# 1. Introduction[1]

The debate in the 1980's about the reinterpretation of the Anti-Ballistic Missile (ABM) Treaty led to a more general discussion on treaty-making and treaty interpretation powers. The Biden Condition, attached to the INF Treaty, promoted the final and crucial part of that discussion.

In this paper, we analyze the arguments for and against the Biden Condition looking at the political process of constitutional interpretation. Many authors have written already with occasion of the reinterpretation debate, interpreting treaty-interpretation powers.[2] We try here to interpret their views, relating them to the political context of their arguments about interpretation. This is not a paper written as a result of new facts found, but as a result of new analysis done on the way those facts are contemplated. We have tried to combine an international law practical perspective with a constitutional law political one.

Glennon, in his book about the foreign relations law of the U.S. introduces a dichotomy that we have tried to develop and apply to the Biden condition context: "Diplomacy clashes with constitutionalism. The policies undertaken by the U.S. in conducting its foreign relations could be formulated more efficiently and carried out more consistently without domestic legal constraints.[3]"

We live in a world changing fast towards more interdependence. That is probably all what we should retain from Fukuyama's famous theory about the end of History,[4] a well-intentioned joke that many commentators took very seriously.[5]

The implications of this growing interdependence for the legal systems are clear: there is no fixed boundary between domestic and international law. Domestic politics have increasingly international implications. We try to exemplify all of this in the study of the Biden Condition and of the treaty-interpretation powers.

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2 See 137 U.Pa. Law Review, (1989), with seven articles about this suject.

3 Glennon."Constitutional Diplomacy", Princeton, (1990).

4 See F. Fukuyama, "*The End of History?*",. The National Interest, Summer 1989.

5 See Marques de Tamaron, "*El acabose*", Nueva Revista, n.1, feb. 1990, for an explanation of Fukuyama's "joke".

## 2. Background of the ABM treaty reinterpretation debate and of the Biden condition

In 1983, during a nationally-televised address, President Reagan revealed his vision of anti-missile technology that would render nuclear weapons "impotent and obsolete."[6] The next days arms control experts pointed out the inconsistency between the President's declared intent to seek such technology and U.S. international legal obligations under the ABM Treaty.

The Treaty on Limitation of Anti-Ballistic Missile Systems was signed by President Nixon and Soviet Union Secretary General, Brezhnev in 1972, along with the SALT I Interim Agreement. Under the ABM Treaty, the parties agreed "not to develop, test or deploy ABM systems or components which are sea-based, air-based, space-based or mobile land base" (art. V) and to restrict their deployments of fixed land based ABM systems to just two sites each. Also in an agreed statement "D" within the treaty, the parties provided that if ABM systems and components "based on other physical principles" were created in the future, they could be deployed only after the parties had formally discussed them and agreed on specific limitations. That regime for "exotic" ABM systems and components,such as high-energy lasers, had yet to be created and would perform the same function of ABM interceptor missiles or radars.

After Reagan's speech the controversy began between those who read art. V and Agreed Statement "D" restrictively or broadly. The ones who read restrictively, claimed that it prohibited the development, testing or deployment of all but fixed land-based systems, whether or not those systems relied on technologies of the time in which the ABM Treaty was signed. The other ones found in their broad reading that the parties had anticipated the creation of ABM systems and components based on "other physical principles" than those in use in 1972 and that the parties had not agree the to restrain the necessary research, development and testing for those new systems.[7]

The President's Space Defense Initiative (SDI), known popularly as the Star Wars project, would clearly involve space-based devices after the initial research had been finished. If the other party to the Treaty, the Soviet Union, read narrowly that part of the treaty, the US would be in trouble, for no easy amendment could be negotiated to replace that essential part. Abrogation of the treaty or withdrawal could be the only alternative for the U.S.

In October 1985, National Security Adviser, Robert McFarlane, disclosed the position of the Reagan Administration, clearly in favor of a broad interpretation of the treaty, allowing the development and testing of new anti-ballistic missile technologies. Only the development was banned.[8] In a strong language, the soviets called McFarlane statement "a deliberate deceit".[9] The newly-installed Legal Adviser of the Department of State, Abraham Sofaer, carefully studied the issue and supported the Executive explaining: "under international law, as under US domestic law, when an agreement has been found to be ambiguous, an interpreter must seek guidance in the circumstances surrounding the drafting of the agreement. Proponents of the restrictive reading of the ABM Treaty have asserted that the treaty unambiguously supports their interpretation; therefore, they argue, the treaty's negotiating record need not be consulted(...). However, the broader interpretation of the treaty is certainly strong enough to warrant consideration of the negotiating record."[10] Sofaer used then the negotiating record among other materials to show that the broader interpretation was actually more accurate than any others. His opponents referred to the negotiating record as an "obscure, undefined, nebulous collection of thirteen year old memoranda."[11] Also, according to the

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6 Biden and Ritch, *The Treaty Power: upholding a constitutional partnership,* 13 7 University of Pennsilvanya Law Review 1530 n. 83 (1989).

7 Sofaer, *The ABM Treaty and the SDI,* 99 Harvard Law Review, 1973, (1986).

8 See Biden, supra note 6, at 1531.

9 Id. at 1531.

10 See Sofaer, supra note 7, at 1978.

11 See Biden, supra note 6, at 1532.

ones who read the treaty narrowly, most of the senior members of the US SALT I negotiating delegation denounced the new interpretation as a misreading of the ABM Treaty's text and negotiations, which they said had produced a more comprehensive ban on ABM systems."[12]

Senators Nunn and Levin, of the Armed Services Committee, were able to have access to the classified negotiating record and criticized the broad interpretation. In the spring of 1987, senator Nunn argued, in a detailed study, from the negotiating record that there had been no failure to obtain consent from the soviets on the restrictive interpretation. He went on and looking at the ratification proceedings (Senate's advice and consent on the Executive's representation about the meaning of the treaty) but he could not find any ambiguity which could support the broad interpretation.[13]

The purpose of the treaty and the subsequent interpretation of it were also arguments used against the broad reading of the ABM Treaty. An article by Chayes and Chayes in 1986[14] showed that a simple prohibition of deployment was not enough for the purpose of each side, assurance that the other was not working to achieve an effective territorial defense against ballistic missiles. It also explained that "each year since 1978 the Arms Control and Disarmament Agency has been required by law to prepare an Arms Control Impact Statement for presentation to Congress. Through fiscal year 1985, each of those statements, without exception, including those prepared by the Reagan Administration, explicitly endorses the traditional interpretation."[15]

At this time the debate was not just about a factual claim –do the negotiating record and the ratification proceedings support a broad interpretation?– but about a legal assumption, no matter what the meaning of the treaty originally was, –can the President change it unilaterally? Sofaer implied that this Executive reinterpretation was permissible in his declaration before the Senate Foreign Relations and Judiciary Committees: "when the Senate gives advice and consent to a treaty, it is to the treaty that was made, irrespective of the explanations the Senate is provided".[16] The Executive could disregard its own representations about the meaning of the treaty when asking the Senate for advice and consent. As Prof. Rostow explained, when the President sent the ABM Treaty to the Senate for its advice and consent to ratification, Executive Branch officials had told the Senate that the Treaty prohibited the testing in space of exotic ABM systems (i.e., those based on 'other physical principles' than those existing in 1972 like lasers). Thirteen years later, the Reagan Administration reinterpreted the treaty to permit the testing in space of exotic ABM systems.[17]

This new legal doctrine came just in time to replace the factual claim about the negotiating record, badly damaged by Senator Nunn careful study. A powerful reaction came from many senators, some of them fearing "grave and far reaching implications for all U.S. treaty-making –not only for the Senate's role but for the conduct of American diplomacy.[18] Presidential reinterpretation of treaties was seen as "a menace and a question never before posed in 200 years of constitutional history".[19] Senator Biden urged his colleagues to treat this constitutional issue as "paramount over the substantive arms control question."[20]

When in March and April of 1987 the Senate Foreign Relations Committee and Judiciary Committee held Joint Hearings to discuss this issue, testimonies of professors Louis Henkin and Laurence H. Tribe supported the original meaning view.[21] Both Senate Committees drafted Senate Resolution number 167, which provided

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12 Koplow, *Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties,* 137 U. Pa. L. Rev., 1371, n.83 (1989).

13 See Biden, supra note 6, at 1533.

14 Chayes and Chayes, *Testing and Development of 'Exotic' Systems Under the ABM Treaty: The Great Reinterpretation Caper,* 99 Harvard Law Review, 1966, (1986)

15 Idem at 1969.

16 *The ABM Treaty and the Constitution: Joint Hearings Be/ore the Senate Committees on Foreign Relations and on the Judiciary,* 100 th cong. ist Session, 130, (1987).

17 Rostow, *The Reinterpretation Debate and Constitutional Law,,* 137 U. Pa. L. Rev., 1451, **n.** 83, (1989).

18 See Biden, supra note 6, at 1533.

19 Idem at 1535.

20 See Rostow, supra note 17, at 1563.

21 See *Joint Hearings,* supra note 16, at 81.