

The Constitution, The Treaty Power, And Executive Agreements

It is amazing to hear all these discussions, so often so inaccurate in their description of that supposedly “outrageous” and “unheard-of” Letter From The 47 Nearly-Traitorous Senators, without any mention of the Constitution, that is of Article II Section 2. Article II Section 2 requires the Executive Branch to obtain “the advise and “of the Senate in the making of treaties, that is the approval of two-thirds of the Senators. Barack Obama has conducted negotiations in great secrecy, without the advice, and without even the knowledge of the Senate as a whole, and he has, over the last few months, made clear that he will not brook any non-acceptance by Congress of whatever deal he makes, and will veto any Congressional attempt to block such a deal. He does not regard this agreement, whatever it looks like, as a Treaty.

This was not inevitable. He might have said something different. He might have said that of course he welcomes Congressional advice, and looks forward to making a deal that will win Congressional approval, and that he understands that it makes sense to call it a Treaty, so that if it wins approval, it cannot be undone by a future president. It is he, not those 47 Senators, who in trying to avoid calling this a treaty, is violating the spirit, and possibly the letter, of Article II Section 2.

The difference between a Treaty and an Executive Agreement or, more exactly, a Congressional-Executive agreement (which requires a vote, but only the approval of a majority, by both houses of Congress) needs to be considered. Who decides when an agreement with a foreign power is a Treaty or that lesser

thing, a Congressional-Executive Agreement? Should the Executive Branch be allowed to decide on its own that an agreement is not a treaty, and therefore does not require the approval of two-thirds of the Senate? Should Congress – the Senate in this case – decide on its own what is a treaty, and what isn't? Are there no criteria that all parties should apply? And what about Obama's apparent readiness to treat a deal with Iran not as a treaty, and not as a congressional-executive agreement, but as a pure executive agreement, that would require no Congressional approval? Shouldn't the subject matter of this agreement – about matters of War and Peace, the subject of traditional treaties – lead one to characterize that conceivable agreement as a treaty, requiring that two-thirds approval of the Senate?

For more on the Treaty Power, and attempts by some to whittle it down, and the convincing argument against them made by the famously liberal Constitutional scholar Laurence Tribe, see – to begin with – [here](#).

The Senators' letter – not a letter sent to Iran, but a letter designed to be made public, *urbi et orbi*, for the American public to see at the very moment it could be seen by the Iranians – was not a statement of policy but merely a lesson in American Constitutional Law. The letter sought to explain to the rulers of the Islamic Republic of Iran that Congress has a role to play in both treaty-making and in the making of executive agreements (which would require only the approval of a majority), and that the Iranians should understand that if they press too hard for every advantage, the resulting deal might be regarded by the Islamic Republic of Iran as a triumph of their negotiators, but a new American President will not be required to honor that agreement, and could undo it – unless it is treated as a treaty, and been approved by the appropriate number of Senators under Article II Section 2.. And since Obama has said he has no intention of asking for Congressional approval, and if there is a vote against it –

apparently whether it is considered a treaty or a congressional-executive agreement, he will veto it. And if 2/3 of the Senate declares its opposition, even if Obama himself refuses to submit it for approval as a treaty, what then? It is important that the rulers of Iran understand the relevance of the American Constitution which, like so many of those commenting with real or feigned outrage on that letter, they apparently do not understand.

The letter is a lesson, necessarily abridged, in American Constitutional Law. And it turns out that not only Iranians – they have an excuse – but many American journalists and commentators and politicians as well, require that civics lesson.