The Asymmetrical Nature of the U.S. Treaty Processes and the Challenges that Poses for Human Rights

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The structural and political realities of U.S. treaty processes raise grave difficulties for efforts to make the United States a full participant in the global system of human rights treaties. The power to stop a treaty from being ratified, along with the associated power to delay ratification or attach weakening reservations and similar limitations, is broadly dispersed within the Senate. Meanwhile, the President has been able to withdraw from treaties unilaterally. This "asymmetrical" approach to treaties raises grave difficulties for efforts to make the United States a full participant in the global treaty system protecting human rights.

Because Article II, Section 2 of the Constitution requires that ratification of a treaty by the United States be preceded by a favorable two-thirds vote in the Senate, any controversial treaty faces substantial obstacles. The structure of the Senate further exacerbates this situation by favoring efforts to stop or delay action. As a practical matter, treaty ratification is usually impossible without bipartisan support. Human rights treaties often have been delayed for long periods because of these factors. For example, the United States did not join the 1948 Genocide Convention until 1989. And even those human rights treaties ratified by the United States are hobbled by numerous reservations, understandings, and other limitations.

On the other hand, Goldwater v. Carter *allows a President to terminate a treaty without fearing judicial intervention. President Carter exercised this prerogative in terminating the*

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mutual defense treaty with Taiwan, and President George W. Bush withdrew from the Anti-Ballistic Missile (ABM) Treaty and from the Optional Protocol to the Vienna Convention on Consular Relations. Neither the Senate nor the House of Representatives played any role in those actions.

It is very difficult for the United States to ratify a treaty, but easy for a President to withdraw. This asymmetry creates serious difficulties, even when there is substantial support for U.S. participation in a human rights treaty. Those outside the United States look at the results of this process and may assume that the Nation is hostile to human rights. However, more general institutional characteristics explain much about why human rights treaties have encountered such extreme difficulties. New approaches to treaty ratification might make it easier for human rights treaties to be considered on their merits rather than being mired in the quicksand now encountered.

February 23, 1978, had the potential to be a banner day for the United States in the field of human rights. That day, President Jimmy Carter transmitted four human rights treaties to the Senate for the purpose of obtaining advice and consent to their ratification. President Carter had made the protection of human rights around the world a major priority for his administration, and the four treaties for which he initiated the ratification process in early 1978 could have greatly enhanced the participation of the United States in the international human rights system. That in turn would have been likely to promote better compliance with human rights norms by putting the considerable influence of the United States more firmly behind the recognition and enforcement of human rights.

A quick look today at the status of those four treaties – more than thirty years after President Carter transmitted them – provides a depressing dose of "reality." The participation of the United States in the international human rights system is often

tardy and grudging.[1] Even today, the United States has not become a party to two of the instruments sent to the Senate by President Carter in 1978. The International Covenant on Economic, Social and Cultural Rights was concluded on December 16, 1966, and entered into force on January 3, 1976, two years before it was sent to the Senate by President Carter.[2] Although the United States signed this treaty on October 5, 1977, it has never ratified it.[3] Likewise, the American Convention on Human Rights, which was concluded on November 22, 1969, entered into force on July 18, 1978.[4] The United States signed this treaty on June 1, 1977, but has yet to ratify it.[5] In light of the dominant role of the United States in the Americas, non-ratification by the United States has had a devastating effect on the Inter-American Court of Human Rights, which has lagged far behind the European Court of Human Rights in its ability to develop and enforce human rights standards within its region.

The other two treaties sent to the Senate by President Carter in 1978 were eventually ratified by the United States, but the circumstances have not evoked unrestrained rejoicing by human rights advocates. The International Covenant on Civil and Political Rights (ICCPR) was concluded on December 16, 1966, and it entered into force on March 23, 1976.[6] This central pillar of the international human rights system was not ratified by the United States until June 8, 1992, and entered into force as to the United States on September 8, 1992. Not only did the U.S. ratification process take more than fourteen years after President

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[1] *See generally* U.S. SENATE COMMITTEE ON FOREIGN RELATIONS, PENDING TREATIES (2009), *available at* http://foreign.senate.gov/treaties.pdf (listing all treaties pending before the United States Senate as of January 15, 2009).

[2] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

[3] PENDING TREATIES, *supra* note 1, at 2.

[4] American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123.

[5] PENDING TREATIES, *supra* note 1, at 2.

[6] International Covenant on Civil and Political Rights (ICCPR), Dec. 16, 1966, 999 U.N.T.S. 171.

Carter's transmittal of the treaty, but when the Senate did finally give its advice and consent to ratification it attached an exhaustive, aggressive, and sometimes bewildering list of reservations, understandings, and declarations, capped by the daunting proviso that "[n]othing in this Covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."[7]

The fourth treaty included in President Carter's 1978 package was the International Convention on the Elimination of All Forms of Racial Discrimination,[8] and it received treatment similar to that given the ICCPR. The treaty was concluded on March 7, 1966, and it entered into force on January 4, 1969. Although the United States provided its signature on September 28, 1966, ratification did not come until October 21, 1994, with entry into force thirty days later. In terms of sheer bulk, the reservations, understandings, and declarations attached by the United States fell short of those with which the ICCPR was festooned, but the skeptical approach expressed by the Senate and the limited acceptance by the United States of the treaty's obligations resembles the Senate's handling of the ICCPR.[9]

From the perspective of international human rights, it would be pleasant to be able to report that the rough handling

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[7] 138 CONG. REC. 8068, 8071 (1992) (text of the Senate's resolution of ratification). The United States has agreed to allow communications alleging ICCPR violations to be filed against it by a State Party that has made a similar declaration under Article 41, but has not ratified the (First) Optional Protocol to the ICCPR that permits communications to be submitted by individuals. *Id.* at 8071.

[8] International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S 195.

[9] *See* 140 CONG. REC. 14326-14327 (1994) (text of the Senate's resolution of ratification). For example, submission of any dispute under the treaty to the International Court of Justice requires specific consent of the United States in each case, principles of federalism are invoked to limit the treaty obligations of the United States, the treaty is declared to be not self-executing, and the ICCPR proviso is repeated.

given to the four treaties sent to the Senate by President Carter in 1978 was unusual, or that it pictures an aspect of the U.S. approach to human rights treaties that has been superseded or diluted by subsequent developments. Sadly, no such reassurances may be given. While the transmittal of four human rights treaties on a single day by a U.S. President committed to the protection of human rights was a dramatic event – perhaps even a unique one – the political and procedural realities reflected in the fates of those four treaties are quite typical. Most of the human rights treaties that have been agreed upon by the international community and presented for possible ratification by the United States have experienced similar difficulties.

A few other examples – both old and new – confirm that the treaties transmitted to the Senate in 1978 are part of a much larger body of similar episodes in which U.S. ratification was very slow in coming, if it came at all, and in which the ratifications that did occur were hobbled by numerous reservations and similar impediments.[10] For example, the Convention on the Prevention and Punishment of the Crime of Genocide entered into force on January 12, 1951, but the United States did not become a party until February 23, 1989.[11] The vital Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) entered into force on June 26, 1987, but ratification by the United States did not become effective until November 20, 1994.[12]

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[10] This article focuses on treaty processes of the United States as applied to human rights treaties. However, from time to time other types of treaties will be referred to. This is appropriate, since the constitutional provisions applicable to treaties are the same no matter what type of treaty is involved, and most of the issues discussed will call for similar analysis without regard to whether a human rights treaty is involved or a treaty involving some other subject.

[11] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277. *See generally* LAWRENCE J. LEBLANC, THE UNITED STATES AND THE GENOCIDE CONVENTION (1991); SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE (2002).

[12] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85. As with the ICCPR, the Senate adopted extensive reservations, understandings, and

The United States has never become a party to the treaties protecting women and children,[13] and active opposition to the International Criminal Court – going well beyond mere non-ratification – was for several years one of the principal diplomatic priorities of the administration of President George W. Bush.[14]

While not a human rights treaty, the United Nations Convention on the Law of the Sea demonstrates the rocky shoals on which so many treaties run aground in the United States. The United States played a major role in drafting the instrument, which went into effect in 1994 and which was strongly supported by the Bush administration, yet the Senate's advice and consent to ratification has yet to be secured.[15] As this article will explain in further detail below, the structural and political realities of the U.S. system of treaty ratification raise grave difficulties for efforts to

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declarations. *See* 136 CONG. REC. 36192, 36198-36199 (1990) (text of the Senate's resolution of ratification).

[13] Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

[14] *See, e.g.*, American Servicemembers' Protection Act of 2002, Pub. L. No. 107-206, Title II, 116 Stat. 899. President Bill Clinton signed the Rome Statute shortly before he left office, but the Bush administration later in effect countermanded that step by formally announcing that the United States does not intend to become a party to the treaty. Letter from John R. Bolton, Under Secretary for Arms Control and International Security, U.S. Department of State, to Kofi Annan, Secretary General, United Nations (May 6, 2002), *available at* http://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm (last visited April 27, 2009).

[15] PENDING TREATIES, *supra* note 1, at 4; *see* John B. Bellinger III, Legal Adviser, U.S. Department of State, *Remarks at the University of California, Berkeley School of Law's Law of the Sea Institute* (Nov. 3, 2008), *available at* http://www.oceanlaw.org/index.php?name=News&file=article&sid=83; James Podgers, *Stuck in Port: The U.S. Senate Is in No Rush To Vote on Ratification of the Law of the Sea Convention*, A.B.A. J., Feb. 2008, at 65; *Sea Treaty Needs Safe Passage*, Editorial, CHRISTIAN SCI. MONITOR, Nov. 2, 2007, at 8 ("The treaty has remarkably broad support in America: State Department and Pentagon chiefs from both parties; oil, gas, and fishing industries; and environmentalists. And yet, a few senators have the power to tangle this treaty in a kelp forest of myths...").

make the United States a full participant in the global system of human rights treaties. The essence of the U.S. treaty ratification process is broad dispersal of both the power to stop a treaty from being ratified and the associated power to delay ratification or attach weakening reservations and similar limitations.

While there are many fewer occasions to see it in operation, and though the damage done is considerably less, the law governing the process by which the United States withdraws from treaties also undercuts full participation by the United States in the international human rights system. The process of withdrawal from a treaty is not one of diffused power, but rather one in which power is concentrated entirely in the President. Describing the U.S. treaty power as being "asymmetrical" in nature calls attention to the fact that ratification is an exceedingly arduous and often drawn-out process, while a President may act on her own to terminate the nation's treaty commitments.[16] Ratification of human rights treaties often stretches over the administrations of several Presidents and involves a number of successive Congresses. Yet when that process is finally seen to a successful conclusion, it can be undone by the President, even if the termination of the treaty is ill-considered, impetuous, or spiteful.[17]

It is natural that human rights supporters, and even the international community at large, sometimes bridle at the approach taken by the United States to human rights treaties. The cause of

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[16] For an article describing the U.S. system as asymmetrical in the same sense I do, *see* Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law*, 38 N.Y.U. J. INT'L L. & POL. 707, 718 (2006) (asserting "the President can unilaterally end treaty obligations even if they were entered into with Senate advice and consent. The United States' system is asymmetric in this regard") (footnotes omitted).

[17] *See, e.g.*, Adam Liptak, *U.S. Says It Has Withdrawn from World Judicial Body*, N.Y. TIMES, Mar. 10, 2005, at 16 (the decision by the United States to withdraw from the Optional Protocol accepting International Court of Justice jurisdiction to resolve disputes arising under the Vienna Convention on Consular Relations, following an ICJ ruling adverse to the United States, was described by Professor Peter J. Spiro as "a sore-loser kind of move").

human rights would be supported more forcefully, and no doubt advanced more successfully, if participation in such treaties by the United States was prompt and enthusiastic, and if a commitment once made could not so easily be negated by a hostile President. However, these difficulties are not encountered with regard to human rights treaties alone, and thus do not necessarily lock the United States into the guarded reaction to human rights treaties that it has so often adopted in the past. Specialized approaches have been developed in the United States to smooth the path to ratification of some other international agreements, especially those relating to international trade. Human rights advocates should explore the possibility that similar mechanisms can be used to rework the procedures that have caused so many human rights treaties to languish in the United States.

I. The Treaty Ratification System of the United States

The most critical aspects of the allocation of treaty-making power in the United States are apparent upon the face of the relevant language of Article II, Section 2 of the Constitution. The President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." Treaties are negotiated on behalf of the United States by the President or her subordinates, who also may sign such instruments. However, the United States does not become a party to a treaty unless and until the Senate gives its advice and consent to ratification as provided for in Article II, Section 2.[18] Only upon receiving such approval by the Senate may

[18] The process described in the text need not be followed if an "executive agreement" may properly be made by the President on her own authority. *See e.g.*, *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 401 (2003) (holding that a California statute was preempted by an executive agreement between the United States and Germany); *Dames & Moore v. Regan*, 453 U.S. 654, 678-688 (1981) (implementing the executive agreement, never submitted for the advice and consent of the Senate, which ended the Iran hostage crisis). The use of executive agreements made solely by the President as an instrument for

the President formally "ratify" the treaty and thus make the United States a party to it.[19]

The requirement of two-thirds approval by the Senate is alone enough to speak volumes about the difficulty of obtaining ratification of treaties in the United States. For many periods in U.S. history, and almost invariably in the recent years that are especially pertinent to the analysis of the ratification process for human rights treaties, the two major parties have been fairly evenly split in the Senate. While control of the Senate shifted from the Republicans to the Democrats after the elections in 2006, the current Democratic majority falls far short of two-thirds. And before the change in control, the Republicans had not been anywhere near a two-thirds majority even though they had controlled the Senate for most of the time between early 1995 and

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promoting human rights is beyond the scope of this paper. However, another approach that will be discussed involves "congressional-executive agreements" that are approved by a majority in both the House and the Senate rather than by achieving a two-thirds supermajority in the Senate alone. Statutes are considered to be on an equal footing with treaties (subject to the "last in time" rule), and thus this approach offers the possibility of using a traditional legislative approach to achieve objectives that might otherwise be accomplished by an Article II, Section 2 treaty. NAFTA was structured in this manner to avoid the difficulty of getting two-thirds of the Senate to approve the agreement, which would have been necessary if it had been framed as a treaty. Litigation challenging the failure to use the Article II, Section 2 ratification process for NAFTA was dismissed as a nonjusticiable political question. *Made in the USA Foundation v. United States*, 242 F.3d 1300, 1312 (11th Cir.), *cert. denied*, 534 U.S. 1039 (2001).

[19] Colloquially, the Senate role is often referred to as that of "ratifying" the treaty, but in fact the President completes the process of ratification (if she still supports the treaty at the time the Senate gives its advice and consent to ratification) by completing the necessary formalities, which typically involve sending the ratification documents to the official depositary for the particular treaty. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §303 cmt. d (1987) ("Even if a treaty has received the advice and consent of the Senate, the President has discretion whether to make the treaty").

the end of 2006.[20] Thus, for purposes of obtaining advice and consent to ratification of a treaty, political realities demand substantial bipartisan support. The prospects for approval of a controversial treaty may be especially bleak if a relatively thin Senate majority is faced by a President of the opposing party, but even a party that controls both the White House and the Senate must garner much support from Senators of the opposing party in order to achieve the two-thirds margin called for by Article II, Section 2.

Although the impact of the two-thirds majority required by the Constitution for approval of a treaty permeates every aspect of treaty maneuvers in the Senate, the situation for treaty proponents is much bleaker than simple vote-counting would itself make obvious. The Senate's own longstanding and deeply ingrained principles tend, through one procedure after another, to make it much easier to stop or delay any proposal (including a treaty) than to push it ahead in the face of opposition.[21]

The party controlling the Senate assigns itself a majority of the seats on every committee, and every committee chair is a member of the majority party. For present purposes, the most important committee is the Senate Committee on Foreign Relations, which has jurisdiction over treaties, although in certain instances some other committee may also be entitled to consider

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[20] The Democrats had a razor-thin margin of control in the Senate for a relatively short period after Republican Senator James Jeffords of Vermont left the party to become an Independent, and then voted with the Democrats to organize the Senate. *See* LINCOLN CHAFEE, AGAINST THE TIDE: HOW A COMPLIANT CONGRESS EMPOWERED A RECKLESS PRESIDENT 1-2, 59-61 (2008).

[21] The literature on the Senate and its procedures is immense. For a succinct and authoritative description of the internal Senate procedures that lead to the results that I describe in the text, see CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE 601-621 (1989). *See generally* LEWIS L. GOULD, THE MOST EXCLUSIVE CLUB: A HISTORY OF THE MODERN UNITED STATES SENATE (2005); FRED R. HARRIS, DEADLOCK OR DECISION: THE U.S. SENATE AND THE RISE OF NATIONAL POLITICS (1993); ESTEEMED COLLEAGUES: CIVILITY AND DELIBERATION IN THE U.S. SENATE (Burdett A. Loomis ed., 2000).

the treaty.[22] The Senate as an institution has long accorded great weight to seniority, and in the case of committees the critical determinant of rank (including the very important questions of succession to the chair and to the position of ranking minority member) is that of length of service on the committee.[23] There was a time when the member senior in service on a committee could be assured of taking the chair if that member's party held a majority in the Senate. Even in more recent years, when those prerogatives have been somewhat moderated, seniority remains by far the dominant factor in determining who will be chair of the Foreign Relations committee or any other.[24]

Even if a President strongly supports ratification of a treaty, the chair of the Senate Foreign Relations committee has great power, often subject to very few constraints, to bottle up the treaty.

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[22] *See* TIEFER, *supra* note 21, at 614 (the Armed Services Committee held hearings on the SALT II treaty and issued a negative report on it).

[23] *See id.* at 98-99 ("the Senate settled in the nineteenth century on the 'property right' and seniority norms: that Senators would keep committee seats unless they requested transfers and that the most senior member would be chair").

[24] *See id.* at 102-105; HARRIS, *supra* note 21, at 123 (modifications in the application of seniority principles made chairs and ranking members "less autocratic" but still had "never caused any Senate chair or ranking member to be deposed, nor have they ever caused a senator other than the most senior party member on a committee to be chosen for committee leadership"). Succession is complicated in some instances by Senate rules preventing a Senator from being chair of more than one major committee, with each Senator's choice having consequences for other Senators. "For example, in 1979, Senator Strom Thurmond (R.-S.C.) chose to be ranking minority member of Judiciary rather than Armed Services, displacing Senator Charles Mathias (R.-Md.) on Judiciary." TIEFER, *supra* note 21, at 105 n.110. In 1985, Senator Jesse Helms did not claim the chair of the Foreign Relations Committee, as he could have, since he had promised his constituents that he would remain chair of the Agriculture Committee. ERNEST B. FURGURSON, HARD RIGHT: THE RISE OF JESSE HELMS 271-272 (1986). In 1989, Helms decided that he wanted to be ranking member on Foreign Relations rather than Agriculture. Even though all the other Republicans on the Foreign Relations Committee chose Senator Richard Lugar as the ranking member, the Republican Conference installed Helms because he was more senior on the committee. HARRIS, *supra*, at 123.

It is the chair who decides whether a treaty will be scheduled for a hearing, and if so, when. The chair controls the selection of witnesses for any hearing that is held, and whether any vote will be taken on the treaty. As a practical matter, the chair can keep a treaty in the committee for years, with very little recourse for those (even the President) who would like to see a vote.[25] Even if the treaty would be supported by a two-thirds majority if it reached the floor, the chair would usually be able to prevent any such vote from taking place.

If and when a treaty reaches the floor of the Senate, which may be many years or even decades after it was sent to the Senate by the President (often a predecessor of the incumbent occupying the White House at the time of Senate consideration), other institutional characteristics of the Senate come into play. Unlike the House of Representatives, in which floor debate on bills is usually strictly controlled by the leadership and limited in time, the Senate's traditions allow unlimited debate and provide numerous other opportunities for those opposing action (even if they are relatively few in number) to prevent passage. The most famous (or notorious) aspect of this system is the filibuster, in which a Senator or a group of Senators endeavor to talk a measure to death.[26] The majority needed to impose the "cloture" that closes off debate is now only 60 votes, rather than the two-thirds vote that was once needed, but limiting debate in the Senate remains a difficult and uncommon procedure.

For the reasons discussed above, Senators opposed to ratification of a treaty (and particularly such a Senator who is chair of the Foreign Relations committee, ranking minority member on that committee, or otherwise a major beneficiary of the seniority system) are well positioned to stop or delay a treaty that they oppose, even if the President and many Senators support it. The

[25] TIEFER, *supra* note 21, at 614 ("[I]t may be a long wait before the Senate takes up ratification").

[26] A filibuster or other delaying floor tactic can be especially effective at the end of a session, when the press of Senate business is urgent and the willingness to wait out a filibuster or threatened filibuster is correspondingly weak.

leverage held by such Senators has another dramatic impact on the ratification process. Precisely because Senators can, due to the structure and procedures of the Senate, so effectively block a treaty that they find objectionable, those Senators are often able to demand and secure the inclusion of reservations, understandings, declarations, provisos, and other statements to address their concerns. This explains in large part the welter of such limitations that accompanies such treaties as the ICCPR, the CAT, and even the Genocide Convention.

Imagine a Senator who was a state prosecutor and later Governor of a state, and who fears that the ICCPR will impose requirements in the field of law enforcement that will be difficult for the states (thinking perhaps especially of her state) to comply with. The Senator's opposition might be withdrawn in light of the inclusion of a reservation providing that the treaty's prohibition on cruel, inhuman or degrading treatment or punishment does not go beyond the limitations already imposed by the relevant provisions of the U.S. Constitution,[27] along with an understanding that the treaty obligations of the United States might be limited by the requirements of federalism.[28] Senators fearing that treaty obligations might be inappropriately enforced by the courts might insist on assurances that the treaty is not self-executing.[29]

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[27] Along these lines, U.S. ratification of the ICCPR was subject to the reservation that "the United States considers itself bound by Article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States." 138 CONG. REC. 8068, 8070 (1992).

[28] *See id.* at 8071.

[29] The United States does not consistently follow either the monist or the dualist view with regard to the domestic effect of treaties. Even though treaties are "the supreme Law of the Land" under the Supremacy Clause, only self-executing treaties may be directly enforced by the courts. *See generally* John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310 (1992). The Senate's consent to ratification of the ICCPR includes the declaration that the protections it includes "are not self-executing." 138 CONG. REC. 8068, 8071 (1992). The Supreme Court has assumed that such a

Imagine this process being repeated with each Senator whose acquiescence is considered vital to approval of the treaty. The final appearance of the human rights treaties – in which the U.S. commitments are hedged with numerous reservations, understandings, declarations, provisos, and other limitations, some very narrow and others quite broad – then becomes easier to understand.[30] In reality, this process usually starts well before a treaty is sent to the Senate. The State Department, in preparing for the ratification process, will generally explore with influential Senators and their staffs the issues that might generate opposition. If potential problems are identified in advance, proposed reservations and other limitations can be included in the package of documents that is sent to the Senate in the first place, setting the baseline from which any future discussion will go forward.[31]

This discussion of the treaty ratification process, while far

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declaration in fact makes the treaty not self-executing, although Professor Halberstam has argued that this issue requires more detailed analysis. Malvina Halberstam, *Alvarez-Machain II: The Supreme Court's Reliance on the Non-Self-Executing Declaration in the Senate Resolution Giving Advice and Consent to the International Covenant on Civil and Political Rights*, 1 J. NAT'L SECURITY L. & POL'Y 89, 93-108 (2005).

[30] Although Tiefer does not appear to be making quite the same point that I am, his description of the ratification process provides a striking visual image that does effectively illustrate the progressive alteration of a treaty to accommodate actual or potential objections: "The treaty . . . floats along through the Senate, accompanied by its resolution of ratification, like a high-level diplomat accompanied in his journeys by an increasingly marked and creased passport." TIEFER, *supra* note 21, at 613-614. He further notes that reservations "may serve as a focus of elaborate maneuvering and posturing for political advantage" and that the "modern politics of the Senate's role has enlarged the importance of the reservation process." *Id.* at 617, 619.

[31] That is exactly what happened to the four treaties sent to the Senate by President Carter in early 1978. "The President's message, while a step in the right direction, came as a distinct disappointment to most supporters of the conventions, since he recommended their ratification only with the addition of several dozen reservations, declarations, understandings, and statements . . . ." U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES: WITH OR WITHOUT RESERVATIONS?, at vii (Richard B. Lillich ed., 1981).

from exhaustive, should be sufficient to explain why ratification of human rights treaties is such a drawn-out, contentious, and uncertain process, and one which often results in the inclusion of numerous reservations, understandings, declarations, and the like. Starting with the two-thirds requirement of Article II, Section 2, and proceeding through the many characteristics of the Senate that give individuals (especially chairs or others with substantial seniority) a great capacity to stop or delay action on a matter, many powerful factors favor delay over action in the ratification process. Given the nature of the treaty ratification system, the often unsatisfactory results reached with respect to human rights treaties are readily understood, even if not applauded.

II. The President's Unilateral Control over Treaty Termination

After long and near-total estrangement between the United States and the People's Republic of China (PRC), President Richard Nixon finally visited China in early 1972 and gave impetus to the process of improving the diplomatic contacts between the two nations. By the time Jimmy Carter was President, the United States was willing to recognize the government of the PRC as the sole legal government of China, and in December 1978 President Carter announced that the United States would recognize the PRC as of January 1, 1979. The Mutual Defense Treaty between the United States and the Republic of China (Taiwan) had stood as a barrier to this step, since the PRC would not normalize its relationship with the United States while the United States maintained its ties with Taiwan. Accordingly, when President Carter disclosed the pending recognition of the PRC he also announced that the Mutual Defense Treaty with Taiwan was being terminated. The treaty required one year's notice for termination, and the Carter administration informed Taiwan that the treaty would end on January 1, 1980.

Senator Barry Goldwater and a number of his colleagues

sued to prevent President Carter from unilaterally terminating the treaty with Taiwan. While the Constitution specifies the ratification process described and analyzed above, it is silent on how treaties are dissolved or otherwise terminated. The essence of Senator Goldwater's position was that since the treaty had been given the Senate's advice and consent to ratification, the Senate had a right to be involved in ending the treaty. Although there is no clearly-stated rationale adopted by a majority of the Supreme Court, the challenge to President Carter's action was dismissed as nonjusticiable.[32] Thus, while the Supreme Court did not rule on the merits of the question of what treaty-termination process is required by the Constitution, the effect of *Goldwater v. Carter* is to allow the President to unilaterally end a treaty under many circumstances, because the courts will refuse to intervene to stop her from doing so.

So far, unilateral termination of human rights treaties by the President has not been a major problem,[33] but the asymmetry in the procedures for making and unmaking treaties is striking. As described above, human rights treaties have traditionally followed a very long and tortuous road to ratification, if ratification is achieved at all. The enormous effort and political capital that must

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[32] *Goldwater v. Carter*, 444 U.S. 996, 996 (1979). The plurality opinion by Justice Rehnquist indicates the matter is a political question, Justice Powell thought it was not ripe, and Justice Marshall concurred in the judgment of dismissal, without explanation. *Id.* The majority in the Court of Appeals had rejected the plaintiffs' claims on the merits, holding that "the President did not exceed his authority when he took action to withdraw from the ROC treaty, by giving notice under Article X of the Treaty, without the consent of the Senate or other legislative concurrences." *Goldwater v. Carter*, 617 F.2d 697, 709 (D.C. Cir. 1979) (en banc).

[33] David Gray Adler has stated that *Goldwater* "will have the unfortunate effect of placing the exclusive authority to terminate defense, commercial, economic, and arms-control agreements, among others, in the hands of the president." David Gray Adler, *Court, Constitution, and Foreign Affairs*, *in* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 19, 38 (David Gray Adler & Larry N. George eds., 1996); *see also* DAVID GRAY ADLER, THE CONSTITUTION AND THE TERMINATION OF TREATIES (1986).

be invested in the ratification process can be undone in an instant by the President. It might be imagined, for example, that a President opposed to the absolute prohibition of torture, or to certain applications of the Geneva Conventions to those thought to be terrorists, or even to the United Nations itself, might act to withdraw from those treaties on behalf of the United States. Reversal of any such move would presumably require repetition of the arduous process described above before participation by the United States in the treaty would be restored.[34]

The Bush administration has taken advantage of the leeway granted the Executive by *Goldwater v. Carter* to terminate two treaties unilaterally. For more than a decade there has been extensive litigation over the consequences that should flow from broad U.S. violations of the Vienna Convention on Consular Relations (VCCR), which requires that foreign nationals who are arrested or detained be notified without delay of the right to have their consulate informed of their status, so that assistance may be provided. The United States was a party to the Optional Protocol recognizing the jurisdiction of the International Court of Justice to resolve disputes arising under the VCCR. After Mexico's action against the United States in the ICJ was successful, President Bush acted on behalf of the United States to withdraw from the Optional Protocol.[35] The United States continues to be a party to the VCCR itself, but any other State Party that seeks to remedy violations of

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[34] If there were widespread dissatisfaction in United States with the President's unilateral action, perhaps the Senate would act more quickly than usual to restore the status of the United States as a party to the relevant agreement. Presumably this would not take place until a new President was in office to sign the treaty and send it to the Senate. It might be theoretically possible to use a statute to make the United States a party to an international agreement under these circumstances, but if the President remained in office he could block legislation unless a veto was overridden by two-thirds of both the House and Senate.

[35] Liptak, *supra* note 17; Charles Lane, *U.S. Quits Pact Used in Capital Cases; Foes of Death Penalty Cite Access to Envoys*, WASH. POST, Mar. 10, 2005, at A1.

the treaty by the United States will not be able to present the matter to the ICJ, as Mexico was able to do.[36] The withdrawal from the Optional Protocol by the United States does not have the same deleterious impact on human rights as would denunciation of the VCCR as a whole, but the legal principles applicable in the two situations would appear to be the same. If some President decided to withdraw from the VCCR, in light of *Goldwater v. Carter* it is very difficult to imagine how she could be prevented from doing so.

Treaties dealing with nuclear testing and arms control have long generated many interesting questions of negotiation, ratification, and interpretation.[37] Most of those issues are not directly pertinent to the topic addressed here, but an arms control controversy does provide an additional example of unilateral treaty termination by a President. Under the terms of the 1972 Anti-Ballistic Missile (ABM) Treaty between the United States and the U.S.S.R. (later Russia), strict limits were placed on the steps that could be taken to develop and test missile defenses. Having made deployment of a missile defense system a high priority for his administration, President George W. Bush decided to withdraw from the treaty, as permitted by its terms, rather than stopping missile defense development at the point at which it would come into conflict with the terms of the ABM treaty.[38] Obviously the

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[36] Difficult remedial issues remain to be resolved even with regard to the claims raised by Mexico. *See Medellin v. Texas*, 128 S. Ct. 1346, 1353 (2008) (holding that the Texas courts are under no obligation to implement the judgment of the International Court of Justice in the *Avena* case brought by Mexico against the United States).

[37] As suggested in the text, when the Senate withholds its advice and consent to ratification of a treaty, that is usually done by inaction rather than by actually rejecting the treaty in a floor vote. A recent counter-example is provided by the Comprehensive Nuclear Test Ban Treaty, which was rejected in 1999 by the Senate. KEITH A. HANSEN, THE COMPREHENSIVE NUCLEAR TEST BAN TREATY: AN INSIDER'S PERSPECTIVE 51 (2006).

[38] *See, e.g.*, Steven Mufson & Dana Milbank, *U.S. Sets Missile Treaty Pullout; Bush To Go Ahead with Defense Tests*, WASH. POST, Dec. 14, 2001, at A1; Bradley Graham, *Withdrawal Gives U.S. More Latitude in Defense Tests*,

ABM treaty does not directly deal with human rights issues. However, this episode is instructive because it provides an additional example of how totally the President controls the process of treaty termination. The question of whether, under current conditions, it was good policy to terminate the ABM treaty in order to continue to pursue the missile defense program was highly controversial. However, since the President believed that it was in the nation's interests to terminate the treaty he was able to take that step, without the need for participation by the Senate or the House of Representatives.

As a practical matter, then, Presidents have been able to unilaterally terminate treaties, even though they have not done so frequently, and so far human rights treaties have not been primary targets. Nonetheless, the drawn-out ratification process for human rights treaties, which so often leads to numerous reservations, if the treaties are ratified at all, presents a stark contrast with the highly centralized and near-instantaneous process by which a President may withdraw the United States from a treaty.[39]

III. Developing Approaches to Alleviate the Difficulties Raised for Human Rights by the Asymmetrical Treaty Process

Sometimes those outside the United States assume that the

WASH. POST, Dec. 14, 2001, at A41; David E. Sangaer & Patrick E. Tyler, *Officials Recount Road to Deadlock over Missile Talks*, N.Y. TIMES, Dec. 13, 2001, at A1.

[39] In order to comply with its international obligations, the United States must give the advance notice specified in a treaty (one year for the mutual defense treaty with Taiwan, six months for the ABM treaty). No case has squarely dealt with the situation in which a President might attempt to terminate a treaty that does not by its terms authorize withdrawal, or where the President does not provide the full advance notice specified in a treaty's termination provision. It seems unlikely, however, that the courts would be willing to entertain such a case, since the justiciability concerns present in *Goldwater v. Carter* would be pertinent whether or not a treaty addresses withdrawal.

tardy and often hostile reception given to human rights treaties in the United States is due to opposition to the content of the treaties, and perhaps to sentiments that in effect boil down to support for American exceptionalism. Obviously the attitudes taken by policy makers in the United States toward international law in general and human rights law in particular vary widely. Plainly, certain Presidents and certain Senators are much more supportive of human rights treaties than are others. However, as explained above, much of the U.S. practice in this area is attributable to structural realities rather than necessarily to hostility toward the international norms.

There is not going to be any amendment to Article II, Section 2 of the Constitution to ameliorate the difficulties described here. Nor is it likely that the Senate will warmly embrace new procedures on the handling of treaties that would dramatically undermine the prerogatives that its members have traditionally exercised. However, the possibility of modifying Senate procedures should not be entirely discarded. Over time, the impact of seniority and the power held by committee chairs have been somewhat softened, and even the requirement for cloture to cut off a filibuster has been reduced from two-thirds to sixty votes. Given the compelling historical record establishing that human rights treaties – even demonstrably meritorious ones such as the Genocide Convention, the ICCPR, and the CAT – are too easily bottled up, perhaps special procedures could be developed to make it more likely that a treaty having substantial support will be the subject of hearings, a committee vote, and ultimately a floor vote. Something along this general line was put in place a few years ago when a bipartisan group of fourteen Senators reached a compromise to defuse the confrontation over use or threatened use of filibusters to impede judicial nominations. Sometimes key legislators are included on the delegations negotiating international agreements, and more effective use of that technique may help to smooth the path for human rights treaties.

An additional avenue to be explored is suggested by the "fast track" approach that Congress has used to consider trade

agreements such as NAFTA. Approving such agreements as treaties subject to the two-thirds requirement for Senatorial advice and consent would often be impossible. Moreover, a trade agreement presents an almost irresistible target for special interest amendments. The response has been to structure such agreements not as treaties subject to the Article II, Section 2 ratification process but rather as congressional-executive agreements that are adopted as legislation. Such a procedure brings the House of Representatives into the picture, when it would otherwise be excluded, but the Senate need only give its approval by a majority rather than by two-thirds. Fast-track trade agreements are also protected against being nibbled to death by amendments. The agreements are considered by each House of Congress on an up-or-down basis, with no amendments permitted.

It is time to consider more seriously whether some procedure like the fast-tracking of trade agreements can be used to streamline U.S. ratification of human rights treaties. It may well be that human rights treaties present a more compelling case for such procedures, given the multilateral nature of the treaties, which greatly complicates the interactions among the prospective parties. While very complicated, trade agreements are often bilateral, and NAFTA involved only three parties. The subject matter of human rights treaties may reasonably be thought to sweep more broadly than trade agreements, and into many issues that are extremely controversial, so working out the limitations on the use of such a process would be difficult.[40] However, the possibility of breaking

[40] It would be difficult to identify which international agreements, if any, that must take the form of Article II, Section 2 "treaties" as opposed to those that may properly be adopted through the legislative process. The Eleventh Circuit found that a challenge to NAFTA raising that question presented a nonjusticiable political question. *Made in the USA Foundation v. United States*, 242 F.3d 1300, 1312 (2001). Other interesting and difficult questions lurk as to the scope of the power of the United States to act through an Article II, Section 2 treaty as opposed to acting through legislation based on some other enumerated power. *See, e.g.*, David Golove, *Human Rights Treaties and the U.S. Constitution*, 52 DEPAUL L. REV. 579, 591-601 (2002); Richard A. Epstein,

the current treaty-ratification logjam by fashioning an approach along the lines of fast-track trade legislation – seeking majority approval in both Houses, and utilizing an up-or-down vote or at least strict limits on reservations – appears promising enough to merit further exploration.

Even without "fast-tracking," the expanded use of congressional-executive agreements on human rights in place of treaties may yield substantial benefits, especially by avoiding the barriers raised by the requirement that Article II, Section 2 treaties receive approval by two-thirds in the Senate. And, since a congressional-executive agreement is a statute, it cannot be terminated unilaterally by the President in the way that a treaty may. Through the operation of the "last in time" rule, there may also be situations in which a congressional-executive agreement would be an appropriate and efficient means by which the United States may withdraw from a reservation, understanding, or declaration that has been attached to a human rights treaty. In light of the extensive limitations that the Senate placed upon U.S. ratification of the Convention Against Torture and the ICCPR, among others, exploration should be given to any available option that offers the prospect of bringing the United States into fuller participation in the international treaty system protecting human rights.

Smoothing the Boundary Between Foreign and Domestic Law: Comments on Professors Dodge, Golove, and Stephan, 52 DEPAUL L. REV. 663, 667-669 (2002).