup>121</sup> In order to receive advice and consent, these treaties must be reported out favorably by the Senate Foreign Relations Committee and receive a successful floor vote that same session.<sup>122</sup> Of these, around half are what I call *repetitive bilateral treaties*: bilateral treaties with similar terms entered into by the United States with many countries. Tax treaties are a good example. The United States enters into many similar bilateral tax treaties—it has even drawn up a Model Income Tax Convention<sup>123</sup>—and frequently updates these treaties to incorporate new policy objectives or harmonize their terms with changes in domestic law. Of the 104 treaties submitted to the Senate for advice and consent from 2001 through 2010, twenty-two were tax treaties aimed at eliminating the double taxation of income and preventing tax evasion.<sup>124</sup> Nineteen of those treaties simply amended or replaced existing tax treaties.<sup>125</sup> For example, in 2006, the Senate advised and consented to an amendment to a tax treaty with France that resolved several technical issues regarding pensions and investments made through partnerships;<sup>126</sup> then in 2009 it advised and consented to yet another amendment that changed withholding rates for certain dividends, sought to reduce “treaty shopping” by tax-savvy entities, and

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121. See Hathaway, *supra* note 10, at 180 fig. 1 (showing little change over the twentieth century); see also CRS REPORT, *supra* note 17, at 39 (including tables showing similar results). From 2001 through 2010, for example, the President submitted 104 treaties to the Senate that were assigned unique treaty numbers under the Senate’s classification system. Author’s calculations from LIBRARY OF CONGRESS, THOMAS: TREATIES (last visited Mar. 5, 2012), <http://thomas.loc.gov/home/treaties/treaties.html> [hereinafter Thomas Database]. Sometimes multiple agreements are assigned the same treaty number and processed together by the Senate. The most striking instances in this decade were a mutual legal assistance treaty and an extradition treaty with the European Union, each of which was submitted together with over twenty bilateral agreements with individual European Union states on the same subjects. See Mutual Legal Assistance Agreement with the European Union, U.S.-EU, Sept. 28, 2006, S. TREATY DOC. No. 109-13; Extradition Agreement with the European Union, U.S.-EU, Sept. 28, 2006, S. TREATY DOC. No. 109-14.

122. CRS REPORT, *supra* note 17, at 7-8, 11-12. Treaties carry over in the Senate from session to session unless the Senate approves them or they are withdrawn in some fashion. If the Senate Foreign Relations Committee reports a treaty to the whole Senate but the Senate does not hold a floor vote during that session, the treaty is returned again to the Senate Foreign Relations Committee. *Id.*

123. *United States Model Income Tax Convention of November 15, 2006*, INTERNAL REVENUE SERV., <http://www.irs.gov/businesses/international/article/0,,id=169597,00.html> (replacing a 1996 version).

124. Author’s calculations from Thomas Database and review of presidential transmission letters linked from this database. This time period included one other tax treaty as well: a treaty with France amending a prior estate tax treaty. See Protocol Amending Tax Convention on Inheritance with France, U.S.-Fr., Nov. 4, 2005, S. TREATY DOC. No. 109-7 (2005).

125. Author’s calculations from Thomas Database, *supra* note 121, and review of presidential transmission letters linked from this database.

126. Protocol Amending the Tax Convention with France, U.S.-Fr., Sept. 28, 2005, S. TREATY DOC. No. 109-4 (2005).

provided for mandatory arbitration of certain claims.<sup>127</sup> Other examples of repetitive bilateral treaties from 2001 to 2010 include treaties with EU countries harmonizing existing bilateral investment treaties with EU law, extradition treaties, and mutual legal assistance treaties (also known as MLATs) providing for cooperation in certain criminal investigations, as to which the Senate advised and consented to eight, ten, and eleven respectively during this time period.<sup>128</sup>

These repetitive bilateral treaties share several striking features. First, their content is indeed quite repetitive. The language of each individual treaty implements a broader policy, such as the goal of reducing double taxation of income, with modest country-specific variations.<sup>129</sup> Second, the Senate almost always advises and consents to these treaties. Of the fifty-one tax, extradition, MLAT, and EU harmonizing treaties mentioned above, the Senate has advised and consented to forty-nine of them as of December 31, 2011, and the remaining two (which were submitted in November 2010) are awaiting floor votes.<sup>130</sup> All of these treaties were approved by division votes, meaning that the Senate did not bother to hold a roll call.<sup>131</sup> Third, the Senate rarely attaches reservations to these treaties, and it includes few understandings, declarations, or conditions affecting the treaties' substance. Of the forty-nine treaties just mentioned, the Senate gave advice and consent to twenty-five without any further embellishments and fourteen more with simple declarations of self-execution or of the supremacy of the Constitution.<sup>132</sup> The remaining ten had additional declarations, understandings, or conditions of little significance.<sup>133</sup>

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127. Protocol Amending Tax Convention with France, U.S.-Fr., Jan. 13, 2009, S. TREATY DOC. No. 111-4 (2009).

128. Author's calculations from Thomas Database, *supra* note 121, and review of presidential transmission letters linked from this database. As is true throughout, I conservatively count treaties only if they are assigned a unique treaty number in the Senate. *See supra* note 121. (If all twenty-plus agreements submitted with the EU extradition treaty and with the EU MLAT were to be counted separately, the number of treaties in these categories would more than triple.) There are two instances where extradition treaties and MLATs were packaged together under a single treaty number, *see* Extradition Treaty with Romania and Protocol to the Treaty on Mutual Legal Assistance in Criminal Matters with Romania, U.S.-Rom., Sept. 10, 2007, S. TREATY DOC. No. 110-11 (2008); Extradition Treaty with Bulgaria and an Agreement on Certain Aspects of Mutual Legal Assistance in Criminal Matters with Bulgaria, U.S.-Bulg., Sept. 19, 2007, S. TREATY DOC. No. 110-12 (2008), and I have counted one instance as an extradition treaty and the other as an MLAT. These are not the only types of repetitive bilateral treaties, but they occurred with the greatest frequency during this time period.

129. For discussion of elements common to these treaties, see CRS REPORT, *supra* note 17, at 265-73, 278-85. Extradition treaties can have somewhat more variation.

130. Author's calculations from Thomas Database, *supra* note 121.

131. Author's calculations from Thomas Database, *supra* note 121. For background on the Senate's voting processes, see MARTIN B. GOLD, SENATE PROCEDURE AND PRACTICE 113-14 (2004).

132. Author's calculations from Thomas Database, *supra* note 121, and from review of individual Senate resolutions where Thomas Database did not include the text of these resolutions. On very rare occasions, the Senate has sought to attach reservations to bilateral repetitive treaties. For example, in 1981 it advised and consented to a tax treaty with Argentina conditional on two reservations, and because of these reservations (and Argentina's response to them) the treaty has not entered into force. Rocco V. Femia & Layla J. Aksakal, *The Use of Tax Treaty Status in Legislation and the Impact on U.S. Tax Treaty Policy*, WORLDWIDE TAX DAILY, Apr. 26, 2010, at 342.

133. For four of these ten treaties, the Senate gave its advice and consent conditional on its receiving certain information or reports. Protocol Amending Tax Convention with France, *supra* note 127; Protocol Amending 1980 Tax Convention with Canada, U.S.-Can., Sept. 21, 2007, S. TREATY DOC. No. 110-15 (2008); Extradition Agreement with the European Union, U.S.-EU, June 25, 2003, S.

Rather than taking up these repetitive bilateral treaties one by one, the Senate should approve these treaties through resolutions of prospective advice and consent that will cover multiple treaties. The process would be straightforward: the Senate, presumably in consultation with the President, would pass a resolution giving advice and consent to all bilateral treaties on a certain subject that satisfied certain conditions. The Senate would control how specifically or generally it worded these resolutions, in line with the constitutional flexibility available to it. By way of example, the Senate could advise and consent in broad terms to tax treaties that relieved the double taxation of income for residents of the United States and the treaty partner, had protections against treaty-shopping, and provided for cooperation against suspected tax evaders, or it could instead draw from the specific language of the U.S. Model Income Tax Convention. The Senate could similarly use expansive or limited language in identifying appropriate treaty partners. For example, it might authorize tax treaties with all countries that the President determines to have met certain standards in terms of their tax codes and collection practices, or with countries with whom the United States already had tax treaties in force (thus giving prospective authorization only to replacements and amendments). The Senate could also include general declarations, understandings, or conditions in its resolutions, such as declarations of self-execution or non-self-execution.<sup>134</sup> In essence, the Senate would function similarly to how Congress does with *ex ante* congressional-executive agreements: It would work with the President to set policy objectives and then

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TREATY DOC. No. 109-14 (2006); Protocol Amending Tax Convention with Sri Lanka, U.S.-Sri Lanka, Sept. 20, 2002, S. TREATY DOC. No. 108-9 (2003). For four MLATs, the Senate included a condition that seems designed mainly to offend the U.S. treaty partners—namely, that the United States need not share information with officials in these countries if the CIA suspects the officials of drug-dealing; and for these treaties, as well as one extradition treaty, the Senate also included an understanding that these treaties would not be used to help the International Criminal Court. Mutual Legal Assistance in Criminal Matters, U.S.-Liech., July 8, 2002, S. TREATY DOC. NO. 107-16 (2002); Mutual Legal Assistance in Criminal Matters, U.S.-India, Oct. 17, 2001, S. TREATY DOC. NO. 107-3 (2002); Extradition Treaty, U.S.-Peru, July 16, 2001, S. TREATY DOC. NO. 107-6 (2002); Mutual Legal Assistance in Criminal Matters, U.S.-Ir., Jan. 18, 2001, S. TREATY DOC. NO. 107-9 (2002); Mutual Legal Assistance in Criminal Matters, U.S.-Belize, Sept. 19, 2000, S. TREATY DOC. NO. 107-13 (2002). Finally, the Senate's advice and consent to a replacement extradition treaty with the United Kingdom included several declarations, understandings, and provisos, mostly to ensure that the United Kingdom would not seek extraditions that would be in tension with the North Ireland peace process (a point that had already been confirmed through an exchange of notes among the respective executive branches). Extradition Treaty, U.S.-U.K., Mar. 31, 2003, S. TREATY DOC. NO. 108-23 (2007).

134. Self-executing treaties double as judicially enforceable domestic laws, while non-self-executing treaties are not judicially enforceable and, following *Medellín v. Texas*, 552 U.S. 491 (2008), may not even have the status of domestic law. *See, e.g.*, Ronald J. Bettauer, *ABA Adopts ABA-ASIL Joint Task Force Policies on Implementing Treaties Under U.S. Law*, 14 ASIL INSIGHT, May 6, 2010, available at <http://www.asil.org/insights100506.cfm> (discussing range of possible readings of *Medellín*). *Medellín* further indicates that a treaty must have “provisions clearly according it domestic effect” in order to be self-executing and emphasizes that both the President and the Senate must intend such domestic effect. 552 U.S. at 519, 526. In light of these factors, if the Senate intends a treaty or treaties to be self-executing, it should clearly signal this in its resolution of prospective advice and consent. *See* Oona A. Hathaway, Sabria McElroy & Sara Aronchick Solow, *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L L. 51, 95-101 (2012). (Indeed, since *Medellín*, Senate resolutions of subsequent advice and consent now specify the Senate's views on self-execution. *See* S. EXEC. REP. NO. 111-3, at 5 (2010) (noting this new policy)). The President can then ensure that language in the negotiated treaty clearly accords it domestic effect.



leave it to the executive branch to fill in the details.<sup>135</sup>

That approach would have significant advantages across the board. At the most basic level, it would speed up the making of repetitive bilateral treaties. For the forty-nine treaties mentioned above, the Senate took an average of eleven months to give its advice and consent.<sup>136</sup> That is a modest amount of time, but it carries real consequences in delaying the advantages that come with a treaty's entry into force, such as improved tax policies or better transnational cooperation in criminal investigations, and it adds up alarmingly given how many treaties are held up in this way. By eliminating subsequent advice and consent for repetitive bilateral treaties and thus enabling ratification to follow fairly soon after signature, the United States would more quickly receive the benefits of these treaties.

More importantly, the use of multi-treaty resolutions of prospective advice and consent would facilitate the making of more treaties. Individualized Senate advice and consent serves as an additional hurdle to treaty-making, and the Senate's ability to review only a limited number of treaties each year<sup>137</sup> may deter the executive branch from making or amending treaties that would advance U.S. interests. To continue with the example of tax treaties, the United States has a much smaller network of tax treaties than does, for example, the United Kingdom,<sup>138</sup> but it submitted only three new tax treaties to the Senate from 2001 to 2010. During that same period it submitted nineteen tax treaties that amended or replaced prior tax treaties in order to incorporate new policy objectives, such as making treaty-shopping harder, but it left dozens of other tax treaties unamended.<sup>139</sup> Some of this may be due to policy reasons, to substantive disagreements with existing or potential treaty partners, or to the costs of negotiations, but surely some of it also reflects concern with overburdening the Senate. Similarly, there may well be useful types of treaties that the United States does not enter into (or enters into only rarely) because of the costs of obtaining individualized advice and consent. Although more such

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135. The Senate Rule on treaties simply assumes that the final text of a treaty will be presented to the Senate and is silent on the issue of prospective advice and consent. *See* STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, r. XXX, at 39-40 (2000). Accordingly, the Rules do not bar the Senate from passing a resolution of prospective advice and consent of its own initiative, *cf.* GOLD, *supra* note 131, at 4 (suggesting that actions are permissible if there is an "absence of restrictive provisions" in the Rules), as was done in the 1920s with the arbitral treaties with Mexico. The Senate could also amend Rule XXX to set out procedures expressly for prospective advice and consent. Amendments to Rule XXX have happened in the past, most recently in 1986. *See* CRS REPORT, *supra* note 17, at 118 n.6.

136. Author's calculations from Thomas Database (showing that the median is around six months), *supra* note 121. This number is a proxy rather than a perfect reflection of the delays caused by the Senate process. Sometimes the delays will be greater, as where further time is lost while the executive branch prepares to submit the treaty to the Senate, and sometimes less, as when the ratification process of the treaty partner independently delays the treaty's entry into force.

137. *See* CRS REPORT, *supra* note 17, at 122-23 (noting the "time constraints" and observing that "[p]articular treaties may languish on the committee's calendar, not necessarily because of serious opposition but for want of interested advocates with the time to do justice to them"); *see also* JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 93 (2005) (noting that "the Senate Foreign Relations Committee can consider only a limited number of treaties each session" and that "[e]very treaty considered by the Senate thus comes at the cost of neglect of other treaties or laws that could further the president's agenda").

138. *See* Femia & Aksakal, *supra* note 132, at 341.

139. The United States presently is party to around sixty income tax treaties. *See id.*

treaties might benefit the United States, the hassle of getting Senate advice and consent may cause the executive to seek such treaties only with the most important treaty partners. By using prospective advice and consent, the United States could enter into more repetitive bilateral treaties that are minor individually but collectively amount to what Louis Henkin once called the “routine, undramatic, uncontroversial, ‘uninteresting’—I do not say unimportant—[foreign policy] aimed at achieving national ends usually through stability, order, good relations.”<sup>140</sup>

By switching from individualized subsequent advice and consent to more generalized prospective advice and consent, the Senate would also gain a stronger role in setting the U.S. negotiating agenda for repetitive bilateral treaties. Presently, the Senate plays no official role in setting U.S. negotiating objectives. The Senate has long lamented this fact—a massive report prepared for the Senate Foreign Relations Committee calls this a “major problem”<sup>141</sup>—and the Senate’s present treatment of bilateral repetitive treaties suggests that it does indeed care more about the general content of these treaties than about the specifics of any one treaty. Although repetitive bilateral treaties are subject to hearings in the Senate Foreign Relations Committee and occupy significant staff time, they receive little direct senatorial scrutiny: the hearings themselves tend to bundle several treaties together, be quite short, and be sparsely attended by actual Senators.<sup>142</sup> Even when Senators have concerns about particular provisions of a treaty, they frequently seek resolution of those concerns not by requesting changes to the treaty but rather by urging the executive branch to rethink its approach for future treaties. For example, the Senate Foreign Relations Committee raised several specific concerns about the details of a mandatory arbitration provision in a tax treaty with Germany, but it did not seek to attach reservations, understandings, or declarations to this treaty and instead couched its concerns in terms of future treaties.<sup>143</sup> Prospective advice

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140. LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 13 (2d ed. 1979). For purposes of this discussion, I assume that more treaties are desirable when the executive branch supports treaties and when difficulties processing them in the Senate relate less to their content than to the Senate’s method of processing. But even those wary of more repetitive bilateral agreements should see some value in prospective advice and consent since, as I suggest in the next Subsection, prospective advice and consent can provide more checks on treaties than do congressional authorizations for ex ante congressional-executive agreements.

141. CRS REPORT, *supra* note 17, at 15. For other examples of this longstanding complaint, see 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 24, at 424; and Bacon, *supra* note 23, at 511-12. Nevertheless, the executive branch often does consult with Senators and the Senate Foreign Relations Committee in the course of treaty negotiations. See *supra* note 53 and accompanying text.

142. For example, a hearing on November 10, 2009, covered five treaties (including three tax treaties), took forty minutes, and had only one Senator in attendance. See S. EXEC. REP. NO. 111-3, Annex II, at 97-131 (2010). That same Senate Report reveals the degree to which individualized review of bilateral repetitive treaties, in this case a tax treaty with Malta, takes up time and resources on the part of both senatorial and executive staff. The 142 pages of the report and its annexes included detailed discussion by the Foreign Relations Committee, lengthy prepared statements by executive branch members, and further written exchanges on the record between Senators Kerry and Lugar and the Treasury Department. See generally *id.*

143. S. EXEC. REP. NO. 110-5, at 8-9 (2007) (suggesting, for example, that future treaties explicitly allow for more taxpayer input at the arbitrations); see also S. EXEC. REP. NO. 111-1, at 2 (2009) (indicating that this point was incorporated into a later tax treaty with France). There are, of course, some instances where the Senate attaches conditions to a particular treaty, see *supra* note 133,

and consent would provide a much better forum for that kind of back-and-forth: the Senate would help craft broad treaty objectives from the beginning, and the Foreign Relations Committee could, if it chose, track the more minute details through the processes used by congressional committees in dealing with administrative agencies.

Prospective advice and consent would carry few, if any, costs with it in relation to repetitive bilateral treaties. As a matter of international relations, it is unlikely that the executive branch gains material negotiating clout from the subsequent advice and consent process for repetitive bilateral treaties in light of the relatively minor individual nature of these treaties and the Senate's nearly spotless if slow record of approving them. As a matter of Senate oversight, the Senate would, of course, be ceding some level of individual control in exchange for influence over policy direction and a process more compatible with transnational realities. But the Senate can retain substantial oversight over individual treaties, if it wishes. By incorporating additional checks into its resolution of prospective advice and consent—such as by obligating the reporting of any treaty authorized under this resolution to the Senate Foreign Relations Committee (or other relevant committees) before its entry into force, including a sunset provision in this resolution, and, as I discuss at more length later in this Part, expressly reserving the effective right to withdraw its advice and consent prior to the ratification of any particular treaty—the Senate can ensure it has a voice.<sup>144</sup> As a matter of legal certainty, questions might arise whether a particular treaty fell within the scope of the Senate's prospective advice and consent, but the executive branch would have strong incentives not to risk pushing the boundaries.

B. *Prospective Advice and Consent Instead of Ex Ante Congressional-Executive Agreements*

Until now, I have focused on prospective advice and consent for bilateral repetitive treaties as an alternative to subsequent advice and consent. But subsequent advice and consent is used for only a modest percentage of U.S. international agreements. Of the international agreements made with the involvement of the Senate or Congress,<sup>145</sup> the vast majority are ex ante congressional-executive agreements. According to Oona Hathaway's calculations, between 1980 and 2000 the United States entered into more than three thousand ex ante congressional-executive agreements, as compared to 375 treaties made under the Treaty Clause (which I will also call Article II treaties) and a mere nine ex post congressional-executive agreements.<sup>146</sup> I argue here that prospective advice and consent offers a valuable alternative to these

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but in my view these instances are ones where the United States would have been better served by less micro-management by the Senate.

144. Cf. Hathaway, *supra* note 10, at 244, 255 (making similar suggestions to the first two given here in the context of ex ante congressional-executive agreements).

145. There are two other processes for treaty-making, both of which have more limited scope: sole executive agreements and executive agreements ancillary to treaties made under the Treaty Clause.

146. Hathaway, *supra* note 10, at 150 n.16.

numerous ex ante congressional-executive agreements.

Ex ante congressional-executive agreements hold obvious appeal to the President relative to subsequent advice and consent and to ex post congressional-executive agreements. Once Congress has passed its single authorizing statute on a particular subject, the executive branch can enter into many congressional-executive agreements based on that authorization without returning to Congress, unless the text of the authorization requires further congressional involvement.<sup>147</sup> Its only remaining obligation to Congress, set by the 1972 Case-Zablocki Act, is to report these agreements to Congress within sixty days of their entry into force.<sup>148</sup> By contrast, both subsequent advice and consent and ex post congressional-executive agreements involve individualized consideration of each negotiated agreement and accordingly take far more time and effort. Where an agreement falls within a prior congressional authorization, the executive branch is thus likely to rely only on this authorization rather than seek some form of post-negotiation approval. If there is no existing congressional authorization, then the State Department will submit the negotiated agreement either as an Article II treaty or as an ex post congressional-executive agreement based on a complicated calculus of factors, including the significance and duration of the agreement, past practice, and congressional preference.<sup>149</sup>

That multi-faceted system of treatymaking has attracted considerable attention from academics in recent years, generating two main topics of debate: first, the constitutionality of congressional-executive agreements;<sup>150</sup> and second, as a matter of practice, how treatymaking should be allocated among the various mechanisms. On the first issue, I will assume that congressional-executive agreements are indeed constitutional—at least to the extent that they are presently used. I note that if they are instead unconstitutional (or cast sufficiently into doubt so as to reduce their use)—then the appeal of prospective advice and consent becomes even stronger.

With regard to the second issue, Oona Hathaway has recently argued that ex ante congressional-executive agreements amount to a dangerous abdication of congressional authority.<sup>151</sup> Specifically, she argues that ex ante

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147. A handful of authorizing statutes do require more from the executive branch. See CRS REPORT, *supra* note 17, at 235-38.

148. See 1 U.S.C. § 112b(a) (2006).

149. See U.S. DEP'T OF STATE, 11 FOREIGN AFFAIRS MANUAL §§ 721, 723.3 (2006). This determination is part of what is known as the Circular 175 process. As the small number of ex post congressional-executive agreements relative to Article II treaties suggests, outside the trade context this usually means through the Article II treaty process. See Hathaway, *supra* note 10, at 150 n.16 (listing the nine ex post congressional-executive agreements found in her research covering 1980-2000, of which most related to trade).

150. See generally sources cited *supra* note 5.

151. Hathaway, *supra* note 10, at 145-47. As I discuss in more detail in Part III, Hathaway also argues that the Treaty Clause should gradually be abandoned in favor of ex post congressional-executive agreements. Hathaway, *supra* note 5, at 1352-55. Hathaway never explains why she considers the ex post congressional-executive process to be superior for bilateral repetitive treaties, however, and her arguments for switching have little relevance for these treaties. For example, she emphasizes the stiffness of the two-thirds requirement, *see id.* at 1307-37, but in the context of bilateral repetitive treaties, this requirement has not proven a barrier to treaty approval. The main problem with subsequent advice and consent for bilateral repetitive treaties is that their individualized consideration occupies time

congressional-executive agreements raise serious accountability questions: The President enters into well over a hundred each year based on broad prior congressional authorizations. But he need not report them to Congress under the Case-Zablocki Act until after their entry into force, and in any event, Congress has very limited ability to block them.<sup>152</sup> Hathaway proposes amending the Case-Zablocki Act to require the President to report those agreements to Congress thirty or sixty days before they enter into force, as well as making them public where possible, in order to give Congress the chance to raise concerns.<sup>153</sup> Her proposal is a valuable one, but it would not resolve many of the concerns she raises, because other than by passing a law, Congress has no formal ability to prevent the entry into force of any particular agreement that it finds questionable.

In my view, prospective advice and consent could better resolve the problem Hathaway identifies. Prospective advice and consent offers considerable advantages over prior congressional authorizations. For one thing, the prospective advice and consent process may generate more careful consideration from the start. Congressional authorizations are often tucked into larger pieces of legislation and therefore less likely to receive specific scrutiny, while a resolution of prospective advice and consent would be solely aimed at authorizing a certain set of treaties.<sup>154</sup> There would also be better oversight of the total amount of discretion made available to the President through these pre-authorizations. Hathaway postulates that Congress ceded so much authority to the President in part because no one kept track of the cumulative effect of numerous small delegations over decades.<sup>155</sup> Although congressional authorizations for ex ante congressional-executive agreements may pass through quite varied congressional committees, the Senate Foreign Relations Committee would be a gatekeeper for all resolutions of prospective advice and consent. Finally, and most importantly, as I discuss in the next Section, the flexible nature of the Treaty Clause would enable the Senate to retain a “veto” over specific treaties in a way that is unavailable to Congress for ex ante congressional-executive agreements.

I do not argue for always using prospective advice and consent instead of congressional authorizations in the future. Congressional authorizations may well be a superior method for certain types of agreements. Given the House’s role in appropriations, for example, international agreements requiring significant appropriations might be better authorized by congressional statutes than by prospective advice and consent. There may also be benefits to

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and effort on the part of the Senate while adding little value. Those problems would be increased, not decreased, by a switch to ex post congressional-executive agreements, which would require the agreement of both Houses in a single session.

152. Hathaway, *supra* note 10, at 191-205.

153. *Id.* at 244; *see also* CRS REPORT, *supra* note 17, at 216, 236-37 (describing Senator Erwin’s attempts in the 1970s to get Congress to pass legislation that would have included a waiting period similar to what Hathaway is now proposing).

154. As noted previously, the Senate does not vote on treaties in conjunction with ordinary legislation and instead takes them up while in executive session. *See supra* note 80 and accompanying text.

155. Hathaway, *supra* note 10, at 185.

including congressional authorizations in broader statutes on certain occasions, as when an authorization is intimately bound into the overall statutory plan rather than a relatively discrete subpart. My argument is rather that interchangeability has advantages both ways. The demand for some kind of an ex ante process is clear from the hundreds of ex ante congressional-executive agreements made each year. Prospective advice and consent will sometimes fulfill this need in a better way than congressional authorizations, and the President and the Senate should consider using it accordingly.

### C. *Preserving a Veto*

Prospective advice and consent offers one other major advantage over ex ante congressional-executive agreements: a way for the Senate to preserve a veto over particular treaties negotiated under its broad grant of authority. More specifically, I argue that the Senate can condition its prospective advice and consent on a requirement that the President submit each finalized treaty to the Senate for a certain period of time prior to its ratification and can retain the option of terminating its advice and consent to that treaty during this time period. This approach would allow the Senate to retain a powerful dose of control: the option to reject any particular treaty if it finds the terms or the identity of the treaty party objectionable.<sup>156</sup> Once again, the Treaty Clause leaves the Senate with the flexibility to choose whether or not it wishes to take this approach in any particular circumstance.

This approach was once possible for ex ante congressional-executive agreements as well. Some broad congressional authorizations required the President to submit congressional-executive agreements negotiated under them to Congress prior to entry into force so that Congress could have the option of vetoing them. For example, the Social Security Amendments of 1977, which authorize the President to enter into bilateral agreements to smooth the situations of people who have built up Social Security benefits in both the United States and other countries, provide that these agreements shall become effective no less than sixty days after their transmission to Congress and “that such [an] agreement shall not become effective if, during such period, either House of the Congress adopts a resolution of disapproval of the agreement.”<sup>157</sup> Similarly, when designing the fast-track trade legislation in the 1970s, Congress considered allowing the President to enter into trade agreements subject to a one-house veto, although it ultimately decided to require a bicameral up-or-down vote to approve each trade agreement.<sup>158</sup>

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156. Similarly, the Senate would probably be able to withdraw its entire generalized prospective advice and consent at any time, except with regard to treaties that have already been ratified. See *infra* note 166.

157. 42 U.S.C. § 433(e)(2) (2006); see also CRS REPORT, *supra* note 17, at 238 (noting that this provision is now constitutionally problematic).

158. See H.R. REP. NO. 93-571, at 6 (1973) (providing that a trade agreement made under this bill would take effect if neither house passed a resolution disapproving the agreement within a 90-day window). But see S. REP. NO. 93-1298, at 75-76 (1974) (noting the “constitutional problems which are raised by the House provision allowing a one-House veto of a change in domestic law negotiated by the President” and instead providing that a trade agreement must survive up-or-down votes in both houses).

In light of the Supreme Court's decision in *INS v. Chadha*, however, legislative vetoes are unconstitutional. *Chadha* considered whether, in an act delegating legislative authority to the executive branch, Congress could preserve the right to nullify any particular decision made by the executive branch in exercise of this authority by means of a one-house resolution.<sup>159</sup> The Court held that this "convenient shortcut" was unconstitutional because it violated the requirements of bicameralism and presentment.<sup>160</sup> As Justice White noted in dissent, this reasoning invalidated the legislative veto via concurrent resolutions as well as one-house ones, and for ex ante congressional-executive agreements as well as in the administrative law context.<sup>161</sup> After *Chadha*, for Congress to stop a particular ex ante congressional-executive agreement from entering into force, it must either garner the President's signature on a two-house enactment or acquire a two-thirds majority in both houses sufficient to override his veto. Oona Hathaway thus concludes that *Chadha* "eliminated the single most significant control over ex ante congressional-executive agreements that Congress possessed."<sup>162</sup>

By contrast, the Senate can constitutionally retain the right to reconsider its advice and consent under the Treaty Clause prior to the President's ratification of a treaty. The constitutional principles relied on in *Chadha*—bicameralism and presentment—are inapplicable to the Treaty Clause. Indeed *Chadha* explicitly recognizes the Treaty Clause as one of four constitutional exceptions to these requirements.<sup>163</sup> Moreover, unlike ordinary legislation, including statutes authorizing ex ante congressional-executive agreements, the Senate's advice and consent has an inchoate quality: no law has been created through it until the President ratifies a treaty and it enters into force, so that the treaty therefore becomes the supreme law of the land under the Supremacy Clause. In giving its advice and consent under the Treaty Clause, the Senate is thus generally regarded as the master of its offer. It can condition ratification on the fulfillment of other requirements.<sup>164</sup> For example, in giving its advice and consent to the Convention on the Prevention and Punishment of the Crime of

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before becoming effective).

159. *INS v. Chadha*, 462 U.S. 919, 923, 944 (1983).

160. *Id.* at 944-59.

161. *See id.* at 967, 1003-05 (White, J., dissenting) (listing congressional authorizations for ex ante congressional-executive agreements with both one-house and two-house legislative veto provisions as among those invalidated by *Chadha*).

162. Hathaway, *supra* note 10, at 194; *see also id.* at 196-204 (discussing *Chadha* and its effects on ex ante congressional-executive agreements in more detail).

163. *Chadha*, 462 U.S. at 955-56. To the extent that *Chadha* further rests on the principle of separation of powers, this principle similarly carries less force for the Treaty Clause. *See supra* notes 77-82 and accompanying text. The Senate's practice of adding reservations when giving advice and consent also shows how different the advice and consent process is from ordinary legislation, as it effectively allows the Senate to give partial acceptance to a treaty. The President cannot constitutionally give partial consent to a piece of legislation, even where a framework statute of Congress has permitted him to do so. *See generally* *Clinton v. City of New York*, 524 U.S. 417 (1998) (invalidating the line-item veto).

164. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. d ("But a condition having plausible relation to the treaty, or to its adoption or implementation, is presumably not improper, and if the President proceeds to make the treaty he is bound by the condition."); *id.* reporter's note 4; *see also* *United States v. Stuart*, 489 U.S. 353, 375 (1989) (Scalia, J., concurring in the judgment); Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 406-10, 451-54 (2000).

Genocide (Genocide Convention), the Senate stipulated that the President could not deposit the instrument of ratification until after Congress had passed implementing legislation.<sup>165</sup>

Just as the Senate can set conditions like these that must be met in order for ratification to occur, it should also be able to set conditions that would prevent ratification from occurring. It should be able to condition its advice and consent on the non-occurrence of a certain event—for example, the Senate could state that its prospective advice and consent is conditional on there being no Senate Foreign Relations Committee hearings held on the treaty between the time of signature and ratification, or on there being no floor resolution disapproving the treaty during this time window. Alternatively, the Senate could specifically reserve the right to withdraw its advice and consent during the period prior to ratification.<sup>166</sup> That approach might be less useful than the use of conditions, however, because it is an open question as to what voting margin the Senate would need to formally withdraw its advice and consent. Would it be the one-third-plus-one required to defeat advice and consent in the first place, the two-thirds required to obtain it, or some other ratio like a simple majority at the option of the Senate? If two-thirds of the Senate were needed to withdraw advice and consent, this would be a steep bar, although not nearly as steep as the two-thirds of both houses needed to override a presidential veto.<sup>167</sup>

By crafting its resolutions of prospective advice and consent so as to leave it effectively with the option of a subsequent veto, the Senate could prevent the ratification of any repetitive bilateral treaties that it finds objectionable. Although, as I have shown above, the Senate finds very few bilateral repetitive treaties objectionable, it has done so occasionally. For

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165. 132 CONG. REC. 2349-50 (1986); *see also, e.g.*, 156 CONG. REC. S7720-21 (daily ed. Sept. 29, 2010) (approving defense treaty with Australia conditional on the President's not exchanging notes of ratification until after he has submitted various reports and certifications to Congress); 143 CONG. REC. 8255-58 (1997) (approving multilateral defense treaty conditional on the President's not depositing his instrument of ratification until he has made a certain certification to the Senate and further requiring that if he ever wishes to substantively amend the treaty he must submit the entire treaty (not just the amendment) again to the Senate for advice and consent). The Senate sometimes even conditions its advice and consent on the President's taking certain steps after ratification, such as reports, certifications, or consultations with the Senate. *E.g.*, 156 CONG. REC. S10982-85 (daily ed. Dec. 22, 2010) (approving New START Treaty conditional on the President's fulfilling significant reporting and consultation requirements after ratification).

166. Indeed, even if it does not explicitly reserve the right, the Senate probably has an inherent right to withdraw its advice and consent to a treaty at any time prior to ratification. In the related Appointments Clause context, on numerous occasions the Senate has successfully withdrawn its advice and consent to nominations prior to the issuance of the appointees' commissions. *See United States v. Smith*, 286 U.S. 6, 43-45 (1932) (holding that the Senate could not withdraw its advice and consent after a commission had issued, but carefully not reaching whether the Senate could withdraw advice and consent where it communicated this withdrawal prior to the issuance of a commission). I am not aware of any instances in which the Senate has sought to withdraw its advice and consent to a treaty prior to the treaty's ratification. Edmund Randolph, at least, thought it could do so. *Edmund Randolph on the British Treaty, 1795*, *supra* note 67, at 592 ("[I]f before [the President] had passed his judgment upon [a treaty], a future Senate should by a vote of two thirds annul the preceding vote, it would be constitutionally abolished.").

167. Moreover, in practice the President would likely decline to ratify any treaty where the Senate had previously triggered its withdrawal mechanism, as this would not only destroy working relations between the Senate and the President but also bind the United States to an international obligation whose domestic constitutionality was very much in doubt.



example, the Senate effectively rejected a tax treaty with Argentina in 1981 through the attachment of reservations.<sup>168</sup> The option of a Senate veto also would cast a shadow of constraint on executive branch action, making it vested in keeping the Senate Foreign Relations Committee on board so as to reduce the risk of a veto. In effect, prospective advice and consent with the option of a veto would preserve most of the control available to the Senate through its present process of individualized subsequent advice and consent while creating a much more workable system for treaty-making.

#### IV. SINGLE-TREATY PROSPECTIVE ADVICE AND CONSENT

Prospective advice and consent also offers great promise for major multilateral treaties, in a way quite different from that discussed in the previous Part. If prospective advice and consent for bilateral repetitive treaties provides a way for the Treaty Clause to accommodate the many small but valuable ties that bind countries together in today's transnational world, then prospective advice and consent for major multilateral treaties addresses a different development: the increasing importance of such treaties in resolving issues of global concern. Prospective advice and consent offers a way for the United States to strengthen its hand in international negotiations and provides the Senate with incentives for acting in a timely and favorable manner. This Part describes the deep need for a better domestic process for the making of major multilateral treaties, argues that prospective advice and consent offers a solution, and provides examples as to how it might work in practice.

##### A. *Today's Graveyard*

Over a hundred years ago, Secretary of State John Hay complained that "there would never be another Treaty, of any significance, ratified by the Senate."<sup>169</sup> There is some truth behind his hyperbole. While the Senate has since advised and consented to some treaties of surpassing importance, such as the U.N. Charter and the Geneva Conventions, it has interred many others in its proverbial graveyard of treaties. A few treaties have been voted down outright, but many more have been laid to rest through endless delays and other means.

This fact is not obvious from looking simply at the overall numbers. As Senate partisans point out, the "overwhelming majority of treaties receive favorable Senate action within a reasonable period of time."<sup>170</sup> Many of these treaties, however, are repetitive bilateral treaties of only modest significance. Similarly, one-of-a-kind treaties of only minor importance usually make it through the Senate without much trouble. To give a few examples, in the last decade the Senate has advised and consented to a treaty with Canada limiting tuna fishing, to a protocol to the Geneva Conventions giving the Red Crystal

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168. See Femia & Aksakal, *supra* note 132, at 342 n.5 (noting that Senate reservations led to the non-adoption of this treaty).

169. Letter from John Hay to Henry Adams (Aug. 5, 1899), *quoted in* HOLT, *supra* note 97, at 177.

170. CRS REPORT, *supra* note 17, at 117.

the same status as a symbol as the Red Cross and Red Crescent, and to a multilateral treaty establishing a registry for the rental of high-value aircraft.<sup>171</sup> As the treaties increase in significance, however, their clearance rates drop off sharply. Some major treaties do make it through, usually weakened by reservations, understandings, or declarations (collectively “RUDs”).<sup>172</sup> But the most important one-of-a-kind treaties—particularly multilateral ones—tend simply to pile up, occasionally clearing the Senate Foreign Relations Committee only to be returned to it at the end of the session for lack of a floor vote. At the beginning of 2012, for example, the Senate had thirty treaties left before it, with many of them going back decades, the oldest of which was submitted to the Senate in 1949.<sup>173</sup> These include the Vienna Convention on the Law of Treaties (submitted in 1971), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (submitted in 1980), Protocol II to the Geneva Conventions (submitted in 1987), the Law of the Sea Convention (submitted in 1994), the Comprehensive Nuclear-Test-Ban Treaty (submitted in 1997), and the Stockholm Convention on Persistent Organic Pollutants (submitted in 2002).<sup>174</sup> It is not a matter of the Senate picking and choosing which significant treaties to bring to a vote—rather, in recent history at least, the Senate simply does not vote on potentially controversial multilateral treaties. Of all the treaties voted on by the Senate from 2001 to 2010, only *one* treaty—the bilateral New START Treaty with Russia—is recorded as receiving any dissenting votes.<sup>175</sup>

The Senate’s failure to advise and consent to important multilateral treaties has significantly influenced the process of forming these international agreements at both a domestic and international level. At a domestic level, it has led the executive branch to bypass the Article II process on certain issues. The President now enters into some agreements under his own authority, such

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171. Protocol III to 1949 Geneva Convention and an Amendment and Protocol to 1980 Conventional Weapons Convention, June 20, 2006, S. TREATY DOC. NO. 109-10A (2006); Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, Nov. 16, 2001, S. TREATY DOC. NO. 108-10 (2003); Exchange of Notes Constituting an Agreement Amending the Treaty on Pacific Coast Albacore Tuna Vessels and Port Privileges, U.S.-Can., Aug. 21, 2002-Sept. 10, 2002, S. TREATY DOC. NO. 108-1 (2003).

172. Recent examples include an arms control treaty with the United Kingdom, Treaty with United Kingdom Concerning Defense Trade Cooperation, U.S.-U.K., Sept. 20, 2007, S. TREATY DOC. NO. 110-7 (2007), which received advice and consent three years after submission in a way that undermined the plain intent of the treaty by declaring it non-self-executing; and the Hague Convention for the Protection of Cultural Property, Jan. 6, 1999, S. TREATY DOC. NO. 106-1(A) (1999), which received advice and consent almost ten years after submission but was cabined through Senate understandings and a declaration of partial non-self-execution.

173. Author’s calculations from Thomas Database, *supra* note 121 and *Treaties Pending in the Senate*, *supra* note 3. The Senate also occasionally returns treaties to the President without having voted on them. *E.g.*, S. Res. 267, 106th Cong. (2000) (returning seventeen treaties).

174. Author’s calculations from Thomas Database, *supra* note 121, and *Treaties Pending in the Senate*, *supra* note 3. Of these treaties, the Comprehensive Nuclear-Test-Ban Treaty is exceptional in having once received a floor vote, albeit a negative one. 145 CONG. REC. 25, 143 (1999) (recording forty-eight yeas and fifty-one nays).

175. Author’s calculations from Thomas Database, *supra* note 121. A division vote was used for most treaties and on the rare occasions where a roll call was taken, the votes were unanimous. *Id.* In the 1990s, treaties did occasionally receive dissenting votes—the Chemical Weapons Convention, for example, passed by a 74-26 vote. 143 CONG. REC. 6426-27 (1997).

as the Paris Peace Accords ending the Vietnam War, which would likely have gone to the Senate under the Framers' original vision.<sup>176</sup> The President also submits some important agreements as ex post congressional-executive agreements rather than as treaties, with the two most prominent recent examples being NAFTA and the establishment of the WTO.<sup>177</sup> To date, however, both processes have proven limited in their scopes (whether due to constitutional limits or political constraints), and neither has become a complete substitute for the Article II process.

At an international level, the Senate's failure to give advice and consent to major multilateral treaties affects the President's negotiating power. To understand why, it is useful to draw on Robert Putnam's well-known portrayal of international negotiations as a two-level game, where each national leader is simultaneously trying to reach a favorable outcome in the international negotiations and to ensure the necessary support for this outcome back home.<sup>178</sup> Strong domestic constraints on a leader can have conflicting effects in the international game. On the one hand, that leader may have a bargaining advantage because he can argue that certain terms will simply not be acceptable back home, but on the other hand he will have low credibility if other leaders think he is likely to suffer involuntary defection—rejection back home—even if they agree to his terms.<sup>179</sup> Putnam considers the subsequent advice and consent process to be a powerful example of the double-edged role of domestic constraints: it “increases the bargaining power of American negotiators, but it also reduces the scope for international cooperation . . . [By] rais[ing] the odds for involuntary defection and mak[ing] potential partners warier about dealing with the Americans.”<sup>180</sup>

Putnam does not parse out how his analysis might apply to different types of treaty negotiations. In my view, however, the trade-offs stemming from domestic constraints are likely to play out differently depending on whether or not all negotiating parties must ratify a treaty in order for it to enter into force. For bilateral treaties (and for multilateral treaties that require U.S. ratification in order for the treaty to enter into force<sup>181</sup>), the President does not lose much bargaining power due to his risk of involuntary defection. The other negotiators

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176. CRS REPORT, *supra* note 17, at 88, 247 (giving other examples).

177. See Charnovitz, *supra* note 5, at 696-97.

178. Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 433-34 (1988).

179. *Id.* at 439-41; see also LISA L. MARTIN, DEMOCRATIC COMMITMENTS: LEGISLATURES AND INTERNATIONAL COOPERATION 175-82 (2000) (arguing that Denmark's high constitutional threshold for ceding power to the European Union has served as a domestic constraint that enables Denmark to be a particularly effective negotiator within the European Union). *But see* Peter B. Evans, *Conclusions*, in DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS 399, 402 (Peter B. Evans, Harold K. Jacobson & Robert D. Putnam eds., 1993) (questioning whether negotiators with tied hands domestically do in fact do better in international negotiations). I assume for purposes of discussion that domestic constraints do help negotiators, but in any event my focus is less on the usefulness of constraints (which can arise through either prospective or subsequent advice and consent) and more on the effects of the risk of involuntary defection.

180. Putnam, *supra* note 178, at 448.

181. See, e.g., Comprehensive Nuclear Test Ban Treaty, art. 14 & Annex II, Sept. 24, 1996, 35 I.L.M. 1439 (including the United States in a list of forty-four countries that must ratify the treaty before it enters into force).

should prefer any agreement that meets their minimum requirements to no agreement, so they should be willing to accommodate his asserted domestic constraints as long as these constraints are within their win sets. If the Senate fails to advise and consent to the treaty, then the treaty will simply not enter into force, and the parties will be in exactly the same positions as before the negotiation, less transactional and reputational costs.

But for multilateral treaties that will enter into force for those countries that ratify it after some but not all of their fellow countries have ratified it, the trade-offs are very different. Imagine, for example, that four countries negotiate a treaty that will enter into force for the ratifiers after three countries have ratified it. Suppose further that three countries then ratify, so the treaty enters into force as to them. If the fourth country negotiated hard and successfully for the treaty to take a certain form but then fails to ratify it, then the other three countries will have only losses from their concessions. They agreed to a treaty that differs from the presumably more desirable treaty they would have reached without the fourth country participating in the negotiations, and now they are bound to that treaty without getting the anticipated gain of the fourth party's participation.<sup>182</sup> Given that risk, parties in such negotiations should be particularly wary of making substantial concessions to one party where that party seems a likely candidate for involuntary defection. The Senate's history of failing to approve important multilateral treaties makes the United States such a candidate.<sup>183</sup>

Recent remarks by John Bellinger, a Legal Advisor to the State Department during the George W. Bush administration, confirm that the Senate's failure to advise and consent to treaties is reducing the effectiveness of U.S. negotiators. He explains:

[T]his is a common refrain now that we hear from our negotiating partners, and it undermines the effectiveness of U.S. negotiators in trying to cut deals. If we say, "If we make this change, then we will come along," then it's a little bit like the boy who cried wolf. It may well be that we will sign the treaty, but our negotiating partners have no confidence that the executive branch will necessarily be able to get a potentially controversial treaty through the Senate. That does undermine the negotiating effectiveness of our State Department and other negotiators.<sup>184</sup>

The Senate's failure to process important treaties has not escaped

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182. Given the small number of countries in this hypothetical, renegotiation might be feasible. For multilateral treaties negotiated among many countries, however, the costs of renegotiation are tremendous. See CRS REPORT, *supra* note 17, at 16 (noting that "renegotiation may not be feasible" for major multilateral treaties that are negotiated by many nations over years).

183. I do not mean to suggest that the only clout carried by U.S. negotiators comes from the possibility that the United States will ratify the treaty at issue. Other countries may seek to accommodate its negotiators for other reasons as well, such as hoping that the United States will sign the treaty even if it will not ratify it. See Vienna Convention on the Law of Treaties, *supra* note 71, art. 18 (noting that states have an obligation not to defeat the object or purpose of a treaty they have signed).

184. Bellinger, *supra* note 4. During the 1998 Rome Conference where the treaty setting up the International Criminal Court was finalized, for example, "[t]here was eventually a limit to how much other states . . . would debilitate the court in order to satisfy a nation [the United States] that plainly was not going to join." Jelena Pejic, *The United States and the International Criminal Court: One Loophole Too Many*, 78 U. DET. MERCY L. REV. 267, 292 (2001).

academic attention. In light of it, Steve Charnovitz and Oona Hathaway have separately argued that treaties should be treated as ex post congressional-executive agreements and that Congress should ensure them timely up-or-down votes in a way similar to that provided for under the now-expired fast-track process for trade agreements. This approach would make treaty-making easier in three main respects: first, simple majorities in both houses are likely easier to obtain than two-thirds of the Senate;<sup>185</sup> second, a timely up-or-down vote would prevent delays and reservations; and third, to the extent that legislation is needed to implement the treaties, it could readily be passed simultaneously with the ex post approval.<sup>186</sup>

Like Charnovitz and Hathaway, I think we need creative alternatives to the current morass, but I doubt the viability of their proposed solution. Even accepting that ex post congressional-executive agreements are constitutionally interchangeable with treaties—which is a contested issue—their proposal faces two tall hurdles.

First, and most importantly, the Senate is likely to resist further shifts from the Article II process to ex post congressional-executive agreements. The Senate has long jealously guarded its constitutional prerogative in treaty-making. The Senate Foreign Relations Committee Rules expressly note that “the House of Representatives has no role in the approval of treaties,”<sup>187</sup> and, as a report prepared for the Committee observes, “[a] perennial concern of Senators has been to insure that the most important international commitments are made as treaties . . . .”<sup>188</sup> As Bruce Ackerman and David Golove have shown, the Senate accepted a shift towards ex post congressional-executive agreements after World War II in the wake of enormous popular pressure;<sup>189</sup> however, outside of the trade context, the Senate has tolerated few encroachments since.<sup>190</sup> Indeed, the Senate has reclaimed ground with regard to major arms control treaties. While the SALT I Interim Agreement on Strategic Offensive Arms was approved ex post by a joint resolution in 1972, the Senate

185. Only simple majorities are constitutionally required for legislation. *See* U.S. CONST. art. I, § 7. The Senate’s current rule on cloture effectively bumps the margin up to three-fifths, see *STANDING RULES OF THE SENATE*, r. XXII, S. DOC. NO. 106-15 (2000), but Congress can override this rule through framework legislation such as that creating the fast-track process.

186. *See* Charnovitz, *supra* note 5, at 706-09; Hathaway, *supra* note 10, at 263-66; Hathaway, *supra* note 5, at 1354-56. Their positions are not identical. For example, Charnovitz calls for pre-negotiation framework legislation that identifies U.S. negotiating objectives, Charnovitz, *supra*, at 707-09, while Hathaway discusses framework legislation only in terms of ensuring an up-or-down vote, not in terms of setting negotiating objectives, Hathaway, *supra* note 10, at 263-66, and suggests that the President resubmit treaties presently pending before the Senate as ex post congressional-executive agreements, Hathaway, *supra* note 5, at 1354-55.

187. Rules of the Senate Foreign Relation Committee, r. 9(a) (2009).

188. CRS REPORT, *supra* note 17, at 26; *cf.* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. e (1987) (noting “the possibility that the Senate might refuse to consider a joint resolution of Congress to approve an agreement, insisting that the President submit the agreement as a treaty”).

189. Ackerman & Golove, *supra* note 5, at 861-96.

190. *See* Spiro, *supra* note 5, at 993-1003. I focus here only on important ex post congressional-executive agreements. As Hathaway shows, ex ante congressional-executive agreements have become prevalent in many subject areas. *See* Hathaway, *supra* note 10, at 150-51 & n.16; Hathaway, *supra* note 5, at 1260.

has since insisted that future major disarmament agreements be approved through the Article II process and has been effective in achieving this demand.<sup>191</sup> Given the Senate's resistance over the last sixty years to ex post congressional-executive agreements outside the trade context, it is hard to see why it would be willing now to embrace them and abandon the Treaty Clause.

Second, while both Charnovitz and Hathaway point to the fast-track trade process as a model, its history offers cautionary notes as well as positive ones. The Trade Act of 2002 and its predecessors<sup>192</sup> developed a collaborative and workable system for making international trade agreements. The Act identified objectives for the President to pursue in negotiations and required him to engage Congress in the negotiating process through substantial consultations with various congressional committees.<sup>193</sup> If the President abided by the consultation requirements, then both houses would hold an up-or-down vote on the agreement and any implementing legislation within sixty days of its submission.<sup>194</sup> This structured but streamlined approach facilitated the approval of important free trade agreements, including, under an earlier version of the Act, NAFTA, and the Agreement Establishing the WTO.<sup>195</sup> On the cautionary side, however, Congress has recently been reluctant to extend fast-track authority. The 2002 Act, which passed by a thin margin of 215-212 in the House (although by a wider margin of 64-34 in the Senate), applied only to agreements entered into by July 1, 2007, and it has not been since renewed.<sup>196</sup>

Given that fast track legislation is so contested in the trade context, it seems unlikely that Congress will pass similar legislation for international agreements generally or even for other specific categories of agreements, such as environmental agreements. In the absence of a fast-track process, however, the substitution of the ex post congressional-executive process for the Article II process would create further procedural hurdles for treaties. It would require treaties to make it on to two legislative calendars in a single session and give the House as well as the Senate a chance to attach RUDs, thus further triggering a likely conference committee stage and second round of votes to resolve differences. Given these practical difficulties, as well as the Senate's oft-stated preference for the Treaty Clause for important agreements, it is important to look for alternatives to Charnovitz's and Hathaway's proposed approach.

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191. Spiro, *supra* note 5, at 996-98 (noting that "[e]very arms control agreement since 1972 has been approved as a treaty" and discussing how the Senate leadership forced President Clinton to submit the CFE Flank Agreement as a treaty rather than an ex post congressional-executive agreement).

192. Trade Act of 2002, Pub. L. No. 107-210, 116 Stat. 933 (2002); *see, e.g.*, Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988); Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1974).

193. Trade Act of 2002, Pub. L. 107-210, §§ 2102-2108, 116 Stat. 933, 994-1019.

194. 19 U.S.C. § 2191 (2006).

195. Charnovitz, *supra* note 5, at 696-97 (identifying various agreements).

196. Laura Altieri, *NAFTA and the FTAA: Regional Alternatives to Multilateralism*, 21 BERKELEY J. INT'L L. 847, 854-56, 855 n.44, 862-65, 864 n.101 (2003); *see also* Karl Rowland, *Obama's Free Trade Goal Hits Roadblock: Democrats Give Him Little Help*, WASH. TIMES, Aug. 19, 2010, at A1, A10 (discussing free trade agreements with South Korea, Colombia, and Panama that Congress had not yet approved).

B. *Prospective Advice and Consent for Major Multilateral Treaties*

The United States is thus caught in a difficult feedback loop. The Senate is not advising and consenting to important multilateral treaties, which makes it less likely that U.S. negotiators can get desirable terms for future important multilateral treaties, which in turn makes it less likely that the Senate will approve these treaties. Prospective advice and consent offers at least a partial solution to this problem. Put simply, the Senate should give advice and consent to certain multilateral treaties in advance of their final negotiation, with the Senate's resolution identifying certain minimum requirements that the treaty must satisfy in order for this advice and consent to take effect. The Senate would have the further option of retaining a "veto" in the ways described in Section II.C. As I discuss below, this approach would strengthen U.S. negotiating power, have appeal for the Senate, and be feasible to implement in practice.

1. *Improved Negotiating Power*

Prospective advice and consent would strengthen U.S. negotiating power. As discussed earlier, Putnam posits a trade-off arising from the subsequent advice and consent process: on the one hand, this process may increase the President's bargaining power by making him a constrained negotiator, but on the other hand it may reduce other nations' interest in accommodating him if they doubt his ability to deliver the Senate even if his terms are met.<sup>197</sup> Prospective advice and consent diminishes this trade-off: it retains the advantages of constraint while removing or at least reducing the risk of involuntary defection.

Depending on how a resolution of prospective advice and consent were structured, it would provide either one or two forms of domestic constraints. First, a resolution of prospective advice and consent which did not reserve a post-negotiation veto for the Senate would set as constraints whatever minimum requirements were needed to satisfy its terms. U.S. negotiators could argue persuasively that these constraints are powerful ones: if the treaty did not satisfy the minimum requirements set out in the Senate's resolution, then the executive branch would have to return to the Senate for subsequent advice and consent, with all the hazards that would imply. The constraints offered by such prospective advice and consent would of course differ from those imposed by a subsequent advice and consent process: prospective advice and consent would set clear, known, and fixed constraints, while the constraints imposed by subsequent advice and consent are unlikely to be fully known by any negotiators at the time of negotiations. Follow-up work to Putnam's theory has suggested that either type of constraint can be effective, however,<sup>198</sup> and so

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197. See *supra* note 180 and accompanying text.

198. See Keisuke Iida, *When and How Do Domestic Constraints Matter? Two-Level Games with Uncertainty*, 37 J. CONFLICT RESOL. 403, 417 (1993) (arguing that a negotiator has an advantage where its severe domestic constraints are known in advance to all parties and also that where all negotiators have incomplete information about domestic constraints of a particular negotiator, that

prospective advice and consent would preserve the negotiating advantages that stem from tied hands. Second, a resolution of prospective advice and consent which reserved a post-negotiation veto for the Senate would set two types of constraints: the clear, known, and fixed requirements needed to satisfy the terms of this resolution in the first place, and the residual risk of the veto which U.S. negotiators could invoke in seeking to improve on the minimum terms set by the Senate.

Prospective advice and consent would also greatly reduce the U.S. credibility problem. If the Senate resolution did not reserve a veto, this would demonstrate that the Senate was already on board if its terms were met. The United States would no longer be the “boy who cried wolf.”<sup>199</sup> Instead, other negotiators could be confident that the risk of involuntary defection by the United States would be low where U.S. negotiators bargained for certain treaty terms and these terms fell within the conditions of the Senate's resolution of prospective advice and consent. If the Senate resolution did reserve a veto, then other negotiators would know that there remained some risk of U.S. defection. Unless the veto were extraordinarily easy to trigger, however, this risk would be less than under a subsequent advice and consent regime.

A reserved veto by the Senate would have both advantages and disadvantages for U.S. negotiators. On the one hand, the possibility of the veto would make other negotiators more willing to agree to the U.S. position regarding terms left to the President's discretion if they thought that these terms were necessary to prevent the exercise of the veto. On the other hand, the possibility of the veto would make other negotiators less willing to accommodate any U.S. terms if they thought that the Senate would end up exercising this veto even if its minimum conditions were met. The balance between these two positions would likely depend on what conditions the Senate's resolution set for the exercise of this veto. If the Senate made the veto fairly hard to trigger—for example, by providing that its advice and consent was conditional on there being no Foreign Relations Committee Report or resolution passed on the Senate floor disapproving the treaty prior to ratification—then other negotiators would have strong although not complete confidence that the United States would join the treaty if its terms were met. They would also have good reason to accommodate U.S. terms left to the President's discretion under the Senate's resolution where the U.S. negotiators could show that these terms were important to keep the Senate from exercising its veto.<sup>200</sup> In short, the flexibility available to the Senate in structuring its veto

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negotiator will retain a bargaining advantage if the probability of ratification is very responsive to the final terms); Ahmer Tarar, *International Bargaining with Two-Sided Domestic Constraints*, 45 J. CONFLICT RESOL. 320 (2001) (finding that negotiators with known and high domestic constraints can do better than other kinds of negotiators in certain situations where the other party is also constrained); see also Hathaway, *supra* note 10, at 235 (showing the difficulty in evaluating whether known or unknown constraints are more useful); cf. MARTIN, *supra* note 179, at 168 (arguing for the need for legislative involvement at the negotiation stage).

199. Bellinger, *supra* note 4.

200. One of the challenges with the subsequent advice and consent regime is that the seeming agreement of key Senate leaders during negotiations cannot now reliably guarantee Senate approval of a treaty or even a floor vote on the issue. The veto, by contrast, could be structured so that key Senate



would enable it to strike a case-by-case balance between showing the credibility of its commitment and retaining residual review.

## 2. *Appeal to the Senate*

Prospective advice and consent would not only advance U.S. interests, but also offer specific advantages to the Senate and its members. This is important and indeed essential, for prospective advice and consent is obviously not feasible without the support of two-thirds of the Senate.<sup>201</sup> Those advantages, I suggest, can sometimes outweigh the importance of traditional review of the finalized treaty text and offer the hope of more votes that might be obtained through such a review.

To begin with, prospective advice and consent gives the Senate a meaningful role at the negotiations stage. While the President may consult with Senators during negotiations, the Senate currently has no formal role at this stage. This absence rankles, particularly in relation to multilateral treaties. As a report prepared for the Senate Foreign Relations Committee explains: “The Senate’s problem of not receiving a treaty until it is completed is particularly acute in multilateral treaties . . . negotiated by many nations in large conferences, sometimes over a period of years.”<sup>202</sup> With prospective advice and consent, the Senate can play a strong role in setting the negotiating agenda of the United States, and the President will have a substantial interest in engaging with the Senate in order to obtain the benefits of prospective advice and consent.

A meaningful Senate role at the negotiating stage may in turn help shield treaties from two longstanding causes of Senate resistance to treaties: “[first,] the struggle between the President and Senate for the control of foreign policy, [and second,] the warfare of the President’s political opponents who hope to secure some partisan advantage.”<sup>203</sup> Subsequent advice and consent exacerbates both of these causes. It makes the relationship between the President and the Senate “adversar[ial] instead of collaborative”<sup>204</sup> because it separates their roles into separate stages and thus encourages them to second-guess each other. It fosters partisanship for similar reasons. When Senators are presented with an already negotiated treaty, their role is mainly one of approving the President’s

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leaders can give credible assurances that it will not be exercised if their terms are met.

201. I focus here on the appeal to the Senate because the Senate is the body responsible for advice and consent. Prospective advice and consent should also appeal to the President, however, for reasons related to the ones I give here. Like the Senate, the President should value the increase in U.S. negotiating power that comes from prospective advice and consent. He should also prefer prospective advice and consent to the extent that it has greater appeal to Senators and thus is easier to obtain. Finally, prospective advice and consent spares the President the frustration and embarrassment of reaching a treaty after exhausting negotiations only to be stymied by the Senate’s failure to advise and consent to it—a problem that Theodore Roosevelt once colorfully described as “making diplomatic bricks without straw.” See Letter from Theodore Roosevelt, President, U.S., to Joseph Bucklin Bishop (Mar. 23, 1905), *quoted in* HOLT, *supra* note 97, at 222. On the other hand, however, the President would have to accept the increased involvement of the Senate at the negotiation stage and to share control in defining U.S. negotiating objectives.

202. CRS REPORT, *supra* note 17, at 16.

203. HOLT, *supra* note 97, at v.

204. LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 51 (1990).

policy, not of influencing it. Senators not of the President's party thus face a nearly binary choice between giving or denying him a win—a choice likely to foster partisanship. By contrast, prospective advice and consent puts the Senate and the President together at the beginning. This creates greater scope for cross-branch and bipartisan collaboration, which in turn has three possible advantages in securing the necessary votes in the Senate, even assuming no effects on U.S. negotiating power. First, prospective advice and consent causes the President to determine pivotal Senators' positions at a time when these determinations could potentially be accommodated into the treaty.<sup>205</sup> Second, prospective advice and consent may give rise to more favorable positions on the part of Senators because it gives Senators not of the President's party the chance to influence U.S. negotiating positions and thus to portray the resulting treaty as their own success. Third, Senators may in fact be more willing to delegate decisionmaking authority to the President than to accept a single, specific outcome.<sup>206</sup> In short, while prospective advice and consent will not eliminate partisanship in treaty-making, it offers an incremental improvement over subsequent advice and consent.

Prospective advice and consent should also appeal to the Senate to the extent that it offers the United States increased negotiating power. The credibility problems facing U.S. negotiators have not gone unnoticed in the Senate—as former Senator Chuck Hagel once observed, “[t]he credibility of the United States is not enhanced when the administration negotiates a treaty that has no hope of ratification in the U.S. Senate.”<sup>207</sup> U.S. dominance on the world stage has perhaps shielded the United States from some effects of its loss of credibility in international negotiations, but this may be on the wane as Europe negotiates more effectively as a block<sup>208</sup> and, in the recent words of one Republican legislator, “[the Chinese] plan on eating our lunch in this next century.”<sup>209</sup> The increased negotiating power offered by prospective advice and consent in turn may bring in the votes of more Senators, not only because they wish to help strengthen U.S. interests but also because these strengthened interests may in turn be more appealing to them.<sup>210</sup>

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205. See generally KEITH KREHBIEL, *PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING* (1997) (proposing that successful legislation turns on the agreement of pivotal actors, such as the sixtieth Senator in legislation that could be subject to a filibuster).

206. See, e.g., Peter Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 58-63 (1982) (observing that legislators may prefer a delegation approach because it allows responsibility-shifting and because terms can be left uncertain in a way that satisfies a wider set of legislators than a single, specific outcome would).

207. 143 CONG. REC. S81150 (daily ed. July 25, 1997) (statement of Sen. Chuck Hagel).

208. See, e.g., David Bosco, *The Multilateralist, Are Europeans Better Negotiators?*, FOREIGN POLICY (Aug. 24, 2010), [http://bosco.foreignpolicy.com/posts/2010/08/24/are\\_europeans\\_better\\_negotiators/](http://bosco.foreignpolicy.com/posts/2010/08/24/are_europeans_better_negotiators/) (quoting a State Department official as observing that European negotiators coordinate well to have their interests “heavily represented” at major multilateral conferences).

209. Kate Sheppard, *Departing Republican Attacks Climate Change Deniers in His Own Party*, GUARDIAN UNLIMITED (Nov. 19, 2010), <http://www.guardian.co.uk/environment/2010/nov/19/republican-climate-change-bob-inglis> (quoting departing Representative Bob Inglis of South Carolina).

210. To the extent that the Senate does not want the treaty to enter into force as to the United States unless certain other countries are also bound by it, then it could condition its advice and consent on the President's waiting to ratify the treaty until those other countries ratify it. Cf. Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061, 2074 (2003) (discussing strategic considerations regarding the

The prospect of this increased negotiating power also offers the Senate an incentive to act rather than to delay. Some major multilateral treaties remain endlessly delayed in the Senate because they likely lack the two-thirds support needed to pass them, but for others the delay is more about the difficulty of receiving a floor vote. For example, the Law of the Sea Convention was reported *unanimously* out of the Senate Foreign Relations Convention in 2004, but it never received a floor vote.<sup>211</sup> The difference between subsequent advice and consent in one session and subsequent advice and consent in the next session is often incremental, making treaties easy candidates for repeated postponements. By contrast, prospective advice and consent would likely prompt action by providing a genuine external deadline. If the Senate wishes to specify U.S. negotiating objectives and thereby increase U.S. negotiating power, then it must act before the final negotiating conference. Senators who favor the treaty thus will have more compelling arguments at their disposal for urging prompt action on a resolution. Conversely, Senators who wish to delay the treaty will likely have to spend more political capital to do so, as they may be accused of reducing U.S. negotiating power vis-à-vis other countries. An example of how deadlines can spur action can be seen in the Senate's subsequent advice and consent to the Chemical Weapons Convention, which occurred in response to an external deadline.<sup>212</sup>

Finally, and most parochially, prospective advice and consent offers the Senate a way of protecting its prerogatives under the Treaty Clause. As discussed above, Oona Hathaway has called for the President to start submitting treaties as ex post congressional-executive agreements rather than through the Treaty Clause. To the extent that Senators care about control shifting from the Senate to Congress generally, they can use prospective advice and consent to dissuade the President from submitting treaties as ex post congressional-executive agreements. Prospective advice and consent would both offer the President more certainty of success in the Senate (since the treaty would only need to survive any residual review process written into the resolution of advice and consent) and make it harder for him to justify a decision to treat the agreement as an ex post congressional-executive agreement. At the moment, there is little reason to think that the President

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timing of ratification).

211. See SCOTT G. BORGERSON, *THE NATIONAL INTEREST AND THE LAW OF THE SEA* 12 (2009) (noting further that Senate Majority Leader Bill Frist did not schedule it for a floor vote); cf. Charnovitz, *supra* note 5, at 709 (arguing that at least in the trade context, automatic up-or-down votes matter more to successful passage than does a specific voting ratio requirement). Another example is the Genocide Convention, which cleared its floor vote with eighty-three yeas and eleven nays but did not receive this vote until thirty-seven years after its submission to the Senate. See LAWRENCE J. LEBLANC, *THE UNITED STATES AND THE GENOCIDE CONVENTION* 1-2 (1991).

212. See generally John V. Parachini, *U.S. Senate Ratification of the CWC: Lessons for the CTBT*, *NONPROLIFERATION REV.*, Fall 1997, at 62. The entry-into-force date of the treaty at the international level provided a deadline that incentivized President Clinton to devote enormous energy towards its ratification. See *id.* at 66 ("The existence of a clear deadline was another factor that helped secure U.S. ratification of the CWC."). This deadline was a soft one, in that the United States could still have joined the treaty at a later date, but there were symbolic and practical advantages to meeting it. Although the treaty was opposed by the Senate Foreign Relations Committee Chair Jesse Helms, he permitted it to come to a vote in exchange for a significant side-deal. *Id.* at 67.

intends to increase the use of ex post congressional-executive agreements outside the already-established trade context. But if that changes, then prospective advice and consent offers the Senate a way to deter further encroachments.

Whether these advantages will carry the day with the Senate will be a treaty-by-treaty matter. Just as Congress is willing to delegate legislative power to the President and administrative agencies on some but not all issues, so the Senate is likely to be more willing to give prospective advice and consent on some types of treaties and insist on retaining the subsequent advice and consent process for others. For example, the Senate may be more willing to give broad-brush mandates to the President in areas where it thinks the executive branch has technical expertise, such as the law of the sea, but less willing where the issues are more obviously normative, such as human rights law. As another example, the Senate may be more likely to prefer a role at the negotiating stage for treaties that ban reservations, while it may continue to prefer a role at the reviewing stage for treaties that can accommodate substantial reservations.<sup>213</sup>

Although, as I have shown in Part I, prospective advice and consent is not entirely new, it would be a substantial shift from the Senate's ordinary practice. There is a range of ways in which the Senate could begin to use it. If it wished, it could give prospective advice and consent without further procedural conditions. In the alternative, it could make its advice and consent conditional on further procedural issues, such as by conditioning its resolution on a Senate presence on the U.S. negotiating team or a veto opportunity after negotiation but before ratification.<sup>214</sup> If the Senate wished to reserve another check, its resolution of prospective advice and consent could provide that the treaty would be non-self-executing and require that the President not ratify the treaty until any necessary implementing legislation had been passed, which would in essence necessitate further congressional action before the treaty could take effect.<sup>215</sup> There may well also be other ways to take prospective advice and consent cautiously.<sup>216</sup> My point is not to argue for any particular variant, but

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213. See CRS REPORT, *supra* note 17, at 16 (noting the Senate's dislike of treaties that ban reservations, as "the Senate is called upon to take or leave [the treaty] in its entirety").

214. See *supra* Section III.C.

215. Of course, the more hedges the Senate chooses to put on its prospective advice and consent, the less international negotiators may be convinced of the sustainability of the Senate's commitment. Nonetheless, even if the Senate reserves itself a strong right of reconsideration, the very fact of its initial commitment may make it more inclined not to disturb this commitment. Indeed, even a signal with no legal force may have such effect: during the debates over the UN Charter, for example, Senators repeatedly pointed to the Connally Resolution as having moved the Senate down the path towards advice and consent. See, e.g., 91 CONG. REC. 7950 (1945) (statement of Sen. Connally); 91 CONG. REC. 8008 (1945) (statement of Sen. Burton); 91 CONG. REC. 8033 (1945) (statement of Sen. Millikin); 91 CONG. REC. 8100 (1945) (statement of Sen. Tunnell); 91 CONG. REC. 8103 (1945) (statement of Sen. Brooks); see also SCHLESINGER, *supra* note 76, at 45 (noting that Cordell Hull (who was Secretary of State for much of World War II) viewed the Connally Resolution as opening the door for U.S. involvement in a U.N.-like body).

216. Alternatively, the Senate could also develop a process similar to the framework resolutions used by Congress in the trade context. For example, the Senate could modify its own Rules to ensure that certain types of treaties receive a fast-track up-or-down vote without reservations within a certain number of days of submission, provided that the President negotiates these treaties according to whatever terms were set out in the resolution (e.g., continuous consultation with the Senate Foreign Relations Committee during negotiations). See Lehmann, *supra* note 6, at 896-97 (proposing a fast-track

rather than prospective advice and consent is a tool that the Senate can use with considerable flexibility.

### 3. *Feasibility*

A Senate resolution giving prospective advice and consent for an important multilateral treaty would need to be carefully calibrated to set negotiating minimums high enough to constitute wins for the United States but low enough that other countries might accept them. This would be a difficult task, but perhaps less difficult than it seems.

A resolution of prospective advice and consent would bear some resemblance to the prospective instructions issued by the Continental Congress and the Senate during the first few years of the Washington Administration. These instructions set forth both strict requirements and space for discretion. For example, private instructions issued by the Continental Congress for perhaps the most important treaty in U.S. history—the peace treaty with Great Britain—identified independence and specific boundaries as firm requirements, explained that fishing rights in Canada were important though not absolutely essential, and stated that

[i]n all matters not above mentioned, you are to govern yourselves by the Alliance between his Most Christian Majesty [France] and these States, by the advice of our allies, by your knowledge of our Interests, and by your own discretion, . . . in which we repose the fullest confidence.<sup>217</sup>

As discussed earlier, in issuing these instructions, the Congress also committed itself to ratifying any treaty that comported with them, pursuant to the doctrine of obligatory ratification.<sup>218</sup>

This early practice is not a perfect parallel for what I am suggesting. For one thing, the Continental Congress kept its instructions secret. Even if secrecy were desirable, however, I do not think it is feasible for prospective advice and consent today. The likelihood of leaks is simply too high. While some consultations can be kept secret, it seems unlikely that such secrecy could securely extend to the passage of a resolution by the entire Senate. If the resolutions of prospective advice and consent are public, then the Senate has two ways available to it to strengthen the hand of U.S. negotiators on contentious issues. One is to offer clear minimum requirements and to make

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process for arms control treaties). This would not be prospective advice and consent, as a subsequent vote would be required. In my view, however, prospective advice and consent is superior to this approach both for repetitive bilateral treaties and for major multilateral treaties. Repetitive bilateral treaties tend to be individually unimportant enough that general preclearance with a right of reconsideration makes more sense than setting up a framework statute that involves Senators in their negotiation and requires individualized consideration of finalized treaties. Major multilateral treaties, on the other hand, are often sufficiently unique that for a framework resolution approach to work for them, the framework resolutions would either have to be improbably broad in terms of subject matter or tailored specifically to each treaty—in which case, the treaty would need to make it through two votes rather than just one.

217. 14 JCC, *supra* note 27, at 956-60 (1779); *see also* 18 *id.* at 948-50 (1780) (modifying these instructions); 20 *id.* at 651-52 (1781) (modifying further the instructions and naming additional plenipotentiaries).

218. *See supra* Subsection II.B.2.

them as favorable to the U.S. as seems feasible.<sup>219</sup> Where the Continental Congress stated in its private instructions that fishing rights in Canada were desired but not required, the Senate in a comparable situation might want to take a stronger public position and require fishing rights. The other is to insist on the vigorous pursuit of certain objectives and reserve for the Senate the option of a post-negotiation veto. Continuing with the fishing rights example, the Senate could instead resolve that the President should make every effort to secure fishing rights and reserve for itself the option of revisiting its advice and consent after the treaty's negotiation. This would signal to other countries that the President was a constrained actor on these objectives, even though the exact contours of the constraints would not be known to these countries. The President could then consult privately with Senators throughout the treaty negotiations to try to ensure that the terms reached were sufficiently favorable that they would not invoke their option of a veto.

One other difference between the time of the Continental Congress and the present is that major multilateral treaties of today are much more complex—or at least much longer—than were the bilateral treaties of old. The Law of the Sea Convention, for example, contains 320 articles, many of them with subparts, and several annexes.<sup>220</sup> Given this complexity, one might wonder whether the Senate could cover all relevant issues in a resolution of prospective advice and consent, and do so in a way that leaves a chance of the treaty being accepted at the international level. Two factors explain why the answer is yes.

First, the likely contours of multilateral treaties are often clear well before their final negotiation. While in the past treaties often developed fairly quickly—the UN Charter, for example, was finalized in 1945 after only a year of serious preparatory rounds<sup>221</sup>—today's multilateral treaties typically follow years of negotiations. On climate change, for example, serious negotiations commenced in 1989 and have been ongoing ever since, with peaks before the 1992 Rio Summit (resulting in the UN Framework Convention on Climate Change), at Kyoto in 1997 (resulting in the Kyoto Protocol), and at Copenhagen in 2009 (not resulting in any treaty).<sup>222</sup> Over the course of the preliminary rounds, the subject matters to be covered by the treaties come into focus, as do likely points of agreement and matters of continuing controversy. U.S. negotiators can share this knowledge with the Senate as it crafts its resolution of prospective advice and consent. I think it unlikely that the Senate's resolution would occur at the beginning of the negotiation process, although the President might well start involving key Senators at or before this time. Rather, prospective advice and consent makes more sense towards the end of the international negotiation process, after key issues have come into

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219. See Iida, *supra* note 198, at 417 (discussing how severe domestic constraints that are known to all negotiators can strengthen that country's negotiators).

220. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

221. See SCHLESINGER, *supra* note 76, at 47-51 (describing the Dumbarton Oaks conference of 1944 and suggesting that only the United States had done serious preparatory work prior to it).

222. See Daniel Bodansky, *The Copenhagen Climate Conference: A Postmortem*, 104 AM. J. INT'L LAW 230, 231-32 (2010).

focus at an international level. The Senate will thus have both this knowledge base to draw from and the necessary time for groundwork. It can accordingly frame its resolution of advice and consent to include both important points that the earlier negotiations have settled and to stake out its bottom line on the controversial issues that it chooses to prioritize.

Second, within the bounds of the intelligible principle doctrine, the Senate can pick and choose how much specificity to offer on particular issues. The Continental Congress instructed its plenipotentiaries to try to preserve fishing rights in Canada—but it left it to them to specify that American fisherman would not be allowed to dry or cure fish on Newfoundland but would be allowed to do so along the unsettled bays of Nova Scotia.<sup>223</sup> Similarly, for many and perhaps sometimes for all issues in a treaty, the Senate can identify the policy objectives but leave the President with considerable room for negotiating the precise terms of their implementation. For the most important and controversial issues, the Senate can choose whether to offer very precise minimum requirements or to use a higher level of generality (perhaps paired with a post-ratification right of veto). Once again, the Senate can draw upon the expertise of the U.S. negotiating team in making those choices through closed hearings or some other form of communication. The negotiators are likely to have a good sense of what minimums are feasible, what issues require greater flexibility, and, among these issues, which the United States might wish to prioritize.

I do not suggest that prospective advice and consent would always work. To the contrary, like much else in treaty-making, it would probably fail more often than not. The Senate might not agree on a resolution or, if it did, U.S. negotiators might not succeed in securing a treaty text that satisfies this resolution's terms. In either case, however, a failed try may be as good or better for U.S. interests than no try at all. If the Senate cannot produce a resolution of prospective advice and consent, this will only harm U.S. negotiating interests if it reduces the U.S. credibility below where it would have been had no attempt been made. But the United States could presumably argue that the resolution failed for reasons related to process rather than substance (such as the Senate's difficulty in structuring prospective advice and consent or its preference for the more traditional subsequent advice and consent) and could point to its very attempt to secure the resolution as a sign of its commitment to the treaty under negotiation.<sup>224</sup> Conversely, if the Senate produces a resolution to which the negotiated treaty does not conform, then the President would need to resubmit the treaty for subsequent advice and consent.<sup>225</sup> But the prospective advice and

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223. See *Definitive Treaty of Peace Between the United States of America and his Britannic Majesty*, U.S.-Gr. Brit., art. III, Sept. 3, 1783, 8 Stat. 80.

224. In addition, the President could work with key Senators to ensure that the resolution dies in a way least likely to harm U.S. negotiating interests. For example, if it becomes clear that the resolution would fall far short of two-thirds support, then it might be better for the resolution never to make it out of the Senate Foreign Relations Committee.

225. Cf. Rachel Brewster, *Stepping Stone or Stumbling Block: Incrementalism and National Climate Change Legislation*, 28 *YALE L. & POL'Y REV.* 245, 254-55 (2010) (noting that "national legislation may be an opening bid, not a constraint, in international negotiations" and suggesting that domestic preferences can shift to accommodate different treaty terms than those initially sought). This

consent might still have helped advance U.S. negotiating positions. Moreover, under either scenario, Senators would have gained exposure to the core issues prior to the treaty's negotiation and the executive branch would have learned more about which Senators it particularly needed to liaise with during the negotiations—both factors likely to make subsequent advice and consent easier to obtain.<sup>226</sup>

### C. Examples

Up to now, I have described prospective advice and consent for major multilateral treaties at a high level of generality. In this Section, I offer brief examples of how prospective advice and consent might have worked in the past or might work in the future. I draw these examples from three very different areas of international law: the law of the sea, climate change, and trade. I have chosen these examples because they demonstrate the possibilities prospective advice and consent offers for major multilateral treaties across a wide range of subject areas.

#### 1. Law of the Sea

In the second half of the twentieth century, one of the great questions of international law was how nations should share and divide rights to the oceans. Following several earlier attempts, the Third United Nations Conference on the Law of the Sea convened in 1973 to develop a treaty on the law of the sea, one that would cover territorial sea limits, exclusive economic zones, navigation rights, deep sea mining, and other issues. Over the next nine years, negotiators hammered out a comprehensive treaty, one that satisfied U.S. interests in part but not in whole. In particular, U.S. negotiators opposed the provisions on deep sea mining, which in the views of the United States inappropriately required sharing of technology by developed countries with developing ones and placed undue burdens on private companies, among other undesirable features.<sup>227</sup> The

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would resemble what happened when a treaty negotiator exceeded instructions in the days when the principle of obligatory ratification was in force. In that situation, the sovereign had a right under the law of nations to reject the treaty, *see supra* note 84 and accompanying text, although the sovereign might nonetheless choose to ratify it.

226. One final issue of feasibility relates to the behavior of other countries. What if they too were to get prospective advice and consent from their legislatures—and what if their prospective mandates left no shared ground with the Senate's prospective mandate? Such an outcome would be unfortunate, but there is reason to think the United States would be allowed to be unique in using a prospective advice and consent approach given the Senate's unparalleled reputation in international law as a stumbling block to treaty ratification. Because of this reputation, the international community is likely to accept prospective advice and consent as a genuine effort by the President and the Senate to promote the treaty at issue rather than simply as posturing. Such acceptance would be less forthcoming for countries other than the United States, as virtually all of them are either sufficiently nondemocratic that their legislatures are under their executives' thumbs; parliamentary systems where the interests of the executive and legislature run together; or at the very least in need only of simple majorities rather than supermajorities for treaty approval. *See* Hathaway, *supra* note 5, at 1271-72; *see also* PARLIAMENTARY PARTICIPATION IN THE MAKING AND OPERATION OF TREATIES: A COMPARATIVE STUDY (Stefan A. Riesenfeld & Frederick M. Abbott eds., 1994) (illustrating the uniqueness of the U.S. treaty-making approach on many fronts in their comparative study).

227. *See* JAMES B. MORELL, THE LAW OF THE SEA: AN HISTORICAL ANALYSIS OF THE 1982 TREATY AND ITS REJECTION BY THE UNITED STATES 80-81 (1992) (listing concerns expressed by



United States would have had to accept this provision in order to join the treaty, since no reservations to it were permitted.<sup>228</sup> Ultimately, in 1982 President Reagan declined to sign the Law of the Sea Convention due to the deep sea mining provisions, although he announced that the United States would abide by most of the Convention's other substantive provisions.<sup>229</sup>

Other developed countries shared the United States' concern, and eventually the United Nations decided to reopen negotiations on the deep sea mining provisions. In 1994, negotiators reached an agreement that effectively amended these provisions to satisfy the concerns of the United States and other developed countries.<sup>230</sup> President Clinton promptly signed this agreement and sent it and the original Law of the Sea Convention to the Senate for advice and consent in October 1994.<sup>231</sup> To this day the treaty remains in the Senate, despite the support of the Clinton, George W. Bush, and Obama Administrations.<sup>232</sup> The delay seems less about the two-thirds requirement and more about political will. The treaty has twice been reported favorably out of the Senate Foreign Relations Committee, once unanimously in 2004 and once by a 17-4 vote in 2007, only to fail both times to receive a floor vote.<sup>233</sup> The failure of the United States to ratify this treaty despite having won the concessions it sought is one of the reasons the United States has become "a bit like the boy who cried wolf" in terms of negotiating credibility in multilateral treaty formation.<sup>234</sup>

Prospective advice and consent could potentially have furthered U.S. foreign policy interests during at least two points in this process. One was early in the Reagan administration, when agreements on most issues except deep sea mining had been reached. Here there was a chance, though a small one, that the certainty of a U.S. commitment to the treaty would have strengthened its negotiators and carried the day.<sup>235</sup> A Senate resolution of prospective advice and consent could have advised and consented to the treaty conditional on it containing the key features that had already been negotiated as well as deep sea mining provisions that were conducive to private development, did not involve technology transfers, and were overseen by a board with adequate representation from the United States. The second likely point was during the renegotiation of the mining provisions, which occurred late in the George H.W. Bush Administration and early in the Clinton Administration. Either President

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President Reagan, most of which related to deep sea mining).

228. Kathryn Surace-Smith, Note, *United States Activity Outside the Law of the Sea Convention: Deep Sea Mining and Transit Passage*, 84 COLUM. L. REV. 1032, 1056-57 (1984).

229. GEORGE V. GALDORISI & KEVIN R. VIENNA, *BEYOND THE LAW OF THE SEA: NEW DIRECTIONS FOR U.S. OCEANS POLICY* 59-60 (1997).

230. BORGERSON, *supra* note 211, at 12.

231. *Id.*

232. Michael A. Becker & Ernesto J. Sanchez, *International Law of the Sea*, 44 INT'L LAW. 519, 519 (2010).

233. BORGERSON, *supra* note 211, at 12-13.

234. Bellinger, *supra* note 4.

235. Cf. GALDORISI & VIENNA, *supra* note 229, at 50-53 (discussing the U.S. negotiating efforts); Leigh S. Ratiner, *The Costs of American Rigidity*, in *LAW OF THE SEA: U.S. POLICY DILEMMA* 27, 32-33 (Bernard H. Oxman et al. eds., 1983) (suggesting that the United States had "substantial negotiating leverage" but that it was undermined in part by doubts of other nations as to the seriousness of the U.S. commitment to the treaty).

could have gone to the Senate for a resolution of prospective advice and consent similar to the one just described. In effect, this resolution would have resembled subsequent advice and consent conditional on particular amendments, as was done with Jay's Treaty, except that the amendments would have been identified in terms of negotiating objectives rather than specific treaty language.

The Senate would have had stronger incentives to give advice and consent prospectively to the Law of the Sea Convention than it has had to do so subsequently. It would have had a chance to collaborate with the President in setting the U.S. negotiating agenda, the possibility of boosting U.S. negotiating power, and specific deadlines in the form of the negotiating conferences to inspire it to action. Under either scenario, the Senate might have reserved the option of a "veto" prior to ratification, but the power of inertia would then have been on the side of ratification. Instead, the Law of the Sea Convention has met with more than seventeen years of delay in the Senate.

## 2. *Climate Change*

In 1992, President Bush signed and the Senate advised and consented with unusual swiftness to the United Nations Framework Convention on Climate Change (UNFCCC).<sup>236</sup> The UNFCCC identified the "common but differentiated" responsibilities of developed and developing countries and called for further negotiations rather than setting any legally binding requirements for emissions reduction.<sup>237</sup> As negotiations continued, the parties appeared headed towards a treaty that set binding requirements only for developed countries, not for developing ones, to be finalized at a December 1997 conference in Kyoto.<sup>238</sup> Then, in July 1997, the Senate passed a resolution that was essentially the opposite of prospective advice and consent. Known as the Byrd-Hagel Resolution, and emphatically not endorsed by the Clinton Administration, it expressed the sense of the Senate that the United States should *not* sign any treaties that committed the United States to limiting greenhouse gas emissions unless (1) developing countries also committed to limitations; and (2) the treaty would not "serious[ly] harm" the U.S. economy.<sup>239</sup> The Byrd-Hagel Resolution passed 95-0.<sup>240</sup> It left the United States in a tough negotiating position at Kyoto:<sup>241</sup> on the one hand, it was clear that the Senate would not advise and consent to any treaty that did not involve

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236. United Nations Framework Convention on Climate Change, June 12, 1992, S. TREATY DOC. NO. 102-38 (1992).

237. *Id.* art. 3(1).

238. See Amy Royden, *U.S. Climate Change Policy Under President Clinton: A Look Back*, 32 GOLDEN GATE U. L. REV. 415, 424-31 (2002) (discussing the posture of the negotiations going into 1997).

239. S. Res. 98, 105th Cong. (1997).

240. 143 CONG. REC. 15,808 (1997).

241. See Timothy E. Wirth, *A Way Forward on Climate Change*, 2 HARV. L. & POL'Y REV. 313, 321 (2008) (observing, as a Clinton Administration official involved in the Kyoto negotiations, that "essential communication was lacking between the Administration, the negotiating team, and the Senate" leading up to Kyoto and that this "breakdown in communication was a very, very big mistake").

developing country commitments, while on the other hand the Clinton Administration could offer little certainty that the United States would in fact join a treaty that did have developing country commitments. U.S. negotiators failed to get developing country commitments included in the Kyoto Protocol; and while President Clinton signed the Protocol in 1998, he “never dared” to send it to the Senate for advice and consent.<sup>242</sup>

Instead of the negative Byrd-Hagel Resolution, suppose that the Senate had passed a positive resolution advising and consenting to a climate treaty that satisfied certain objectives—such as including commitments from developing countries, mandating emissions reductions to only a certain threshold, offering flexibility in implementation, and causing no serious harm to the U.S. economy—and further authorizing the President to ratify it only if countries amounting to a certain high percentage of the world’s population (e.g., including China or India) had also ratified it. This would have given the United States a significant boost in its attempt to obtain commitments from developing countries (as well as stronger support from developed countries in pursuing this goal), since the rest of the world would have placed a high value on obtaining a likely commitment from the United States, then the world’s biggest emitter of carbon dioxide.<sup>243</sup> At the domestic level, the Senate would have had incentives to give prospective advice and consent in order to increase U.S. negotiating power, particularly vis-à-vis China (about which the floor debates over the Byrd-Hagel Resolution revealed deep concern).<sup>244</sup> The process would also have involved the Senate in a collaborative rather than adversarial way, with the increased potential for buy-in that this implies. As elsewhere, the Senate could have reserved a right to review the final treaty—an approach that would have weakened the strength of the Senate’s initial commitment but would have placed the subsequent burden on opponents of the treaty rather than on those in favor of it.

Prospective advice and consent might well have failed in this example. But even then, the United States might well be in a better position to deal with climate change than it is today. Even if the resolution of prospective advice and consent did not gain enough support to be brought to a vote, it might have positively exposed Senators to the issue or reduced the degree of support for the Byrd-Hagel Resolution. If a resolution of prospective advice and consent had passed but developing nations refused to accept emission-control commitments, then these countries would be more likely to be seen as the international obstructionists and accordingly face more pressure to change their approach.

Climate change talks continue today under the UNFCCC framework. It is unlikely that sufficient support in the Senate can be found for *any* action in relation to climate change in the short to medium term. If the political climate changes in years to come, however, prospective advice and consent may offer

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242. *Id.* at 321.

243. 143 CONG. REC. 15,784 (1997) (statement of Sen. Chuck Hagel).

244. *See, e.g., id.* at 15,786 (statement of Sen. Robert Byrd); *id.* at 15,787 (statement of Sen. Wendell H. Ford).

more potential for success than subsequent advice and consent. Through prospective advice and consent, the United States could gain negotiating leverage by setting out tough negotiating positions while simultaneously sending a credible signal that the United States is likely on board if these positions are met.<sup>245</sup> This increased leverage in turn could give Senators an incentive to pursue prospective advice and consent that they would not have at the post-negotiation stage.

### 3. Trade

Multilateral trade negotiations are presently underway to further liberalize the trade regime operating under the auspices of the World Trade Organization. Known as the Doha Round, these negotiations have been ongoing since 2001. Contentious issues include the extent to which developing countries will reduce tariffs on imported goods and the extent to which the United States and the European Union will reduce agricultural subsidies.<sup>246</sup>

In the last few decades, the U.S. political branches have approved major trade agreements as ex post congressional-executive agreements rather than through subsequent advice and consent. The key advantage of this approach has been the fast-track framework legislation, which has enabled these agreements to receive prompt up-or-down votes in each house of Congress.<sup>247</sup> But fast-track applies only to agreements signed before July 1, 2007,<sup>248</sup> so any post-2007 agreement reached in the Doha Round cannot benefit from this process. Negotiators in the Doha Round are well aware that this option has been lost—indeed, there were strong efforts to complete the negotiations prior to fast-track’s expiration.<sup>249</sup> One scholar has remarked that “[w]ithout [fast track] authority, shepherding any Doha Round agreement through Congress without amendment is a virtual impossibility, thus sounding the death knell of the Doha Round.”<sup>250</sup>

Prospective advice and consent offers a possible alternative to an attempt to renew fast-track authority. Senators have shown an interest in shaping U.S. negotiating positions at Doha—for example, in 2008, fifty-eight Senators signed a letter to President Bush urging him not to make further concessions on

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245. Prior to the Copenhagen conference in December 2009, there was an unsuccessful push for domestic legislation on climate change as a “signal to the international community that the United States is looking to engage other states in treaty negotiations regarding global warming.” Brewster, *supra* note 225, at 258-59, 279-81. Prospective advice and consent offers the benefit of a similar signal. But it does not commit the United States to any action unless a satisfactory international agreement is reached—and thus may be more appealing to those concerned that a competitive disadvantage would arise from unilateral domestic legislation.

246. For a detailed discussion of the various issues, see IAN F. FERGUSSON, CONG. RESEARCH SERV.: WORLD TRADE ORGANIZATION NEGOTIATIONS: THE DOHA DEVELOPMENT AGENDA 9-20 (2008), [www.nationalaglawcenter.org/assets/crs/RL32060.pdf](http://www.nationalaglawcenter.org/assets/crs/RL32060.pdf).

247. See *supra* notes 192-196 and accompanying text.

248. See 19 U.S.C. § 3803(a)(1)(A)(ii) (2006).

249. Angela Balakrishnan, *Doha Timeline*, GUARDIAN, July 21, 2008, available at <http://www.guardian.co.uk/business/2008/jul/21/doha.trade>.

250. Kevin C. Kennedy, *The Statute of the Trade-Environment-Sustainable Development Triad in the Doha Round Negotiations and in Recent U.S. Trade Policy*, 19 IND. INT’L & COMP. L. REV. 529 (2009).

agricultural subsidies.<sup>251</sup> By prospectively advising and consenting to a Doha Round treaty, the Senate could both strengthen the U.S. negotiating hand and make other countries more willing to accommodate this hand, since they would have Senate precommitment in return. Prospective advice and consent would also provide any Senators with strong views about the Senate's constitutional prerogative in treaty-making a chance to reassert this prerogative in the trade context.

It may seem odd to consider prospective advice and consent for an issue where the constitutional and precedential footing of ex post congressional-executive agreements is most strongly established. I suggest it because there may be circumstances under which prospective advice and consent would be achievable but a renewal of fast-track would not be. First, as a matter of process, trade is an issue on which obtaining the votes of two-thirds of the Senate may sometimes be as easy as, or easier than, both sixty votes in the Senate and a majority of the House, with its heavily localized voting interests.<sup>252</sup> By way of example, the most recent fast-track authorization squeaked through the House but sailed through the Senate: the initial voting margins were 216-215 and 66-30, respectively, while the votes on the conference version were 215-212 and 64-34.<sup>253</sup> Second, prospective advice and consent also offers a potentially quicker and easier process in that it needs to go only through one house, as opposed to two houses and reconciliation. Third, the fact that prospective advice and consent can be tailored offers the Senate considerable flexibility in terms of structure. The Senate can vary its level of precommitment based on the extent to which it reserves an option of subsequent review.<sup>254</sup> There is a trade-off here: the weaker the level of precommitment, the more willing the Senate may be to make it but the less other countries can rely on it.

The President can weigh those factors and others in deciding whether to seek prospective advice and consent or renewal of fast-track authority for the Doha Round (or, for that matter, subsequent advice and consent or purely ex post congressional approval). What is desirable and achievable will vary based on the precise timing and political context. Ex post congressional-executive agreements may well be the best way of getting trade agreements through in most circumstances, especially if substantial implementing legislation will be required in any event.<sup>255</sup> Under some circumstances, however, prospective

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251. Letter from Kent Conrad et al., Senators, to George W. Bush, President (Apr. 12, 2007), available at [https://conrad.senate.gov/issues/statements/agriculture/070412\\_WTO\\_Ag\\_Letter.pdf](https://conrad.senate.gov/issues/statements/agriculture/070412_WTO_Ag_Letter.pdf).

252. See John C. Fortier & Norman J. Ornstein, *Legislative Strategist*, in THE GEORGE W. BUSH PRESIDENCY: AN EARLY ASSESSMENT 138, 161 (Fred I. Greenstein ed., 2003) ("[T]he Senate, filled with members who represent statewide constituencies rather than particular economic interests, has been the body more inclined toward free trade.").

253. CAROLYN C. SMITH, CONG. RESEARCH SERV., TRADE PROMOTION AUTHORITY AND FAST-TRACK NEGOTIATING AUTHORITY FOR TRADE AGREEMENTS: MAJOR VOTES 3 (2011), available at [atfpc.state.gov/documents/organization/155619.pdf](http://atfpc.state.gov/documents/organization/155619.pdf); see also Fortier & Ornstein, *supra* note 252, at 162-63 (noting that significant concessions had to be offered to swing votes in order to achieve the House majority).

254. See *supra* Section III.C. By contrast, the renewal of fast-track would likely limit Congress to the specific mechanism of an up-or-down ex post majority vote.

255. In giving prospective advice and consent, the Senate would also have flexibility in the

advice and consent could prove the most effective approach.

## V. CONCLUSION

As presently used, the Treaty Clause has become a straitjacket. For minor treaties, the Senate's consideration of each individual treaty both slows the treaty-making process and limits the number of ratifiable treaties. For major multilateral treaties, the costs are greater still: the Senate's widespread failure to approve them hurts the United States in its foreign relations and weakens future U.S. negotiating power. The failure of the executive branch to represent credibly that it can deliver the Senate has led to an odd anomaly in major multilateral treaty negotiations: the United States is both the world's leading superpower and yet "a little bit like the boy who cried wolf."<sup>256</sup>

There are a number of possible responses to the challenge of obtaining the Senate's advice and consent to negotiated treaties. One response, of course, is just to leave the process as it is and to accept that multilateral treaties marked by any notable opposition—even ones like the Law of the Sea Convention that have widespread though not universal bipartisan support—will be the subject of long or perhaps even endless delays. Another response is to turn away from the Treaty Clause and instead process international agreements as sole executive agreements or congressional-executive agreements. Since World War II, these approaches have been used more frequently, but the constitutionality of sole executive agreements on major issues is doubtful at best and the Senate has shown itself reluctant to abandon the Treaty Clause in favor of congressional-executive agreements for major agreements outside the trade context.

This Article has argued that yet another possible response—prospective advice and consent—should be used for certain treaties as an alternative to the subsequent advice and consent process. The Treaty Clause leaves the President and the Senate with considerable flexibility as to how they can apply it, as precedents during and after the Washington Administration confirm. I show here that this flexibility is broad enough to allow the Senate to advise and consent to treaties prospectively and in broad-brush strokes. As an approach for major multilateral treaties, prospective advice and consent can improve the likelihoods that the Senate will advise and consent to the President's power to

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extent to which it specified that the treaty would be self-executing. *See supra* note 134. A non-self-executing treaty would require implementing legislation to constitute judicially enforceable domestic law. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(3) (1987). Only if the President thinks that the House of Representatives is more likely to vote to implement a treaty than to approve this same agreement in the first place would he be likely to use the Article II process for treaties not designated as self-executing where, as with trade, ex post congressional-executive agreements are widely deemed a legitimate alternative to the Article II process. A self-executing treaty (or a partially self-executing treaty) would be more desirable than a non-self-executing treaty. It would invalidate any conflicting laws under the last-in-time rule, *id.* § 115(2), and so there would both be less need for implementing legislation as a matter of law and greater incentives to pass implementing legislation as a matter of clarity. A self-executing treaty made under the Treaty Clause could likely constitutionally reduce existing tariffs—even if it could not raise them in light of the House's special role with regard to raising revenue. *See id.* § 111 cmt. i ("Treaties of friendship, commerce, and navigation, however, frequently affect tariffs and trade by 'most-favored nation,' 'national treatment,' and analogous clauses.')

256. *See* Bellinger, *supra* note 4.

make a treaty and that other international negotiators will accordingly view U.S. negotiators as more credible. It will not always work, but it offers improvements over the subsequent advice and consent process.

A final question is what it would take for the Senate to shift to the use of prospective advice and consent for appropriate treaties, as an initial change in process can require more effort than its later applications. The time-lines for such events are hard to predict, and they may be long ones. The possibility of ex post congressional-agreements is mentioned in legal scholarship as early as 1905,<sup>257</sup> but they were not clearly used until decades later. As I see it, however, there are at least two possible scenarios that would provide the Senate with strong incentives to shift. First, if the Senate were to discover that the President is using the ex ante congressional-executive process to make agreements that it views to be of dubious value, then it might consider prospective advice and consent as an alternative process that allows a built-in veto and thus allows the Senate to retain considerable oversight. Second, if doubts about Senate commitment were obviously weakening the U.S. negotiating position regarding a treaty that had widespread although not complete bipartisan support, then the Senate would have a strong incentive to consider prospective advice and consent. In either situation, prospective advice and consent offers clear benefits, and this Article has shown that it is a constitutionally appropriate tool.

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257. See James Barnett, *International Agreements Without the Advice and Consent of the Senate*, 15 YALE L.J. 63, 63 (1905).