

Is It A Treaty, Or Is It An Executive Agreement? It's Either One Or The Other

The reaction of Barack Obama and others who support him, to the letter sent to Rouhani and signed by 47 Senators, is instructive. This former lecturer in Constitutional Law did not address the central Constitutional question, which is whether or not whatever is reached with Iran should be called a Treaty or should be called an Executive Agreement. Many Senators, not all of them Republicans, have asked repeatedly, over the last year, and more, that they be involved in the decision-making, that they be consulted— they have not been — on what the treaty should look like, and that they be allowed to vote to approve, or disapprove, on whatever deal is consummated is by the storied team headed by former social worker Wendy Sherman, and now by John Kerry, negotiating with the wily Iranians in storied Montreux, lapped by the waves of Lac Lemane, a mere rowboat's ride from the Chateau of Chillon. In other words, these Senators believe that the Constitution gave them the right to “advise and consent” to treaties, and they regard whatever is arrived at with Iran should be treated as sufficiently grave a matter as to rise to the level of a Treaty.

Obama, however, has dismissed without any discussion their desire to be involved. He has not shared with them the details of the negotiating except in the broadest way. He seems to think the Constitutional powers given to Congress are not even worth discussing, even if he concludes, and hopes others will too, that Congress — that is, the Senate — has no role. His contempt for those old fogies who keep bringing up the Constitution is remarkable. He has no wish to permit the members of Congress to express, in a vote, their opinion of the agreement that he hopes will be reached with Iran, an

agreement that involves matters not of trade or the environment – though in the earliest days of the Republic there were treaties of commerce and navigation – but of Peace and War, exactly the subjects that the Framers thought would naturally be the subject of a Treaty.

But let us pretend to believe that this is not a Treaty, requiring Senate approval. Let's assume it is That Other Thing, an Executive Agreement. If it is an Executive Agreement, then it can be undone, at a later date, by another government, another President. Do any of those now cluck-clucking about Tom Cotton and his letter not understand that? NPR's coverage left out all mention of the Constitution, and the role of the Senate, and whether or not what is being discussed is a Treaty or an Executive Agreement. Apparently they have no one on their staff capable of understanding, much less discussing, this matter. After all, over the past year or two at NPR so many of the older, and wiser people – and with better-modulated voices too – have been replaced by much younger people with very young, shrill, ill-modulated voices, and with minds, I'm afraid, mostly to match. The Constitution of the United States is not high on their list of what they think they must know and understand.

Soon enough there will be lawyers who will explain what should be obvious. It is Obama who has treated the Constitutional system with contumely. It is he who in his arrogation of power is most like the late Richard Nixon. It is he who has the burden of explaining why he thinks this is not a Treaty, requiring a Senate vote, and why, if he thinks it is not a Treaty but an Executive Agreement, he thinks it illegitimate for many members of the Senate to inform the Iranians that, in our Constitutional system, if the agreement reached is one that does not meet with the approval of the Senators, even if they are not given a chance, by Obama, to have a vote, then at a later date – Obama's writ will run for only two more years – they are likely to express that disapproval, in supporting a

new President, or forcing that new President, to end that Executive Agreement that his predecessor, Barack Obama, eager for a foreign policy “achievement” that of course requires, it’s positively *de rigueur*, the achievement of “peace” in his time – one might assume he always promised himself a Rose Garden ceremony – was willing to sign..

What could be clearer? Of course that will not stop Obama, his courtiers and handlers, and NPR, from doing everything they can not to mention any of this, but to absurdly express outrage at this “unheard-of meddling” by members of the Senate in the very matters that, according to the Constitution, those Senators are explicitly assigned a role to take a part in, and that Obama has – very likely unconstitutionally – tried to prevent them from having.

The Senators who signed the letter were giving the Iranians a lesson in the American Constitution, something about which they were no doubt unaware. They have explained that if the deal turns out to be one that in their estimation is a bad one, and if Obama does not present the deal to be ratified by the Senate, then it will be only because it is not considered to be a treaty but an executive agreement, and can be undone, by a later President, at a later date. Almost half the Senate thought that should be made clear now, to the Iranians, as a way of concentrating their minds. What’s so outrageous about that?