The Honorable Ruth Bader Ginsburg  
United States Court of Appeals  
District of Columbia Circuit  
United States Courthouse  
3rd & Constitution Avenue NW  
Washington, D.C. 20001  

Dear Ruth:

It has taken me more than a year to put aside the time for indulging a personal luxury: responding to your letter (copy enclosed) about Det Vagts's piece on Stuart. I have learned not to care about unfair academic commentary in general, but I do care about your regard for my precision and scholarship.

I enclose a copy of the relevant portion of my concurrence in Stuart, and of Prof. Vagts's critique. Do an old friend (me, not Vagts) the favor of rereading both before you go any further.

You will perceive that the issue involved in Part II of my concurrence is whether a treaty means what the consenting Senate believes it means. I did say -- too loosely, perhaps -- that "I have been unable to discover a single case in which this Court has consulted the Senate debate, committee hearings or committee reports." 109 S.Ct., at 1195. In context, however, it was entirely clear what that meant. It meant consulting them, as "we have become accustomed to [doing] for purpose of determining the meaning of domestic legislation," id., at 1196, in order to establish "Senate understandings," id., at 1197, that are authoritative as to "the meaning of a treaty," ibid. Prof. Vagts undoubtedly understood that to be my meaning, since the whole purpose of his essay (other than mockery) was to assert that Restatement Third was reciting "well established" law, rather than, as I asserted, making "a proposal for change," when it said (§314, comment d): "[I]ndication that ... the Senate ascribed a particular meaning to the treaty is relevant to the interpretation of the treaty by a United States court in much the same way that the legislative history of a statute is relevant to its interpretation."

Not a single one of the cases Prof. Vagts cites establishes such a use of Senate materials -- or even comes close.

cited the Senate hearings (along with the documents of the Hague Conference and Bruno Ristau's treatise) to explain the operation of the French notification au parquet. The citation had nothing to do with interpreting the language of the treaty at issue.

_Societe Nationale Industrielle Aerospatiale v. U.S. District Court_, 107 S.Ct. 2542 (1987) used the Senate Report as a source of authority for many factual matters, such as that "[t]he Hague Conference ... has been conducting periodic sessions since 1893," id., at 2548, that "[t]he United States participated in those sessions as an observer in 1956 and 1960," _ibid._, and that the Hague Evidence Convention was supported by a number of "national legal organizations," _ibid._, at 2549. It also used Senate documents as a handy reference point for such sources as Amram, Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, _ibid._, and the Secretary of State's letter of submittal of the treaty to the President, _ibid._. The opinion does not contain a single citation relating to the Senate's understanding or interpretation of the treaty.

_Air France v. Saks_, 470 U.S. 392, 403 (1985) refers to a Senate Report for the fact that certain Protocols (to which the United States was not a party) included a certain amendment. It contains no citation of Senate materials for the purpose of interpreting the treaty.

_INS v. Stevic_, 467 U.S. 407 (1984) said that "[t]he President and the Senate believed that the [United Nations] Protocol [Relating to the Status of Refugees] was largely consistent with existing law," _ibid._, at 417, and cited Senate legislative history to support that. Even if that generality could qualify as an "interpretation" of the Protocol, it would not establish Vagt's point, since the issue in the case was not the meaning of the Protocol but the meaning of the Refugee Act of 1980.

_Trans World Airlines, Inc. v. Franklin Mint Corp._, 466 U.S. 243 (1984), used Senate legislative history, once again, as a source of _facts_ rather than interpretation: the fact that a protocol to the Warsaw Convention had not yet been ratified by the Senate, 466 U.S., at 250 n.18, and the fact that the $9.07-per-pound liability limit retained since 1978 has represented a reasonably stable figure," _ibid._, at 256-257 & n.29.

Finally, in _Warren v. United States_, 340 U.S. 523 (1951), the Senate materials are cited as a convenient reference to the Report of the Secretary of State _[to the President]_ recommending ratification of the Shipowners' Liability Convention, which Report established that the aim of the Convention was "not to change materially American standards." _Id._, at 527 & n.5. It is quite obviously cited, not because it is part of the "Senate legislative history" but because it shows the views of the
Secretary of State and the President -- just as (in a footnote on
the opposite page, see id., at 526 n.2) the Secretary of State's
expressions to the House are considered relevant. (As the
Restatement rightly says, "executive interpretations of
international agreements are given great weight by courts in the
United States," regardless of whether they are expressed to the
Senate.)

By the way, Vagts ostentatiously describes how he obtained
all six of these cases (plus Stuart itself) by entering "treaty"
and "S. Exec. Rep." into LEXIS, and then asking for Supreme Court
cases using those terms. Try it yourself. You will get only
five of them -- not Stevic. You will also not get one of the
page references Vagts uses for one of the other five, Saks, 470
U.S., at 397 -- which contains no citation of Senate documents at
all, but a passing reference to the fact that the official
American translation of the Warsaw Convention contained in the
Statutes at Large "was before the Senate when it ratified the
Convention in 1934." 470 U.S., at 397. Tsk, tsk. All this is
very careless for a law professor who is lecturing a Justice on
accuracy and the techniques of legal research.

Vagts also claims to have found another Supreme Court case
"the old way," without use of a computer. He cites Factor v.
Laubenheimer, 290 U.S. 276, 299 n.6 (1933), as a case that "used
a document that would now probably be in a committee report."
LEXIS would not have turned it up, he says, "since it did not use
the modern citation form." To be accurate about the matter,
however, it was not a different form of citation that was used,
but a different body of documents -- presidential documents
rather than senatorial. The citation was of "Executive
Documents, Vol. 1, 1842-3," which contained President Tyler's
interpretation of the Treaty of 1842, as reflected in his message
transmitting it to the Senate for consideration. Another clean
miss as an example of looking to the Senate's understanding for
its own sake.

Later in his piece, Prof. Vagts asserts that another Supreme
Court case which I myself cited, Maximov v. United States, 373
U.S. 49, 54 n.2 (1963), "show[s] in a footnote that the Court
consulted hearings before a subcommittee of the Committee on
Foreign Relations." In fact, however, the only portion of the
hearings that the footnote cites consists of the Message of
Transmittal from the President to the Senate, and the Report on
the Treaty from the Secretary of State to the President.

Finally, Prof. Vagts purports to have summoned up by memory
alone one Court of Appeals case that supports him -- God knows,
he suggests, how many hundreds of these a LEXIS search might have
uncovered. He says that Rosado v. Civiletti, 621 F.2d 1179
(CA2), cert. denied, 449 U.S. 856 (1980) contains "very thorough
consultation of legislative materials, both as to the [Mexican
prisoner transfer] treaty and as to the implementing legislation." But besides the fact that interpretation of the treaty was not remotely at issue in that case, the only legislative materials cited that deal with the background of the treaty are House rather than Senate documents, see 621 F.2d, at 1186-1187. The Congressional Record (Senate) is cited for the date of Senate approval of the treaty, and a Senate Executive Document for a reprint of its text, id., at 1187. Yet another clean miss.

What Prof. Vagts has to say about the Restatement itself is equally misleading. Please read the passage -- the first full paragraph on p. 549. Vagts claims that "the reporters did not cite authority as to the use of legislative materials ... because it was thought to be well established." Well established on the basis of what? On the basis of no authority? Ah, no. It turns out that it was "well established" because it had also been asserted (again without case support) in a comment to the Restatement Second! "A check from the Restatement (Third) back to the Restatement (Second) would have shown that sections 314 and 325 were not Professor Henkin's 'proposal for change' but a nearly word-for-word reproduction of comment a to section 151 of the Restatement (Second) as it was written in 1965 by a different set of reporters." This sentence makes no sense. I enclose copies of §§314 and 325 of Restatement Third and §151, comment a of Restatement Second. They bear no relationship to one another, nor to the subject of my opinion. What Prof. Vagts presumably means (one has ceased to expect precision here) is that Reporters' Note 5 to §325 of Restatement Third (one of the two provisions I criticized -- and not the worse of the two) was nearly a word-for-word reproduction of comment b (not comment a) to §151 of Restatement Second. Contrary to Prof. Vagts's illogical assumption, I was quite aware of that. My opinion cited the same comment in the Proposed Official Draft of Restatement Second. Did he think I would assume, without checking, that the Draft would change rather than remain the same? The reason I cited only the Draft, however, was that the Draft, unlike the final Restatement Second and unlike the Restatement Third, contained a final paragraph to the comment, admitting that "[t]here is virtually no precise decisional authority on this matter." Vagts points out triumphantly that this passage "was dropped from the final version." Poor fellow, he seems not to grasp that this is precisely my point. Why was it dropped? Where is the "precise decisional authority" that had been discovered in the interim? And if there was none (as there was not, right up through Restatement Third), why was that reality not prominently acknowledged rather than suppressed -- or is that standard Restatement technique? Vagts seems to think he has made his point if he establishes that Restatement Third was not a "proposal for change" from Restatement Second. I could not care less about that. My criticism was that it seemed to be a "proposal for change" from current case law -- and whether the
proposal originated with Second or Third was quite irrelevant. By the way, you should not read Vagts's statement that "[a] check of the cases that cited the Restatement (Second) provision would have revealed that it proved entirely noncontroversial" to mean that the provision was entirely noncontroversial — though it is understandable how one might obtain that misimpression. To my personal knowledge there was academic opposition to the provision.

You have been most patient. But since you know my obsession with language, I am sure you will permit a response to the least relevant (and therefore somehow the most offensive) of Prof. Vagts's smart-assisms: "I take it that this is what the Justice means by 'self-exertion,' but I cannot be sure since that word appears in none of the six dictionaries I consulted." As it happens, my law clerk found it in the very first one he consulted: Random House College Dictionary (rev. ed. 1975). But really, an intelligent person would not expect to find all the possible compounds of such an all-purpose prefix as "self-" explicitly listed. To the intelligent person, the meaning will be, I might say, self-evident.

In short, Ruth, to respond directly to the questions in your year-ago note: I do not think Prof. Vagts "has a point" that I was "a bit rough on the Restatement." I would not "kill all the law clerks" — though I would certainly fire one that submitted a piece of work such as the one under discussion here. I cannot imagine how it got published in the American Journal of International Law — do they do no cite-checks? If it left you with the misimpression that the Restatement had substantial support (and that Scalia is pretty careless), I am sure it did the same to many others. You I care about.

Many thanks for bearing with me. I feel a lot better. See you soon in Edinburgh.

Sincerely,