

How American Treaty Behavior Threatens National Security

Antonia Chayes

American treaty behavior is no longer an esoteric subject. Many people outside legal, academic, and diplomatic circles have taken notice, and what they observe does not reflect well upon the United States. America has been both lauded and criticized for its exceptionalism in the past.¹ But even America's staunchest allies are concerned by behavior that goes beyond a superpower's notion of entitlement to special treatment. There is bewilderment at the inconsistency and unreliability that seem to characterize the United States' attitude and actions toward international agreements. On such fundamental issues as nuclear proliferation, terrorism, human rights, civil liberties, environmental disasters, and commerce, the United States has generated both confusion and anger abroad. Such a climate is not conducive to needed cooperation in the conduct of foreign and security policy.

Americans regard themselves as law-abiding and chide others who are not. But to many in the world, the highly visible deviations from international legal obligations by the United States, such as failing to pay UN dues and attacking a nation without UN approval, are signs of lawlessness. Refusal to accept agreements that most other nations regard as important—such as the UN Convention on the Law of the Sea (UNCLOS), prohibition against the use of land mines, goals and timetables to slow climate change, and protection of the rights of the child—are viewed, incorrectly perhaps, as a disregard for international law. Historically, failure to join the rest of the world in the League of Nations or to break agreements with Native American tribes—nations within U.S. borders—had little impact on U.S. security. Today American treaty behavior serves neither the national interest nor American security.

Current U.S. treaty behavior is anachronistic in an era of globalization and

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1. Harold Hongju Koh, "On American Exceptionalism," *Stanford Law Review*, Vol. 55, No. 5 (May 2003), pp. 1479, 1483–1494; and Michael Ignatieff, "The Burden: The American Empire (Get Used to It)," *New York Times Magazine*, January 5, 2003, p. 22.

interdependence. It denies Americans the international support required to resolve critical global and regional problems. The United States has long been ambivalent in its attitude toward international agreements; both leader and laggard. It exhorts others to change their behavior in international law but hedges American acquiescence with delays and conditions. Today this attitude has hardened into near contempt for the law of nations. Ironically, the exhortation of other nations to change their ways continues unabated. But to the rest of the world, it sounds like hypocrisy. Until now, this American behavior has sought justification in the U.S. constitutional system. Now, however, the very constitution and domestic laws on which American treaty behavior relied seem to be undermined by the same contempt and arrogance that has pervaded U.S. attitudes toward international law. Although the United States remains the world's sole superpower, the inconvenient fact is that it can neither accomplish its goals nor function effectively in this "flattened" world without the lubricant of dependable, cooperative international treaty behavior. Time is running out.²

Understanding American treaty behavior is important not only to students and theoreticians, but also to policymakers, who need to confront the increasingly negative international impact it creates. This article first analyzes U.S. treaty behavior, seeking to illuminate whether the United States can indeed be criticized as exceptionalist, and if so, to what extent the criticism is valid. This analysis also demonstrates that although other democratic nations might also engage in behavior similar to that of the United States, the cumulative impact of American treaty behavior is more damaging overall. Second, the article attempts to explain some of the structural and historical reasons for American treaty behavior that are deeply rooted in the U.S. system of government and not simply explained by superpower arrogance. Third, the article looks at the impact and consequences of current treaty behavior and offers suggestions for a strategy that will better meet today's needs. This article seeks to widen as well as inform a debate that becomes particularly important in light of upcoming negotiations in two sensitive areas—the International Criminal Court and climate change—that will confront a new U.S. president inaugurated in 2009.

2. Numerous commentators, journalists, politicians, and activists have pointed to the deleterious impact of U.S. treaty behavior. See, for example, Philip Gordon, "Bridging the Atlantic Divide," *Foreign Affairs*, Vol. 82, No. 1 (January/February 2003), p. 70. See also Bruce Nussbaum, "Commentary: The High Price of Bad Diplomacy," *Business Week*, March 24, 2003, p. 33; and Ignatieff, "The Burden."

American Treaty Behavior Characterized

Commentators have found many ways to criticize and characterize U.S. treaty behavior. None, however, fully express the widespread disappointment in U.S. leadership or convey the urgency of problems that America has created for itself and the world.

“Unilateralism” does not adequately describe a century of treaty behavior. America created many significant multilateral treaties and institutions in the period of optimistic internationalism following World War II, for example, and it also exercised leadership in the General Agreement on Tariffs and Trade (GATT), the creation of the World Trade Organization (WTO), and regional trade agreements. The slim quantitative analysis available shows exponential growth in U.S. participation in treaties from the early 1900s to the end of the twentieth century.³

“Selective multilateralism”—or in Richard Haass’s words, “multilateralism à la carte”—is perhaps a more accurate description of U.S. treaty behavior than unilateralism. The United States does not oppose international agreements, but rather adheres to those obligations that serve its perceived interests and rejects other obligations that do not.⁴ Yet this realist description implies a degree of rationality that other nations might understand, even if they resented the conduct. But, even an unpleasant rationality is hard to find in some inconsistencies that characterize American actions.

Another time-honored description of U.S. international behavior has been American exceptionalism, dating back to Alexis de Tocqueville.⁵ Michael Ignatieff has revived the term among scholars and analysts of foreign affairs, and even the press has adopted it.⁶ Ignatieff takes a highly critical view in defining American exceptionalism: “American exceptionalism has at least three separate elements. First, the United States signs on to international treaties and then exempts itself from their provisions by explicit reservation, nonratification, or noncompliance. Second, the United States maintains double

3. See Stewart Patrick, “Multilateralism and Its Discontents: The Causes and Consequences of U.S. Ambivalence,” in Patrick and Shepard Forman, eds., *Multilateralism and U.S. Foreign Policy: Ambivalent Engagement* (Boulder, Colo.: Lynne Rienner, 2002), p. 11.

4. See Peter J. Spiro, “The New Sovereignists: American Exceptionalism and Its False Prophets,” *Foreign Affairs*, Vol. 79, No. 6 (November/December 2000), pp. 9–15.

5. Samuel Krislov, “American Federalism as American Exceptionalism,” *Publius*, Vol. 31, No. 1 (January 2001), p. 9. Alexis de Toqueville sought to explain why the United States, and not France, was able to create a democracy from revolution.

6. See “From Sea to Shining Sea,” *Economist*, November 8, 2003, pp. 6–8.

standards: judging itself and its friends by more permissive criteria than it does its enemies. Third, the United States denies jurisdiction to human rights law within its own domestic law, insisting on the self-contained authority of its own domestic rights tradition."⁷

All of the elements of Ignatieff's definition can be found in American treaty behavior, not merely in the human rights area. The most notable case is, of course, the League of Nations Charter, which the United States failed to ratify after World War I. More recently, American failure to ratify the Comprehensive Test Ban Treaty (CTBT) has created problems in securing arms control cooperation. It can be argued that the United States has also undermined several weapons treaties with packages of reservations and understandings. The list is extensive.

In fairness, American treaty behavior does have positive elements on which a new approach can be based. As Harold Koh notes, the United States, historically, has been exceptional in its international leadership and activism. And it alone holds the power to forge solutions to global problems. If the United States has been reluctant to be bound by the growing network of international agreements, it characteristically abides by those agreements it ratifies. When it refuses to ratify or fully implement certain provisions, the United States is at least candid with the world, unlike other nations that join treaty regimes with which they do not intend to comply.⁸

Nor is the United States unique in displaying uncooperative treaty behavior. The French opted out of NATO but keep a foothold. Britain attaches many reservations to human rights treaties. Iceland and Japan have arguably violated the International Convention for the Regulation of Whaling.⁹ But given the singular power the United States wields, its uncooperative treaty behavior is more noticeable and uniquely damaging to international comity. Moreover, world opinion—fairly or unfairly—holds America's conduct to a higher standard of expectation. The following eight sections discuss and analyze the

7. See Michael Ignatieff, "Introduction: American Exceptionalism and Human Rights," in Ignatieff, ed., *American Exceptionalism and Human Rights* (Princeton, N.J.: Princeton University Press 2005), p. 3.

8. Koh, "On American Exceptionalism," especially pp. 1483–1494. For positive assessments of U.S. conduct, see also Seymour Martin Lipset, *American Exceptionalism: A Double-Edged Sword* (New York: W.W. Norton, 1996); and James Q. Wilson, "American Exceptionalism," *American Spectator*, Vol. 39, No. 7 (September 2006), pp. 36–43. See also Oona Hathaway, "Do Human Rights Treaties Make a Difference?" *Yale Law Journal*, Vol. 111, No. 8 (June 2002), pp. 1935–2042; and Beth A. Simmons, "Theories of Compliance," book manuscript, 2008, chap. 3.

9. See "U.S. Sanctions against Japan for Whaling," *American Journal of International Law*, Vol. 95, No. 1 (January 2001), pp. 149–152; and Bob Holmes and Duncan Graham-Rowe, "Pressure Is On to Lift Whale Ban," *New Scientist*, June 18, 2005, pp. 6–8.

kinds of treaty behavior characterized as American exceptionalism to understand more fully the entire range of criticism.

FAILURE TO RATIFY

Failure to ratify has been the *bête noire* of human rights proponents. Of the principal human rights treaties, the United States has refused to ratify three: the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). This failure is exceptional compared to the records of other liberal democracies and most other nations. CEDAW has 185 parties not including the United States, which joined Somalia and a handful of others in refusing to ratify it. One hundred fifty-seven states ratified the ICESCR while only six treaty signatories, including the United States, did not.¹⁰ After Harry Truman's administration signed the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), the United States took nearly forty years to ratify it (in 1988).¹¹

Similarly troubling are the occasions when the United States wrings compromises from other countries during the negotiating process, often significantly changes the terms and even basic concepts of the agreement, only to refuse to ratify the resulting treaty or to walk away from negotiations altogether. Most notorious of these treaties is the Rome Statute of the International Criminal Court (ICC). Although the United States signed the Rome Statute in 2000, President Bill Clinton voiced his continuing concerns with it, and stated that he would not present it to the Senate for ratification. Without further changes, however, the Clinton administration considered it important to be a signatory so that it could participate in final negotiations.¹² The George W. Bush administration took more drastic action, announcing that the United States refused to become a party to the Rome Statute and, in a dramatic gesture, "unsigned" the treaty.¹³

10. States Parties to CEDAW, <http://www.un.org/womenwatch/daw/cedaw/states.htm> (accessed March 23, 2008); and States Parties to ICESCR, <http://www2.ohchr.org/english/bodies/ratification/3.htm> (accessed April 15, 2008).

11. See Lawrence J. LeBlanc, *The United States and the Genocide Convention* (Durham, N.C.: Duke University Press, 1991); and Natalie Hevener Kaufman, *Human Rights Treaties and the Senate: A History of Opposition* (Chapel Hill: University of North Carolina Press, 1990).

12. David Scheffer, "Staying the Course with the International Criminal Court," *Cornell Law Journal*, Vol. 35, No. 1 (November 2001–February 2002), p. 47.

13. See "U.S. Notification of Intent Not to Become a Party to the Rome Statute," *American Journal of International Law*, Vol. 96, No. 3 (July 2002), p. 724. The lead U.S. negotiator for the Rome Statute, David J. Scheffer, offers his assessment of the treaty in Scheffer, "The United States and the Inter-

Other examples dot the last century to the present. After years of negotiating the Convention on the Law of the Sea, the United States still disputed one of its provisions concerning seabed mining and, based upon that objection, refused to sign the convention. Although not a signatory, the United States nevertheless benefited from the regime by claiming that it accepted many of UNCLOS's articles under customary international law.¹⁴

The United States has also undercut efforts to strengthen international arms control enforcement. Since 1980, states parties to the Biological Weapons Convention (BWC) have held review conferences to develop a more robust verification system. In March 2001 an ad hoc group that included the United States negotiated a draft protocol seeking to establish a system similar to that of the Chemical Weapons Convention (CWC) in which America fully participates. But the United States rejected it and, on the final day of the Fifth Review Conference in December 2001, abruptly proposed to terminate the ad hoc group.¹⁵

The United States has further angered allies by finding other ways to carve out portions of a treaty to meet its interests. Despite its failure to ratify the CTBT, for example, America continues to participate selectively while declaring itself outside any obligations or verification procedures of the regime. It funds—and benefits from—the International Monitoring System, which tracks fallout from nuclear tests with sensitive instruments that can detect even minimal payloads.¹⁶

Although no evidence suggests that the United States deliberately misleads

national Criminal Court," *American Journal of International Law*, Vol. 93, No. 1 (January 1999), pp. 12–22. For a legal assessment of "unsigned," see Edward T. Swaine, "Unsigned," *Stanford Law Review*, Vol. 55, No. 4 (May 2003), pp. 2061–2089.

14. Although the United Nations negotiated an amendment to part 11 of the convention to assuage America's concerns, the United States still has not ratified it. See Leigh S. Ratiner, "The Law of the Sea: A Crossroads for American Foreign Policy," *Foreign Affairs*, Vol. 60, No. 5 (Summer 1982), pp. 1006–1021; and James K. Sebenius, *Negotiating the Law of the Sea* (Cambridge, Mass.: Harvard University Press, 1984). But compare with James L. Malone, "Who Needs the Sea Treaty?" *Foreign Policy*, No. 54 (Spring 1984), pp. 44–63. For a legal analysis of nonsignatories, see Luke T. Lee, "The Law of the Sea Convention and Third States," *American Journal of International Law*, Vol. 77, No. 3 (July 1983), pp. 541–568.

15. The last review conference was held in April 2008. Oliver Meier, "CWC Conference Boosts Treaty, Exposes Rifts," *Arms Control Today*, December 2007, http://www.armscontrol.org/act/2007_12/CWC.asp.

16. See Emma Belcher, "U.S. Exceptionalism and the Comprehensive Test Ban Treaty," unpublished paper, Fletcher School of Law and Diplomacy, Tufts University, 2004; Thomas Graham Jr. and Damien J. LaVera, "Nuclear Weapons: The Comprehensive Test Ban Treaty and National Missile Defense," in Patrick and Forman, *Multilateralism and U.S. Foreign Policy*, pp. 225–246; and Daryl G. Kimball, "CTBT Rogue State?" *Arms Control Today*, December 2001, http://www.armscontrol.org/act/2001_12/ctbtanalysisdec01.asp.

other nations about its intent to sign and ratify treaties, this sequence of participating then withdrawing at the end—more than the simple decision not to sign or ratify a treaty—intensifies consternation abroad. America appears to others as a free rider, benefiting from the terms negotiated in international agreements without incurring the costs of adherence. The United States' unwillingness to ratify the Kyoto Protocol is a case in point. Such free-riding behavior evinces a double standard. It encourages mimetic behavior by other nations that, if multiplied, can impair treaty effectiveness. It is also part of a pattern of U.S. treaty actions that collectively may hurt the United States when it seeks support for agreements or other foreign policy efforts that it deems important.

RESERVATIONS, UNDERSTANDINGS, AND DECLARATIONS

The United States characteristically exempts itself from specific treaty provisions by attaching reservations, understandings, and declarations (RUDs) to the treaty's ratification. Considered mechanisms of accommodation, RUDs are used to strike a balance between fulfilling the objectives of a treaty and reassuring potential signatories that they will not relinquish an undue portion of their sovereignty. RUDs serve a useful purpose in helping to broaden the base of signatories. But they are not useful if they carve out so many fundamental exceptions that the treaty is made ineffective. Critics argue that this is what the United States does. The freedom to impose RUDs has become the sine qua non for American treaty ratification. Any attempt to prohibit their inclusion would likely sound a treaty's death knell in the Senate.¹⁷

The United States affixes a number of boilerplate RUDs to treaties, especially those concerning human rights. These include understandings that it will construe obligations in accordance with its system of federalism and with its constitution, as well as "non-self-executing" clauses that require Congress to pass an additional law or laws giving effect to the treaty.¹⁸ Only then can courts adjudicate claims to enforce its provisions. This additional hurdle further complicates the ratification process, delaying implementation and, with it, a private right of action.¹⁹ But the United States is not alone in having a dualist,

17. See David J. Scheffer, "Staying the Course with the International Criminal Court," *Cornell International Law Journal*, Vol. 35, No. 1 (November 2001–February 2002), p. 47.

18. *Foster v. Neilson*, 27 U.S. 253 (1829).

19. Nicholas Quinn Rosenkranz contends that legislation implementing treaty provisions cannot extend beyond the enumerated powers of Congress without becoming unconstitutional. This view, as Rosenkranz explains, calls for partially overturning or seriously limiting the Supreme Court's opinion in *Missouri v. Holland*, 252 U.S. 416 (1920), which interpreted the treaty power

not a monist, system that automatically incorporates ratified treaties into the law of the land.

Nor is America alone in its use of RUDs. Not only do Western democracies limit their participation by the same methods, but countries governed by sharia law also carve a wide swath of exemptions from the human rights treaties they sign.²⁰ Other signatories tolerate these deviations both in the interest of universality and, in the case of America, because of the symbolic or actual importance of its inclusion in an international regime.²¹

Nevertheless, the United States remains more widely criticized than other nations for its practice of including RUDs. This criticism is in part aimed at the nature as well as the scope of the exemptions America has demanded. Some northern European states argue that the United States has undermined the “object and purpose” of the International Covenant on Civil and Political Rights (ICCPR), violating the Vienna Convention on the Law of Treaties²² by attaching RUDs to the ICCPR’s limitations on the death penalty and by insisting that it define the treaty prohibition against torture and cruel, inhuman, or degrading treatment according to American judicial interpretation of similar constitutional provisions.²³

Another point of contention has been the Connally amendment, an “automatic” reservation by which the United States limits the jurisdiction of the International Court of Justice (ICJ). All matters “essentially within the domestic jurisdiction of the United States of America as determined by the United States of America” are declared outside the ICJ’s jurisdiction.²⁴ Concern raised

broadly. See Rosenkranz, “Executing the Treaty Power,” *Harvard Law Review*, Vol. 118, No. 6 (April 2005), pp. 1867–1938.

20. Afghanistan, for example, declared that it reserved the right to uphold “reservations on all provisions of the Convention [on the Rights of the Child] that are incompatible with the laws of Islamic Shari’a and the local legislation in effect.” See <http://www.unhcr.ch/tbs/doc.nsf/73c66f02499582e7c1256ab7002e2533/b1710eb42f6170b8c1256b9200649405?OpenDocument>.

21. Some treaties allow states to suspend obligations in cases of emergency. The United Kingdom used this type of reservation, a derogation, in the ICCPR. France also has attached reservations to its ratification of the ICCPR. See http://www.ohchr.org/english/countries/ratification/4_1.htm.

22. Article 19 of the convention reads: “A State may, when signing, ratifying, accepting, approving, or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.” For the text, see http://www.untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

23. Catherine Redgwell, “U.S. Reservations to Human Rights Treaties: All for One and None for All?” in Michael Byers and Georg Nolte, eds., *United States Hegemony and the Foundations of International Law* (New York: Cambridge University Press, 2003), pp. 392–415.

24. In 1946 the Senate inserted this reservation into the optional clause of Article 36, paragraph 2, of the statute of the International Court of Justice. See *Interhandel Case (Switzerland v. United States*

by that issue pales in comparison with the consternation caused by the withdrawal of the United States from the compulsory jurisdiction of the World Court in the wake of the Nicaragua case in 1984, after the court rejected its arguments.²⁵

Some observers contend that it is less the nature of the specific RUDs than the cumulative effect of widespread American use that generates hostility. Whether American use of RUDs in fact undermines the effectiveness of treaties is the subject of lively debates among scholars. In the area of human rights, Harold Koh and Andrew Moravcsik regard such use of RUDs as a form of “exemptionalism” that creates a pernicious double standard for the United States. They criticize the nation’s reluctance to make international human rights treaties a source of law in the domestic realm.²⁶

Others, however, defend America’s use of RUDs. Jack Goldsmith posits that these terms enable the United States to square its constitution and domestic political structure with international human rights regimes that it would otherwise spurn. According to Goldsmith, and other self-described “revisionists,” the United States upholds treaties by refusing to commit to provisions it knows it cannot fulfill. Countries less serious about their international obligations simply fall into noncompliance. The “revisionist” camp also finds little ground for incorporating international agreements into U.S. law, which it sees as an end-run around accountable law making.²⁷ “In a flourishing constitutional democracy with a powerful tradition of domestic human rights protection,” Goldsmith concludes, “such issues should not be decided by international norms and institutions.”²⁸

Both arguments have considerable merit, but the criticism suggests that the U.S. executive and legislative branches must pay more attention to the resentment an overzealous use of RUDs has caused. It should be possible to continue

of America), 1959 ICJ 6 (March 21) (separate opinion of Judge Lauterpacht) (Preliminary Objections).

25. See Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), 1984 ICJ 392. See also Abram Chayes, “Nicaragua, the United States, and the World Court,” *Columbia Law Review*, Vol. 85, No. 7 (November 1985), pp. 1445–1482.

26. See Harold Koh and Andrew Moravcsik, “The Paradox of U.S. Human Rights Policy,” in Ignatieff, *American Exceptionalism and Human Rights*, pp. 147–197; and Koh, “On American Exceptionalism.”

27. See Curtis A. Bradley and Jack L. Goldsmith, “Customary International Law as Federal Common Law: A Critique of the Modern Position,” *Harvard Law Review*, Vol. 110, No. 4 (February 1997), pp. 815–876; Jack Goldsmith, “Should International Human Rights Law Trump U.S. Domestic Law?” *Chicago Journal of International Law*, Vol. 1, No. 2 (Fall 2000), pp. 327–339; and Curtis A. Bradley and Jack L. Goldsmith, “Treaties, Human Rights, and Conditional Consent,” *University of Pennsylvania Law Review*, Vol. 149, No. 2 (December 2000), pp. 399–468.

28. Goldsmith, “Should International Human Rights Law Trump U.S. Domestic Law?” p. 335.

to rely on RUDs that protect the Constitution and federal system, without undermining a treaty that is otherwise beneficial. RUDs remain a valuable tool for the executive to help overcome the difficult obstacle of Senate ratification. However, both a proposing executive and responsible senators must keep in mind the objective of a proposed treaty and how much it can enhance needed international cooperation. There may be, as Curtis Bradley, Goldsmith, and others argue, a democratic deficit inherent in many treaties, but the negotiation and ratification process can ensure that no more sovereignty is relinquished than is necessary in such an interdependent world.

FAILURE TO SUPPORT A TREATY REGIME

In some cases, the United States has become a party to a treaty regime and then failed to support it adequately with the funding or commitment that would help ensure effectiveness. This problem surfaced with the CWC following a bitter ratification tussle. After the Senate imposed twenty-eight “conditions,” notwithstanding the CWC’s express prohibition of any reservations, the chamber gave its consent on April 24, 1997. But after the treaty’s entry into force, America met CWC implementation requirements with intransigence. United States personnel—under Pentagon oversight—were especially uncooperative with inspectors, frustrating verification of chemical stockpiles.

Underscoring the extraordinary influence that the United States exerts, nations around the world followed its lead, for better and for worse. Once the U.S. Senate ratified the CWC, news spread quickly and eighty-six countries joined on the same day. Other states also took note of the twenty-eight “conditions,” particularly the one forbidding CWC officials from removing samples of material from U.S. territory for tests—a central piece of the rigorous inspection system. India inserted the same provision into its ratification, while other states parties, including China and Japan, intimated they would take advantage of like conditions. When the United States submitted its declaration on chemical weapons production facilities late, others emulated it. Nations likewise failed to pay their dues in a timely fashion, just as the United States was tardy with its payments. This mimetic effect even reached American actions on the ground, as China and Iran similarly objected to the use of x-ray verification by inspectors.

Over time, however, the United States grew familiar with CWC procedures and reached a level of accommodation. If America can now justly claim to be an upstanding member of the treaty regime, its recent dispute over use of riot control agents and calmatives has rekindled tensions.²⁹

29. See Robert Z. Lawrence, “U.S. Trade Policy: The Exception to American Exceptionalism?” in

In contrast to weapons inspections, U.S. support for international trade regimes has been stronger, although not without its inconsistencies and actions that created resentment abroad. Since the end of World War II, the United States has been an active proponent of multilateral trade agreements, including the GATT and WTO.³⁰ America furnished the impetus for many of the measures, both procedural and substantive, that make the WTO one of the most comprehensive and effective international regulatory regimes today. Specifically, it spearheaded the dispute resolution scheme that provides for binding adjudication of trade agreements within its jurisdiction. Not unlike Europe, the United States is slow to comply, but it has ultimately done so, even at some internal cost.³¹

Yet even in the sphere of international commercial agreements, the United States drew criticism from other members of the GATT and domestic commentators for using unilateral measures. Section 301 of the Trade Act of 1974 still authorizes the president to eliminate unfair trade practices, and this authority, further augmented by even tougher amendments, was used against major U.S. trading partners from Asia to South America. Moreover, in 1981 Ronald Reagan's administration employed voluntary export restraints against Japan to curb the flow of foreign automobiles into the United States. Although earlier unilateral actions have not been repeated, the continued existence of that power causes concern among other signatories.³²

NONCOMPLIANCE

Compliance is probably the most important area of treaty behavior, because a treaty becomes meaningless if most of its signatories ignore its provisions.³³

Morton H. Halperin, Jeffrey Laurenti, Peter Rundlet, and Spencer P. Boyer, *Power and Superpower: Global Leadership and Exceptionalism in the 21st Century* (Washington, D.C.: Brookings Institution Press, 2007); and Joel P. Trachtman, "The WTO Cathedral," *Stanford Journal of International Law*, Vol. 43, No. 1 (Winter 2007), pp. 127–167.

30. Amy Smithson, "The Chemical Weapons Convention," in Patrick and Forman, *Multilateralism and U.S. Foreign Policy*, pp. 247–259; and Danielle Tarin, "The United States and the Chemical Weapons Convention: Exemplifying American Exceptionalism in Treaty Behavior," unpublished paper, Fletcher School of Law and Diplomacy, Tufts University, 2006.

31. Arbitrator's Decision, United States Tax Treatment for "Foreign Sales Corporations," Recourse to Article 21.5 of the DSU by the European Communities, WT/DS108/ARB (August 30, 2002); and Appellate Body Report, United States Tax Treatment for "Foreign Sales Corporations," Recourse to Article 21.5 of the DSU by the European Communities, WT/DS108/AB/RW (January 14, 2002).

32. See B. Peter Rosendorff, "Voluntary Export Restraints, Antidumping Procedure, and Domestic Politics," *American Economic Review*, Vol. 86, No. 3 (June 1996), pp. 544–561; and Steven Berry, James Levinsohn, and Ariel Pakes, "Voluntary Export Restraints on Automobiles: Evaluating a Trade Policy," *American Economic Review*, Vol. 89, No. 3 (June 1999), pp. 400–430.

33. See generally Michael J. Glennon, "How International Rules Die," *Georgetown Law Journal*, Vol. 93, No. 3 (March 2005), pp. 939–991. See also Oona A. Hathaway, "Do Human Rights Treaties

Despite an impressive record of compliance generally, America's noncompliance became a dramatic issue after the exposure of detainee abuse at the Abu Ghraib prison in Iraq, continuing media coverage of the treatment of prisoners at Guantánamo Bay and the Supreme Court opinion in *Hamdan v. Rumsfeld*.

As a party to the 1949 Third Geneva Convention Relative to the Treatment of Prisoners of War, the United States must adhere to one of its central provisions: that "no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever." Article 3, often referred to as "Common Article 3" because it appears in all four Geneva Conventions, prohibits "outrages upon personal dignity, in particular, humiliating and degrading treatment" and "cruel treatment and torture." As one scholar notes, the "standards of Common Article 3 are . . . well established customary international law which the United States for half a century has applied as a baseline protection in conflicts in Korea, Vietnam, Panama, Bosnia, Haiti, and Somalia."³⁴

Yet in February 2002, the Bush administration announced that neither the Afghan nor Iraqi detainees held at Guantánamo were entitled to prisoner-of-war (POW) status and thus could not claim the protections afforded under the convention. Still, the Bush administration asserted, "The detainees will receive much of the treatment normally afforded to POWs by the Third Geneva Convention."³⁵ Its words belied reality, as graphic accounts of detainee abuse—both physical and mental—shocked the world.³⁶

Several detainees have sought to advance claims of abuse and wrongful detention against the U.S. government in American courts and more recently in Germany. Salim Ahmed Hamdan, a Yemeni national and formerly a driver for Osama bin Laden, was held in U.S. custody at Guantánamo after being captured in Afghanistan. Although Hamdan was not charged with any crime following his apprehension in November 2001, President Bush deemed him

Make a Difference?" *Yale Law Journal*, Vol. 111, No. 8 (June 2002), pp. 1935–2042; and Harold Hongju Koh, "Why Do Nations Obey International Law?" *Yale Law Journal*, Vol. 106, No. 8 (June 1997), pp. 2599–2659. For the "revisionist" view, see Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (New York: Oxford University Press, 2005); and Oona A. Hathaway and Ariel N. Lavinbuk, "Rationalism and Revisionism in International Law," *Harvard Law Review*, Vol. 119, No. 5 (March 2006), pp. 1404–1443, for a critical review of the revisionists.

34. Cornelia Pillard, "Unitariness and Myopia: The Executive Branch, Legal Process, and Torture," *Indiana Law Journal*, Vol. 81, No. 4 (Fall 2006), p. 1297.

35. Office of the Press Secretary, "Fact Sheet: Status of Detainees at Guantanamo" (Washington, D.C.: White House, February 7, 2002), <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html>.

36. For a recent example, see Eric Fair, "An Iraq Interrogator's Nightmare," *Washington Post*, February 9, 2007.

eligible for trial by military commission. Three years after his capture, the United States finally charged him with conspiracy “to commit . . . offenses triable by military commission.” Hamdan petitioned for a writ of habeas corpus, claiming, *inter alia*, that trial by military commission violated the Third Geneva Convention.³⁷

The United States argued before the Supreme Court that Hamdan could not seek relief under the Geneva Conventions. According to the United States, the conventions afford full protections to detainees only in “cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.” Because the conflict with al-Qaida was neither a declared war nor a conflict between two or more such parties, the United States maintained that “the conflict with Al Qaeda [was] not . . . a conflict to which the full protections afforded detainees under the 1949 Geneva Conventions apply.”³⁸ The United States also argued that the conventions’ protections applied only to their signatories and because al-Qaida was not a signatory to the conventions, the protections did not apply to Hamdan.³⁹ The Supreme Court rejected these arguments, holding not only that Common Article 3 did in fact apply to Hamdan, but also that the procedures adopted by the United States to prosecute Hamdan—trial by military commission—violated Common Article 3.⁴⁰

In addition to the Geneva Conventions, the United States is party to the 1984 Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Torture Convention). The Torture Convention, which prohibits states parties from engaging in such acts, defines torture as any action “by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession . . . or intimidating or coercing him or a third person.”⁴¹

The United States attached a reservation to its ratification of the Torture Convention that it would interpret the prohibition on cruel, inhuman, and degrading treatment only to the extent that the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution banned such treatment.⁴² Then, in a 2002

37. *Hamdan v. Rumsfeld*, 548 U.S. 55 (2006), 126 S.Ct. 2749.

38. *Ibid.*, p. 2795.

39. *Ibid.*

40. *Ibid.*, pp. 2793–2799.

41. See Part 1, Articles 1 and 16, <http://www.ohchr.org/english/law/cat.htm>.

42. The U.S. reservation can be found at <http://www.ohchr.org/english/bodies/ratification/9.htm>.

memorandum since repudiated, the Justice Department offered a narrowly circumscribed interpretation of “torture”: “We further conclude that certain acts may be cruel, inhuman, and degrading but still not produce pain and suffering of the requisite intensity to fall within Section 2340A’s [of the domestic legislation implementing the Torture Convention] proscription against torture. . . . Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury such as organ failure.”⁴³ Contrary to this limitation, other nations regard U.S. treatment of detainees at Abu Ghraib as torture under any plausible interpretation of the convention. And the failure to punish senior military leaders in the aftermath of the Abu Ghraib scandal has created widespread concern that Americans will suffer similar treatment.

The Bush administration’s response to the Supreme Court decision was not a fundamental reconsideration of detention policy. Instead, it proposed, and Congress enacted, a law that enshrined military commissions, presumably curing one defect of Hamdan’s treatment—the lack of congressional sanction.⁴⁴ And although the law defined “torture” more broadly than in the discarded Department of Justice memoranda,⁴⁵ it did not cure all of the due process issues raised. The *Manual for Military Commissions* issued as a guide to actions under the legislation limits detainees’ right to habeas corpus and allows convictions based on hearsay and coerced evidence.⁴⁶ Only prisoners charged with a crime appear to have any legal rights, leaving the vast majority of prisoners in indefinite detention. Whether the Military Commissions Act of 2006 either meets constitutional muster or complies with U.S. international obligations remains to be seen. In 2007 the Supreme Court agreed to hear a case brought by Guantánamo detainees that challenged the constitutionality of the denial of habeas corpus.⁴⁷

43. See Office of Legal Counsel to Alberto Gonzales, U.S. Department of Justice, “Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A,” Memorandum from Assistant Attorney General Jay S. Bybee, August 1, 2002. A later memorandum by John Yoo, written in 2003, expands on this definition. See Mark Mazzetti, “’03 U.S. Memo Approved Harsh Interrogations,” *New York Times*, April 2, 2008.

44. In response to the Supreme Court’s decision, Congress passed the Military Commission Act of 2006 in October. See Public Law 109-366, 120 stat. 2600 (2006).

45. See Office of Legal Counsel, “Legal Standards Applicable under 18 U.S.C. §§ 2340–2340A,” Memorandum by Acting Assistant Attorney General Daniel Levin, December 30, 2004, <http://www.usdoj.gov/olc/2004opinions.htm>.

46. For the 2007 edition of the *Manual for Military Commissions*, see <http://www.defenselink.mil/news/d20080213manual.pdf>. It contains the rules and procedures that implement the Military Commissions Act of 2006. In addition, the manual prohibits defense counsels from presenting classified evidence unless the government approves its use. See also “Attorneys for 3 Guantánamo Detainees Criticize New Tribunal Rules,” *International Herald Tribune*, February 8, 2007.

47. *Boumediene v. Bush*, 127 S.Ct. 3078 (2007), consolidated with *Al Odah v. United States*, 127 S.Ct.

Despite these recent and deeply disturbing examples, the record of U.S. treaty compliance outside a few salient areas concerning war and peace is rather good. It is a record that can be built on in the future. American compliance in arms control has been quite exacting, even during the extended period of Cold War bilateral agreements. The United States does not suffer by comparison with other nations in its enforcement of environmental treaties either.⁴⁸ Italy, for example, failed to comply with the International Trade in Endangered Species of Wild Fauna and Flora (CITES) when it imported alligator hides for its shoe manufacturing industry.⁴⁹ Japan has likewise been somewhat lax in its CITES enforcement, as a major importer of endangered species.⁵⁰ Russia has transgressed at one time or another almost all environmental treaties ratified in the Soviet era.

In fact, there are many cases in which the United States has not only complied, but has also led other nations in a cooperative effort to make the treaty at issue effective. The Montreal Protocol on Substances That Deplete the Ozone Layer (1987) constitutes one of the most visible examples. The United States led efforts to prevent the destruction of the stratospheric ozone by being one of the first countries to ban chlorofluorocarbons (CFCs) as aerosol propellants for nonessential uses. America similarly directed efforts to achieve the goals of CITES after passing several domestic laws to put pressure on recalcitrant governments, such as the Lacey Act banning wildlife imports from Singapore. The threat of U.S. trade sanctions also led Japan to withdraw its CITES reservations on marine turtles in 1994. Such environmental zeal for compliance has paradoxically led other nations to criticize the United States for violating international trade agreements. However, international resentment in the environ-

3067 (2007), was brought on behalf of thirty-seven Guantánamo detainees. It raises the question of whether requiring federal court challenges to Combatant Status Review Tribunal decisions regarding Guantánamo detainees to be heard under truncated procedures in the U.S. Court of Appeals for the District of Columbia Circuit, instead of under the federal habeas corpus statutes normally used to challenge unlawful detentions, constitutes an unconstitutional suspension on the writ by Congress. The Supreme Court heard oral arguments on December 5, 2007. See Robert Barnes, "Justices Weigh Courts' Role in Detainee Cases," *Washington Post*, December 5, 2005; and Amy Goldstein, "Justices Won't Hear Detainee Rights Cases—for Now," *Washington Post*, April 3, 2007. See also Linda Greenhouse, "A Second Case on Detainees Complicates Deliberations," *New York Times*, February 6, 2008 (referring to yet another case: *Bismullah v. Gates*).

48. Michael J. Glennon and Alison L. Stewart, "The United States: Taking Environmental Treaties Seriously," in Edith Brown Weiss and Harold K. Jacobson, eds., *Engaging Countries: Strengthening Compliance with International Environmental Accords* (Cambridge, Mass.: MIT Press, 1998), pp. 173–214.

49. See Peter H. Sand, "Whither CITES? The Evolution of a Treaty Regime in the Borderland of Trade and Environment," *European Journal of International Law*, Vol. 8, No. 1 (1997), pp. 29–58.

50. See Weiss and Jacobson, *Engaging Countries*.

mental area is focused not on compliance, but on failure to enter treaties designed to curb energy consumption.

ACTIVE UNDERMINING OF A TREATY REGIME

There are not many cases in which the United States has deliberately undermined a treaty regime or tried to undercut its effectiveness. But one egregious example—the protracted battle to establish the International Criminal Court—sets just the kind of negative example that encourages irresponsibility in others. While 139 countries signed the Rome Statute and more than 100 ratified it, only seven countries voted against it—China, Iraq, Israel, Libya, Qatar, and Yemen, as well as the United States. Critics of the ICC voice concern over its expansive jurisdiction, which encompasses nationals from signatory and nonsignatory states, as well as over its potential to be co-opted for a partisan agenda.

The Bush administration demonstrated its aggressive stance against the ICC by “unsigning” the treaty and shepherding through the American Service-Members’ Protection Act (ASPA) in 2002.⁵¹ ASPA prohibits U.S. courts, agencies, and governmental representatives from providing any kind of assistance to the ICC or even responding to requests for cooperation.⁵² The legislation further restricts U.S. personnel from participating in UN peacekeeping operations unless the president has issued a waiver. ASPA even contains a provision that authorizes the president to “use all means necessary and appropriate” to free U.S. personnel detained by the ICC, known widely as the “Hague Invasion Act.”⁵³ According to David Byrne, a former European Union commissioner, the legislation “came as a great surprise and disappointment to many of America’s allies and partners.”⁵⁴

The administration’s efforts continued in July 2002, when the United States

51. See “U.S. Notification of Intent Not to Become a Party to the Rome Statute.”

52. Prohibitions include extraditing a defendant to the ICC (American Service-Members’ Protection Act of 2002, § 2004(d), Priv. L. No. 107-206m, 116 Stat. 820 (2002)), assisting the ICC with appropriated funds (§ 2004(f)), or allowing any agent or representative of the ICC to conduct investigatory activities in any U.S. territory (§ 2004(h)).

53. *Ibid.*, § 2008.

54. See “Commissioner Byrne’s Speech on the American Service-Members’ Protection Act (ASPA),” presented before the European Parliament, Strasbourg, France, http://www.europa-eu-un.org/articles/fr/article_1516_fr.htm. The European Union reacted strongly against this alleged Hague Invasion Act. See “Council Conclusions on the ICC and the Draft U.S. Service-Members’ Protection Act (ASPA),” 2437th Council Meeting, Luxembourg, June 17, 2002, p. 23. See also Konstantinos Magliveras and Dimitris Sourantonis, “Rescinding the Signature of an International Treaty: The United States and the Rome Statute Establishing the International Criminal Court,” *Diplomacy & Statecraft*, Vol. 14, No. 4 (December 2003), pp. 40–41.

threatened to veto—and did veto—a resolution extending the UN peacekeeping mission in Bosnia if its service members did not receive immunity from prosecution.⁵⁵ The Security Council compromised, passing a resolution that exempted U.S. peacekeeping personnel from ICC jurisdiction for one year, which America renewed a year later. But Europe, outraged by U.S. treatment of prisoners in Iraq and Guantánamo Bay, spearheaded the successful campaign against a further exemption in 2004, and the United States has not lobbied actively for one since that defeat.⁵⁶

Outside a blanket exemption, the United States continues to exert pressure on states to approve bilateral agreements requiring them not to surrender U.S. citizens to the ICC. By mid-2006, for example, the United States had suspended military assistance to more than twenty countries that demurred from immunity agreements, known as “Article 98 agreements,”⁵⁷ including aid designed to help several Eastern European countries deploy troops to Iraq.⁵⁸

In fact, under section 2007(1) of ASPA, the U.S. government is prohibited from supplying military assistance to countries that are parties to the ICC, although section 2007(c) grants the president the ability to waive the ban. President Bush has exercised this authority for parties to the ICC that have signed Article 98 agreements—Belize, Panama, and the former Yugoslav Republic of Macedonia, for instance—along with some states that have not signed them.⁵⁹

55. The United States’ vote on draft resolution S/2002/712 constituted the sole veto, with thirteen Security Council votes in favor and one abstention (Bulgaria).

56. Colum Lynch, “Congress Seeks to Curb International Court,” *Washington Post*, November 26, 2004.

57. The Rome Statute includes Article 98(2), which states: “Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.” Starting in 2002, the United States began negotiating these agreements with individual countries and has concluded at least 100 such agreements. See generally Samantha V. Ettari, “A Foundation of Granite or Sand? The International Criminal Court and United States Bilateral Immunity Agreements,” *Brooklyn Journal of International Law*, Vol. 30, No. 1 (2004), pp. 205–254; and Cosmos Eubany, “Justice for Some? U.S. Efforts under Article 98 to Escape the Jurisdiction of the International Criminal Court,” *Hastings International and Comparative Law Review*, Vol. 27, No. 1 (Fall 2003), pp. 103–129. For a list of countries that have signed these agreements with the United States, see http://www.ll.georgetown.edu/intl/guides/article_98.cfm#countries. See also Adam Isacson, “Taking ‘No’ for an Answer: The ‘American Service-Members’ Protection Act’ and the Bush Administration’s Security Relations with Latin America,” International Policy Report (Washington, D.C.: Center for International Policy, May 2007), <http://ciponline.org/colombia/takingnoipr.pdf>.

58. See Clare M. Ribando, *Article 98 Agreements and Sanctions on U.S. Foreign Aid to Latin America* (Washington, D.C.: Library of Congress, April 10, 2006), Order Code RL3337, pp. 2–9.

59. See Richard Boucher, “U.S. Signs 100th Article 98 Agreement” (Washington, D.C.: U.S. Department of State, May 3, 2005), <http://www.state.gov/r/pa/prs/ps/2005/45573.htm>; and Office of the Press Secretary, “Memorandum for the Secretary of State: Waiving Prohibition on United States

In addition, Congress enacted the Nethercutt amendment, a provision to the FY05 Consolidated Appropriations Act and to the FY06 Foreign Operations Appropriations Act, that discontinued Economic Support Funds (ESF) to ICC states parties that have not signed immunity agreements with the United States or received a presidential waiver. Ironically, Congress established the ESF to promote economic and political stability in areas where the United States has special security interests. Thus far the amendment threatens more than \$300 million intended to help promote democracy and combat terrorism.

The amendment endangered aid to Jordan, among other nations, which has been using the funds to train Iraqi police and support U.S. efforts to reconstruct Iraq. Peru may lose \$8 million in funding for democratic reforms and programs to reduce coca cultivation and drug trafficking. According to politicians in the region, U.S. actions are seen as “blackmailing Latin American governments into signing an agreement they oppose in principle.”⁶⁰

In all, America’s pressure has been effective—at least 100 countries have signed immunity accords. But France, Germany, and the United Kingdom, among others, have refused. Costa Rican Foreign Minister Roberto Tovar voiced his criticism in September 2005, declaring that Article 98 agreements “go against the multilateral order and against the principles of defense of human rights.”⁶¹

In recognition of the negative impact of such behavior, the Bush administration and Congress began to take action to repeal the prohibitions in October 2006. On October 2 a presidential order waived the International Military Education Training restriction from Section 2007 of ASPA.⁶² In November

Military Assistance to Parties to the Rome Statute Establishing the International Criminal Court,” Presidential Determination, No. 2004-17 (Washington, D.C.: White House, December 30, 2003), <http://www.state.gov/t/pm/rls/prsr1/27663.htm>.

60. Ribando, *Article 98 Agreements and Sanctions on U.S. Foreign Aid to Latin America*, pp. 2–9, quoting “U.S. Could Cut Aid to Latin American Countries over ICC,” EFE News Service, November 18, 2005. The United States also pressed Croatia hard, raising questions about the country’s ability to join NATO if it refused to sign an immunity agreement. See Kenneth Roth, executive director of Human Rights Watch, letter to Secretary of State Colin Powell, June 30, 2003, <http://www.hrw.org/press/2003/06/usa063003ltr.htm>. See also Bradley Graham, “Rumsfeld Lauds Croatia’s Efforts,” *Washington Post*, February 9, 2004.

61. Quoted in Adam Isacson, “The Impact on Latin America of the Service-Members’ Protection Act,” testimony before the Western Hemisphere, Peace Corps, and Narcotics Affairs Subcommittee, Senate Committee on Foreign Relations, 109th Cong., 2d sess., March 8, 2006. See also “Courting Ill Will,” *Los Angeles Times*, November 26, 2005; and Allison Danner and Beth Simmons, “Why States Join the International Criminal Court,” unpublished paper, Harvard University, 2007.

62. As Isacson explains, the ASPA did not freeze all military aid programs. It froze four programs: International Military Education Training (IMET), Foreign Military Financing, Excess Defense Articles, and Emergency Drawdowns. The freezing of the IMET program drew the most criticism domestically. See Isacson, “Taking ‘No’ for an Answer.”

2006 President Bush issued another presidential waiver lifting prohibitions on ESF under the Nethercutt provision to fourteen ICC states parties.⁶³ The remaining prohibitions in section 2007 of ASPA were repealed with the president's January 28, 2008, signature of the National Defense Authorization Act.⁶⁴ To date, restriction of ESF through the Nethercutt amendment, for those countries not granted a waiver, is the only remaining connection between the freezing of aid and refusal to sign Article 98 agreements.⁶⁵ Although the history is short, and some corrective measures have been undertaken, American behavior with respect to the ICC is likely to leave a bitter aftertaste.

LAST-IN-TIME RULE

It is shocking to nations entering into treaties with the United States that such agreements may not be or remain the "supreme law of the land." Article 11 of the Constitution affords treaties and federal statutes the same level of primacy; both constitute the "supreme law of the land."⁶⁶ When treaties and federal laws stand at odds, U.S. courts resolve the conflict by applying the "last-in-time" rule—that is, the last one enacted controls.⁶⁷ Under this rule, enactment of federal legislation may trump or circumscribe previously established treaty obligations.⁶⁸

The last-in-time rule caused serious international concern when the Supreme Court handed down its decision in *Breard v. Greene* (1998) on the right of foreign nationals to communicate with their consulates. Angel Francisco Breard, a Paraguayan citizen, was scheduled to be executed by the state of

63. Coalition for the International Criminal Court, "Developments on U.S. Bilateral Immunity Agreements (BIAs): U.S. Removes Military Training Sanctions from BIA Campaign and Issues Economic Aid Waivers to Some ICC Member States," December 2006, http://www.iccnw.org/documents/CICCFS-UpdateWaivers_11Dec06_final.pdf; and Isacson, "Taking 'No' for an Answer."

64. Section 1212 reads: "Repeal of limitations on military assistance under the American Service-Members' Protection Act of 2002."

65. See Xaviera Fontan, "A Policy Analysis of the American Service-Members' Protection Act and Nethercutt Amendment Prohibitions on Non-Signatories of Article 98 Agreements," unpublished paper, Fletcher School of Law and Diplomacy, Tufts University, March 10, 2008.

66. The Constitution stands above both statutes and treaties. See *Reid v. Covert*, 354 U.S. 1 (1957).

67. See *Taylor v. Morton*, 23 F. Cas. 784 (C.C.C. Mass. 1855), affirmed on other grounds, 67 U.S. (2 Black) 481 (1862), as well as *Whitney v. Robertson*, 124 U.S. 190 (1888). This rule is not unique to American jurisprudence. Austria, Germany, Poland, and Russia, for example, use this rule of statutory construction.

68. But to accommodate domestic and international obligations, the Supreme Court articulated the "Charming Betsy" doctrine, which urges judges to interpret federal statutes narrowly so as to avoid conflict with treaties. See Harold Hongju Koh, "International Law as Part of Our Law," *American Journal of International Law*, Vol. 98, No. 1 (January 2004), p. 44; and Detlev F. Vagts, "The United States and Its Treaties: Observance and Breach," *American Journal of International Law*, Vol. 95, No. 2 (April 2001), pp. 320–323.

Virginia after being convicted for rape and murder. He sought federal habeas corpus relief, arguing for the first time that his conviction should be overturned because Virginia violated Article 36(1)(b) of the Vienna Convention on Consular Relations (VCCR) by failing to inform him that, as a foreign national, he was entitled to contact the Paraguayan consulate in the United States.⁶⁹

Meanwhile, Paraguay sued the United States in the ICJ, alleging that it violated Article 36(1)(b) of the VCCR. The ICJ issued an order requesting the United States Supreme Court to stay Breard's execution until it could reach a judgment. The Supreme Court declined the request and held against Breard, who was subsequently executed by the state of Virginia. The Supreme Court determined that by failing to raise that claim in state court, Breard procedurally defaulted the claim. In doing so, the Supreme Court relied on a 1996 federal law—the Antiterrorism and Effective Death Penalty Act (AEDPA)—that generally precluded habeas review when the factual basis for the claim had not been developed at trial. The Supreme Court applied AEDPA over the VCCR, because AEDPA was enacted later in time, thereby preempting the treaty.⁷⁰

Unsurprisingly, *Breard* and similar cases arising under the VCCR have elicited alarm abroad.⁷¹ As one scholar points out, "European countries have [now] asserted their unwillingness to extradite terrorist suspects to the United States if the death penalty will be sought."⁷² European countries have taken

69. The United States, upon the advice and consent of the Senate, ratified the VCCR in 1969, [1970] 21 U.S.T. 77, T.I.A.S. No. 6820. Article 36(1)(b) of the VCCR provides that if a person detained by a foreign country "so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State" of such detention, and "inform the [detainee] of his right[t] to request assistance from the consul of his own State."

70. On *Breard*, compare Carlos Manuel Vazquez, "Night and Day: Coeur d'Alene, Breard, and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine," *Georgetown Law Journal*, Vol. 87, No. 1 (October 1998), pp. 1–101, with the "revisionist" Curtis A. Bradley, "Breard, Our Dualist Constitution, and the Internationalist Conception," *Stanford Law Review*, Vol. 51, No. 3 (February 1999), pp. 529–566. Years later, in *Sanchez Llamas v. Oregon*, 548 U.S. 331, the Supreme Court held that, contrary to the ICJ's determination, the VCCR did not preclude the application of state default rules.

71. For examples of the international reaction, see David Stout, "U.S. Executions Draw Scorn from Abroad," *New York Times*, April 26, 1998; and Mary Beth Warner and Jerry Kammer, "Germans Knock U.S. Justice," *Arizona Republic*, March 4, 1999. For a discussion of the cases and issues, see Aparna Sridhar, Comment, "Creating Judicial Remedies for Violations of the Vienna Convention on Consular Relations: A Proposed Resolution to *Medellin v. Dretke*," *Stanford Journal of Civil Rights & Civil Liberties*, Vol. 2, No. 2 (August 2006), pp. 333–360. See also Evan J. Criddle, "The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation," *Virginia Journal of International Law*, Vol. 44, No. 2 (Winter 2004), pp. 431–500.

72. Anthony N. Bishop, "The Death Penalty in the United States: An International Human Rights Perspective," *South Texas Law Review*, Vol. 43, No. 4 (Fall 2002), pp. 1119–1120. Bishop cites official statements from Britain, France, and Spain, which signal Europe's unwillingness to abet executions.

this stance not only because they reject the death penalty but also because they cannot rely on the United States to abide by its international obligations regarding their citizens under the VCCR.

The United States further antagonized international opinion by giving notice of withdrawal from the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention (Optional Protocol) on March 7, 2005. The Optional Protocol provides that disputes arising out of the interpretation or application of the VCCR “shall lie within the compulsory jurisdiction of the International Court of Justice” and “may accordingly be brought before the [ICJ] . . . by any party to the dispute being a Party to the present Protocol.” By withdrawing from the Optional Protocol, the United States has withdrawn its consent to the specific jurisdiction of the ICJ regarding claims arising out of the VCCR.⁷³

America’s withdrawal runs counter to its own experience. In 1979 the United States took advantage of the Optional Protocol to successfully sue Iran for violating the VCCR during the hostage crisis.⁷⁴ Because of the Bush administration’s withdrawal, the United States no longer has recourse to this provision, and given the U.S. record in enforcing the VCCR, other countries may think twice about observing its protections for U.S. citizens abroad. America’s conduct—and that of its states—stands in sharp contrast to the executive order President Clinton issued on December 10, 1998, which declared that the United States would fully respect and implement its international human rights obligations.⁷⁵

APPLICATION OF INTERNATIONAL LAW IN U.S. COURTS

Around the time the Bush administration withdrew the United States from the Optional Protocol, the Supreme Court once again examined the circumstances in which the United States would enforce its international treaty obligations under the VCCR: this time in *Medellin v. Texas*. Although the Supreme Court’s decision essentially affirming *Breard* was expected, the Mexican national claiming a VCCR violation found an unlikely advocate in President Bush.

Medellin v. Texas involved José Medellin, a Mexican national convicted of

73. Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention, April 24, 1963, [1970] 21 U.S.T. 325, T.I.A.S. No. 6820.

74. John B. Quigley, “Toward More Effective Judicial Implementation of Treaty-Based Rights,” *Fordham International Law Journal*, Vol. 29, No. 3 (February 2006), pp. 568–569.

75. Office of the Press Secretary, “Implementation of Human Rights Treaties,” Executive Order, No. 13107 (Washington, D.C.: White House, December 10, 1998); and Nina Schou, “Instances of Human Rights Regimes,” in Thomas M. Franck, ed., *Delegating State Powers: The Effect of Treaty Regimes on Democracy and Sovereignty* (Ardley, N.Y.: Transnational, 2000), p. 209.

murder and sentenced to death by a Texas court.⁷⁶ Upon arresting Medellín, the state of Texas failed to notify him that the VCCR entitled him to legal assistance from the Mexican consul.⁷⁷ Six weeks after the sentence was affirmed by the Texas Court of Criminal Appeals, Mexico learned of Medellín's arrest, trial, and death sentence.⁷⁸

Mexico helped Medellín petition for a writ of habeas corpus from state and federal courts, arguing that Texas violated his rights under the VCCR. The courts denied the petitions, reasoning that (1) Texas's "contemporaneous objection" rule prevented Medellín from raising a VCCR claim on collateral review because he failed to assert it at trial; (2) Medellín could not sue for a VCCR violation because the VCCR did not create private, judicially enforceable rights; and (3) the United States was bound by *Breard*.⁷⁹

While the federal habeas proceeding was pending, Mexico sued the United States in the ICJ on behalf of Medellín (and fifty-three other Mexican nationals) for violating the VCCR. In the *Case Concerning Avena and Other Mexican Nationals*, the ICJ held that the United States violated Article 36(b)(1) of the VCCR.⁸⁰ It determined that, notwithstanding state procedural default rules, the United States was obligated "to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals."⁸¹

The Supreme Court granted certiorari to determine (1) whether the ICJ decision required U.S. courts to review and reconsider Medellín's VCCR claim, and (2) in the alternative, whether international judicial comity and uniform treaty interpretation require U.S. courts to enforce the ICJ's decision. By the time Medellín's case reached the Supreme Court, President Bush had issued a memorandum to Attorney General Alberto Gonzales directing state courts to comply with the ICJ's decision.⁸² Nevertheless, the Supreme Court affirmed

76. *Avena and Other Mexican Nationals (Mexico v. United States of America)*, 2004 ICJ 128 (March 31) [hereinafter *Avena*].

77. *Ibid.*

78. *Ibid.*

79. *Medellin v. Dretke*, 544 U.S. 660, 662 (2005); and *Medellin v. Texas*, No. 06-984, 552 U.S. ___, slip opinion, March 25, 2008, p. 6.

80. *Avena*, pp. 53–55.

81. *Ibid.*, pp. 56–57, 72.

82. *Medellin*, 544 U.S., p. 663, quoting George W. Bush, memorandum to the Attorney General, February 28, 2005: "I have determined, pursuant to the authority vested in me as President by the Constitution and laws of the United States, that the United States will discharge its international obligations under the decision of the International Court of Justice in the Case Concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)*, 2004 ICJ 128 (March 31), by having state courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision." *Medellin v. Texas*, 552 U.S. __ (2008)

the Texas court's decision, concluding that "neither Avena nor the President's Memorandum constitute[d] directly enforceable federal law that pre-empts [the application of state default rules]."⁸³

The international community will likely greet the Supreme Court's decision and the president's memorandum with ambivalence and skepticism. Some might be ambivalent because, given *Breard*, the *Medellin* decision was unsurprising. And, like *Breard*, *Medellin* exposed the intricacies of the U.S. federal system wherein a treaty has a much more restricted meaning in U.S. law than in international law. Under international law, a "treaty" is any international agreement concluded between states that is intended to have international legal effect. Yet, under U.S. law, although the executive and legislative branches may bind the United States to observe certain obligations through treaties, the judiciary, applying the constitutional law, might not interpret the treaties as giving states parties' citizens private rights of action to enforce rights granted by the treaties.

The Supreme Court has held that for a treaty to create a private right of action, the treaty must be "self-executing." In *Foster v. Neilson*, 27 U.S. 253 (1829), Chief Justice John Marshall first articulated the difference between self-executing and non-self-executing treaties by explaining that a treaty is, by nature, a contract among nations, but has power "by the sovereign power" of the parties: "In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. . . . But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court."

In other words, treaties "may comprise international commitments," but "they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be self-executing and is ratified on these terms."⁸⁴ Applying this rule, the Supreme Court concluded that nothing in the VCCR indicated that the U.S. Congress intended it to constitute domestic law enforceable in U.S. courts. Such a decision will

explains that the Supreme Court dismissed as improvidently granted *Medellin's* first petition for certiorari because "the state-court proceedings might have provided *Medellin* with the review and reconsideration he requested, and because his claim for federal relief might otherwise have been barred," and adding that the Texas Court of Criminal Appeals dismissed *Medellin's* second state habeas petition as an abuse of the writ because neither the *Avena* decision nor the president's memorandum was "binding federal law."

83. *Medellin v. Texas*, 552 U.S. ____ (2008).

84. *Ibid.*

likely give little comfort to states parties that obligated themselves to accord U.S. citizens the very rights that the United States cannot guarantee their citizens reciprocally.⁸⁵

How does one explain President Bush's decision to support a foreign habeas petitioner on death row for murder and to cite U.S. international law obligations to do so, except as an assertion of presidential power? The Bush administration has not been the standard bearer for treaties that constrain U.S. actions. In fact, as governor of Texas, Bush questioned whether ICJ rulings affected Texas at all given that Texas was "not a signatory to the [VCCR]" and thus could not be bound by its terms.⁸⁶ Days after President Bush issued the memorandum and had declared that "compliance with the ICJ serves to protect American interests abroad and promotes the global rule of law,"⁸⁷ the United States withdrew from the VCCR's Optional Protocol—which it helped draft.⁸⁸ The administration maintained that withdrawal was necessary to "protect[] against future ICJ judgments that might similarly interpret the consular convention or disrupt our domestic criminal systems in ways we did not anticipate when we joined the Convention."⁸⁹

Such conflicting positions, as one commentator has observed, signal to the international community that U.S. treaty obligations and policy can be unpredictable, unenforceable, and unreliable. The conflicting positions indicate that the United States "withdraw[s] from treaties it deems critical of United States positions and show[s] disdain for long-standing international obligations which the United States itself helped create."⁹⁰ The result is that, if the Bush administration "does not protect the interests of foreign governments and their nationals, it may find its own ability to protect United States nationals abroad has been damaged."⁹¹

85. And, as discussed above, even if the treaty is self-executing, it may be superseded by a later, inconsistent legislative enactment.

86. Andreas Paulus, "From Neglect to Defiance? The United States and International Adjudication," *European Journal of International Law*, Vol. 15, No. 4 (September 2004), pp. 783, 808, citing President George W. Bush, address on National Public Radio, December 9, 1998.

87. See Amnesty International, "U.S. Withdrawal from VCCR Protocol Is Step Backwards," March 10, 2005, <http://www.amnestyusa.org/abolish/document.do?id=C8544612FF018A4685256FC000630122>.

88. Hadar Harris, "'We Are the World'—Or Are We? The United States' Conflicting Views of the Use of International Law and Foreign Legal Decisions," *Human Rights Brief*, Vol. 12 No. 3 (Spring 2005), pp. 5, 6.

89. *Ibid.*

90. William J. Aceves, "Murphy v. Netherland," *American Journal of International Law*, Vol. 92, No. 1 (January 1998), pp. 87, 91.

91. *Ibid.* In *Boumediene v. Bush*, 127 S.Ct. 3078 (2007), and *Al Odah v. United States of America*, 127 S.Ct. 3067 (2007), the Supreme Court also will likely assess whether international standards apply

WITHDRAWAL FROM A TREATY

Ordinarily, a withdrawal from a treaty regime under its terms would not be considered either a treaty violation or exceptional behavior. But the history of U.S. efforts to develop and build an antimissile defense system in violation of the Antiballistic Missile (ABM) treaty, first during the Reagan years, and continuing until the Bush administration announced its intent to withdraw from the treaty in December 2001, might be considered yet another chapter of American exceptionalism.

The ABM treaty of 1972 was a linchpin of U.S.-Soviet arms control measures from its inception and throughout the Cold War.⁹² It was based on the theory, current at the time, that the two hostile and nuclear-armed superpowers could best avoid a disastrous collision through a relationship of mutual deterrence. It had been agreed that any attempt to create a defensive shield by either party would diminish mutual deterrence, creating a major imbalance in nuclear capability. The ABM treaty was carefully crafted and negotiated to avoid such an imbalance. Article 1(2) states, "Each Party undertakes not to deploy ABM systems for a defense of the territory of its country and not to provide a base for such a defense." The treaty permitted one, and later two land-based sites, and it did permit research. But Article 5 of the treaty prohibited development, testing, or deployment of "ABM systems or components which are sea-based, air-based space-based, or mobile land-based." In Article 2, the treaty created a broad definition of ABM systems designed to protect against future technological developments that would challenge the treaty's premises: "For the purpose of this Treaty an ABM system is a system to counter strategic missiles or their elements in flight trajectory currently consisting of (a) ABM interceptor missiles, . . . (b) ABM launchers . . . and (c) ABM radars."⁹³

In 1985 President Reagan challenged this fundamental strategic assumption by launching a multibillion dollar program, the Strategic Defense Initiative. He challenged scientists to develop and deploy a defensive shield over the United

to U.S. courts. Amici for the detainees argue that international law entitles detainees to certain fundamental rights, including those enshrined in the Geneva Conventions and Article 9 of the ICCPR. According to the amici, the failure of the United States to follow the Geneva Conventions "weakens the entire international legal regime and invites other signatories to disregard their own treaty obligations." *Boumediene v. Bush*, Nos. 06-1195, 06-1196, 2007 WL 2441573 (Appellate Brief of International Humanitarian Law Experts as Amici Curiae in Support of Petitioners, 2007). Amici for the U.S. government, however, counter that the ICCPR creates no obligations in U.S. federal courts and is not applicable to territories leased by nations.

92. "Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems," May 26, 1972, 23 UST 3435, TIAS No. 7503 (hereinafter the ABM treaty).

93. *Ibid.*

States that would render nuclear weapons “impotent and obsolete.”⁹⁴ The Reagan administration did not attempt to withdraw from the ABM treaty, but rather chose a route of reinterpretation of its terms. The legal adviser of the State Department, Abraham Sofaer, the author of and spokesman for an elaborate reinterpretation, argued that Article 2 defined the parameters of systems that were prohibited, and these did not include systems based on physical principles other than those contemplated at the time of ratification. He relied on an Agreed Statement between the parties that provided for consultation in the case of systems based on other physical principles.⁹⁵ The debate then turned on the meaning and intent of the term “currently” in Article 2. Sofaer argued, “The article II(I) definition can reasonably be read to mean that for the purposes of the Treaty, an ABM system is one that serves the function and that consists of the type of components that existed ‘currently’ (that is, at the time the Treaty was signed).”⁹⁶ The counterarguments were based on the treaty language, its negotiating and ratification history, and widespread understanding of the treaty’s meaning after ratification within the U.S. government. These arguments were vigorously pursued in a wide range of forums.⁹⁷

Ultimately, the Senate Foreign Relations Committee, led by Senator Sam Nunn, issued a stinging rebuke of the “reinterpretation caper” in a 147-page Senate report that stated, “The Committee can find no evidence to contradict the conclusion that the Reagan Administration’s ‘reinterpretation’ of the ABM Treaty constitutes the most flagrant abuse of the Constitution’s treaty power in 200 years of American history.”⁹⁸

Research on ballistic missile programs continued during the intervening years, along with the debate about the threshold for violation of the ABM treaty. The Clinton administration expanded the traditional understanding of permissible research by including such steps as clearing land and even pour-

94. President Ronald Reagan, address to the Nation on Defense and National Security, Public Papers 437, 443, March 23, 1983.

95. 23 U.S.T. at 3456; and T.I.A.S. no. 7503 at 22. Agreed Statement D declares: “In order to insure fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III of the Treaty, the Parties agree that in the event ABM systems based on other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars are created in the future, specific limitations on such systems and their components would be subject to discussion in accordance with Article XIV of the Treaty.”

96. Abraham D. Sofaer, “The ABM Treaty and the Strategic Defense Initiative,” *Harvard Law Review*, Vol. 99, No. 8 (June 1986), pp. 1972–1985, at p. 1974.

97. Abram Chayes and Antonia Handler Chayes, “Testing and Development of ‘Exotic’ Systems under the ABM Treaty: The Great Reinterpretation Caper,” *Harvard Law Review*, Vol. 99, No. 8 (June 1986), pp. 1956–1971.

98. S. Rep. No. 164, 100th Cong., 1st sess. (1987); 133th Cong. Rec. S12,498 (daily ed. September 22, 1987); and 82 ICJ, p. 151.

ing concrete. When “asked how the threshold for violating the treaty for most of Mr. Clinton’s tenure could suddenly become the basis for a broader interpretation permitting construction, a senior Pentagon official said ‘better lawyers.’ The actual decision to deploy was deferred to the next administration.”⁹⁹ President Bush’s announcement of the United States’ withdrawal from the ABM treaty, long promoted by missile defense advocates, was made in December 2001, while the nation was reeling from the terrorist attacks of September 11. It was barely noted at the time. Just before June 13, 2002, when withdrawal became effective under the treaty, thirty-two congressmen filed a lawsuit alleging that a treaty withdrawal required the consent of Congress. That lawsuit was dismissed a few months later.¹⁰⁰

Toward an Explanation of U.S. Treaty Behavior

It has been a complex task to understand and explain the reasons for such inconsistent and puzzling U.S. treaty behavior. Scholars highlight six crucial factors: geopolitical power, democratic stability, political and structural decentralization, ingrained conservatism, a unique American rights culture, and characteristically weak liberalism.¹⁰¹ This article focuses on one of these factors—decentralization—and identifies another—grassroots politics.

The constitutional structure of American government, and the debates surrounding its creation, offer perhaps the most powerful basis for understanding U.S. treaty behavior.¹⁰² One of the most contentious issues the founders confronted was that of federalism, and it indirectly influenced drafting of the treaty power. They granted states significant influence in the Senate, where each, regardless of size or population, has equal representation. States possessed even more direct power at the time of the framing, because state legislatures—not the public as mandated by the Seventeenth Amendment (1913)—elected senators. The requirement that two-thirds of the Senate lend its advice and consent to ratify a treaty ensured that the states would wield con-

99. Eric Schmitt and Steven Lee Meyers, “Clinton Lawyers Give a Go-Ahead to Missile Shield,” *New York Times*, June 15, 2000. See also Lisbeth Gronlund and David Wright, “The Alaska Test Bed Fallacy: Missile Defense Development Goes Stealth,” *Arms Control Today*, Vol. 31, No. 7 (September 2001).

100. *Kucinich v. Bush* (D.D.C., December 30, 2002). See also “Contemporary Practice of the United States Relating to International Law,” *American Journal of International Law*, Vol. 97, No. 1 (January 2003), p. 206.

101. Michael Ignatieff’s edited collection provides insight into each of these explanatory avenues. See Ignatieff, *American Exceptionalism and Human Rights*.

102. Andrew Moravcsik, “Why Is U.S. Human Rights Policy So Unilateralist?” in Patrick and Forman, *Multilateralism and U.S. Foreign Policy*, pp. 358–359.

siderable influence over the process. This architecture of government, unique among democracies, gave them in effect a veto sufficient to hamper the ability of the executive to enter into legal agreements with other nations. Senate procedural rules further enhanced the power of a vociferous minority to stall or even thwart attempts to conclude international agreements.¹⁰³

Few senators will vote to ratify a treaty over the opposition of their constituents. Accordingly, a president seeking to persuade senators to approve a treaty must not only convince their home base of its importance to the nation, but also offer reassurance that the treaty's impact on daily life is positive, and not adverse to local interests, prerogatives, or economies. In almost all cases, it takes unswerving determination and political acumen to secure a two-thirds vote in the Senate. That effort is not costless. The "logrolling" campaign to gain the necessary Senate votes—favors asked and paid for—is not light, and the high price must be balanced against the rest of a presidential agenda. One treaty per presidency may be a sound political rule of thumb. Conservative senators present the most difficult obstacle, as they can take full strategic advantage of the structure and rules in their favor. One notable example is Senator John Bricker, who, in the wake of World War II, railed against the Covenant on Human Rights and other treaties that might affect U.S. domestic law or diminish U.S. sovereignty. In 1951 he first introduced the Bricker amendment, a constitutional amendment aimed at curtailing the treaty power, which eventually fell short of passing the Senate by a single vote.

Bricker's campaign established a lasting hostility toward human rights treaties, which Jesse Helms continued as chairman of the Senate Foreign Relations Committee. The Genocide Convention was one long-standing victim. Senators of Bricker's ilk argued that if the United States became a party, the Soviet Union and other communist or left-leaning nations would use the convention against it, in particular indicting the United States for its history of slavery and abhorrent practice of lynching. Needless to say, this rhetoric mobilized the South into opposing ratification of the convention.¹⁰⁴

The conservative element in American political life does not influence treaty

103. See Jack N. Rakove, "Solving a Constitutional Puzzle: The Treaty-making Clause as a Case Study," *Perspectives in American History*, Vol. 1 (1984), p. 236. For the most comprehensive collection of the debates at Philadelphia, see Max Farrand, ed., *The Records of the Federal Convention of 1787*, 4 vols., rev. ed. (New Haven, Conn.: Yale University Press, 1966 [1911]). But the extent and division of such power set forth in the Constitution has become the subject of much scholarly debate, which is too complex to be detailed here. See especially the writings of Louis Henkin, Harold Hongju Koh, and Carlos Manuel Vazquez, in contrast with Curtis Bradley, Jack Goldsmith, and Eric Posner.

104. On Bricker and his legacy, see Kaufman, *Human Rights Treaties and the Senate*; and Louis Henkin, "U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker," *American Journal of International Law*, Vol. 89, No. 2 (April 1995), pp. 341–350.

behavior in the Senate or other high offices alone. It also makes itself felt through grassroots organizations, which similarly exploit the fractured political system. For example, a combination of religious-right and other conservative grassroots associations, including the Christian Coalition, Eagle Forum, and Focus on the Family, along with Senator Helms, proved crucial in defeating ratification of the Convention on the Rights of the Child.¹⁰⁵ Although the primary focus of these organizations remains domestic—on topics such as abortion, gun control, school prayer, flag burning, and family issues—many of them were repeat players in opposing international human rights treaties as well. From the beginning, these groups launched a well-financed public campaign using inflammatory slogans such as “The UN Wants Your Children,” “Hands Off Our Kids,” and “UN Threatens Families.”¹⁰⁶

The Convention on the Elimination of All Forms of Discrimination against Women fell to a parallel campaign that employed such phrases as, “The UN Hates Your Mommy.” Even *U.S. News and World Report* voiced criticisms that echoed these opponents: “CEDAW is a more perverse version of American radical feminism, circa 1975: It bristles with contempt for family, motherhood, religion, and tradition. Parents and the family don’t count. The state will watch out for children’s rights. The treaty extends access to contraception and abortion to very young girls and imposes ‘gender studies’ on the schools and feminist-approved textbooks on students.”¹⁰⁷

On the other hand, grassroots support can be effectively mobilized to promote ratification of treaties. While conservative senators and their southern allies stymied the Genocide Convention for years, local and community support proved crucial in pushing ratification ahead. Along with the efforts of Senator William Proxmire and the Reagan administration’s desire to cultivate voters, Jewish as well as Catholic organizations were especially influential, the treaty finally inched through the Senate in 1988.¹⁰⁸

As knowledgeable insiders know, moreover, during certain periods—partic-

105. Monica Mange, “The UN Wants Your Children: Explaining American Exceptionalism in the Convention on the Rights of the Child,” unpublished paper, Harvard Law School, 2004. Her sources include Susan Kilbourne, Comment, “Closing Remarks, Legal Reform & Children’s Human Rights,” *St. John’s Journal of Legal Commentary*, Vol. 14, No. 2 (Spring 2000), p. 464.

106. Susan Kilbourne, “U.S. Failure to Ratify the U.N. Convention on the Rights of the Child: Playing Politics with Children’s Rights,” *Transnational Law & Contemporary Problems*, Vol. 6, No. 2 (Fall 1996), p. 439. Kilbourne’s article is one of several in the fall 1996 issue analyzing the CRC.

107. See John Leo, “They Hate Your Mommy,” *U.S. News and World Report*, July 1, 2002, p. 35. Many of these claims are patently erroneous. See Harold Hongju Koh, “Why America Should Ratify the Women’s Rights Treaty (CEDAW),” *Case Western Reserve Journal of International Law*, Vol. 34, No. 3 (Summer 2002), pp. 263–276. For the text of CEDAW, see <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>.

108. Samantha Power, *“A Problem from Hell”: America and the Age of Genocide* (New York: Basic Books, 2002); and Mange, “The UN Wants Your Children.”

ularly when there is a Democratic majority and strong proponents in the White House or Senate or both—an effective leadership strategy can overcome even a strong conservative minority and propel a treaty through the ratification process.¹⁰⁹ But the going is never going to be easy. Some of these strategies are discussed below.

Impact and Implications

Negative reactions to U.S. treaty behavior may well have undercut essential international cooperation.¹¹⁰ We cannot know for sure that the “unsigning” of the ICC, walking away from Kyoto, rejecting the Land Mine Treaty, or any other form of American treaty behavior will lead to lack of future cooperation on issues that Americans value. But resentment runs deep.¹¹¹

How did the United States lose the support it had after the September 11 terrorist attacks? The phrase, “We are all Americans now,” no longer resonates abroad. According to results from the June 2007 Pew Center 47-Nation Global Attitudes Survey, “Over the last five years, America’s image has plummeted throughout much of the world.”¹¹² This is particularly true for most Muslim

109. See the chart in Moravcsik, “Why Is U.S. Human Rights Policy So Unilateralist?” p. 185.

110. Andrew T. Guzman, “A Compliance-Based Theory of International Law,” *California Law Review*, Vol. 90, No. 6 (December 2002), p. 1823; and Rachel Brewster, “Unpacking the State’s Reputation,” unpublished paper, Harvard Law School, 2008.

111. Three of Europe’s leaders leveled implicit criticisms at the United States in a joint op-ed they wrote in 1999. British Prime Minister Tony Blair, French President Jacques Chirac, and German Chancellor Gerhard Schröder noted that “failure to ratify the Comprehensive Test Ban Treaty will be a failure in our struggle against proliferation” and will “expose a fundamental divergence within NATO.” See Chirac, Blair, and Schröder, “A Treaty We All Need,” *New York Times*, October 8, 1999. Regarding Kyoto, Swedish Environment Minister Kjell Larsson made clear that the protocol “is still alive, and no individual country has the right to declare that a multilateral accord is dead.” See BBC News, “Europe Backs Kyoto Accord,” March 31, 2001, <http://news.bbc.co.uk/1/hi/world/europe/1252556.stm>. After the United States refused to support a proposed legally binding protocol to strengthen the BWC or any efforts to revise the protocol in 2001, a Geneva official remarked, “Many people were very, very angry at what the U.S. did. Even diplomats who had, in the past, supported the U.S. could no longer support them at all. [The U.S. proposal] just killed any chance at agreement on a final declaration.” See Seth Brugger, “BWC Conference Suspended after Controversial End,” *Arms Control Today*, Vol. 32, No. 1 (January/February 2002), pp. 34–35. See also John Gerard Ruggie, “American Exceptionalism, Exemptionalism, Global Governance,” in Ignatieff, *American Exceptionalism and Human Rights*, chap. 11. Ruggie argues that U.S. behavior will become increasingly costly in a more internationalized world with stronger legal norms.

112. Pew Global Attitudes Project, “Rising Environmental Concern in 47-Nation Survey: Global Unease with Major World Powers,” 47-Nation Pew Global Attitudes Survey, <http://pewglobal.org/reports/pdf/256.pdf>. Quoting: “In the current poll, majorities in 25 of the 47 countries surveyed express positive views of the U.S. Since 2002, however, the image of the United States has declined in most parts of the world. Favorable ratings of America are lower in 26 of 33 countries for which trends are available.” *Ibid.*, p. 3.

countries in Asia and the Middle East, where “the U.S. image remains abysmal.”¹¹³ Furthermore, opinions of the United States among some of its oldest allies are declining. According to the Pew Center survey, “Currently, just 30% of Germans have a positive view of the U.S.—down from 42% as recently as two years ago—and favorable ratings inch ever lower in Great Britain and Canada.”¹¹⁴ In addition, “Favorable views of the U.S. are in single digits in Turkey (9%) and have declined to 15% in Pakistan.”¹¹⁵ Support for the war on terrorism has further eroded while broad concern about United States international unilateralism has climbed.¹¹⁶

Although Americans may still see their nation as “the shining city on the hill,” others clearly do not. Part of the resentment Americans face from the rest of the world stems from disappointment that U.S. leadership has fallen well short of hopes and expectations.¹¹⁷ The comparison between American ideals and behavior in the aftermath of World War II and today is thoroughly disappointing.

More than ideals abandoned or leadership squandered, America may be inflicting serious harm on itself and others. Few disagree that cooperation and international agreement are required to combat terrorism. Nevertheless, the United States cuts off aid to nations whose help it needs because they support the ICC. America invades Iraq in the quest for weapons of mass destruction, but undermines the Nuclear Nonproliferation Treaty and its implementing organization, the International Atomic Energy Agency, whose painstaking ef-

113. *Ibid.*

114. *Ibid.*

115. *Ibid.*

116. *Ibid.* Quoting: “In 30 of 34 countries where trends are available (including the U.S.), support for America’s anti-terrorism efforts has dropped since our 2002 poll, which was conducted just months after the Sept. 11 attacks. The falloff has been especially steep in Europe, with decreases of at least 25 percentage points in Ukraine, France, Great Britain, Poland, Germany, Italy, and the Czech Republic. But support has also weakened in the Western Hemisphere, with sharp drops in Venezuela and Canada. Even in the U.S., the percent who favor the war on terrorism has fallen 19 points, from 89% to 70%. Currently, support for the U.S.-led efforts to fight terrorism is at or above 50% in only 16 of 47 countries. And in several countries that have experienced terrorist attacks in recent years, such as Indonesia, Bangladesh, Spain, Jordan, Morocco, Pakistan, and Turkey, majorities say they oppose America’s war on terrorism.” *Ibid.*, p. 22. “The current survey reveals extensive criticism of American foreign policy, including the widespread belief that the U.S. acts unilaterally in the international arena. Majorities in 30 of 46 nations say that when making foreign policy decisions the U.S. does not take into account the interests of countries like theirs.” *Ibid.*, p. 20. See also Andrew Kohut and Bruce Stokes, *America against the World: How We Are Different and Why We Are Disliked* (New York: Times Books, 2006); and the articles in AHR Forum, “Historical Perspectives on Anti-Americanism,” *American Historical Review*, Vol. 114, No. 4 (October 2006), pp. 1041–1130.

117. Stephen M. Walt, *Taming American Power: The Global Response to U.S. Primacy* (New York: W.W. Norton, 2006).

forts could have revealed what Saddam Hussein did with his nuclear weapons. America fears a chemical or biological strike on its transportation systems, but rejects an admittedly imperfect, but still useful treaty regime such as the BWC protocol that might improve verification of stockpiles across the globe. U.S. leaders give rhetorical support to economic growth in Africa that will develop responsible government, but do not use American power to help remove obstacles that retard their ability to compete agriculturally. America talks transparency but lowers the blinds.

Toward a Strategy of Negotiation, Ratification, and Implementation

Moving to a more cooperative international stance does not mean that the United States should sign treaties that are ill conceived, poorly developed, or superficially deliberated. But if negotiations seem promising, the United States can and should use its leverage more patiently to achieve mutually beneficial goals. Indeed, in case after case it has actually improved the effectiveness of treaty language—from Law of the Sea to the International Criminal Court.¹¹⁸ America similarly exerts a tremendous influence on the conduct of states parties. But dramatic walkouts, refusals to continue to participate, failure to ratify after signing, major reservations that appear to be at cross-purposes with the treaty, elaborate reinterpretations, and downright noncompliance signal that the United States believes it can stand above cooperation.

If after thorough consideration, a president deems a formal treaty to be the best approach, there are strategies that may be used to overcome the structural obstacles, skepticism, and arrogance that militate against international agreements. Because the process is inevitably a “two-level game,” as much attention must be given to the domestic as the international table.¹¹⁹ Even if it means running the risk of seeming untrustworthy, U.S. negotiators must continue to make their international counterparts aware of internal domestic hurdles.

Perhaps the most successful navigator of the two-level game was President Franklin Roosevelt. Under his leadership, the drafting, negotiations, and ratification of the UN Charter began well before the end of World War II. Such a strategy produced a document that was satisfactory to allies as well as to critical domestic constituencies.¹²⁰

118. See Sebenius, *Negotiating the Law of the Sea*; and Scheffer, “The United States and the International Criminal Court.”

119. Robert D. Putnam, “Diplomacy and Domestic Politics: The Logic of Two-Level Games,” *International Organization*, Vol. 42, No. 3 (Summer 1988), pp. 427–460.

120. See generally Robert Dallek, *Franklin D. Roosevelt and American Foreign Policy, 1932–1945* (New York: Oxford University Press, 1979).

During the Reagan administration, even without presidential leadership, strong cabinet members devised a strategy to secure passage of the protocols controlling ozone in the atmosphere. With careful planning and hard work with senators, they gained sufficient support to overcome the belated attempt to defeat the treaty.¹²¹ Such efforts also benefited from communication and association with industrial firms. Dupont, the major domestic producer of CFCs that thinned and destroyed the ozone layer, was enlisted to support the treaty. It joined in part because it had a successor chemical to CFCs in the wings. Yet success in protecting the ozone layer was remarkable given the combination of indifference—despite public concern over skin cancer—and easily mobilized opposition.

Learning from its defeat, industry mobilized quickly to prevent curbs on greenhouse gas emissions. After the 1992 UN Conference on Environment and Development in Rio de Janeiro and before the Kyoto Protocol negotiations began in 1995, the Climate Change Coalition began to organize the opposition, convincing public and politicians alike that the science on global warming was inconclusive.¹²² In the case of greenhouse gases, not only would the treaty adversely affect powerful domestic oil and automobile industries, but the American public would also be asked to make the ultimate sacrifice—lessening dependence on the most popular gas-guzzling vehicles.¹²³

The successes and failures that past presidential and senatorial leaderships have had in securing ratification suggest some approaches that, given the same players and governmental structure, do not differ markedly from strategies for advancing a foreign policy agenda.

First, advance planning to overcome obstacles is a crucial part of any treaty campaign, and it must include development of a strong bipartisan coalition in the Senate. As noted, efforts surrounding the passage of the UN Charter began long before the end of World War II and included Senate leadership of both parties. The allies signed a Declaration of the United Nations in January 1942, and Secretary of State Cordell Hull appointed a liaison to the Congress to consult and ensure that the treaty reflected congressional views. Secretary Hull met with congressional leaders of both parties throughout 1943 to ensure they

121. Richard Elliot Benedick, *Ozone Diplomacy: New Directions in Safeguarding the Planet* (Cambridge, Mass.: Harvard University Press, 1998), pp. 51–67.

122. James K. Sebenius, "Designing Negotiations toward a New Regime: The Case of Global Warming," *International Security*, Vol. 15, No. 4 (Spring 1991), pp. 110–148; and Harold K. Jacobson, "Climate Change: Unilateralism, Realism, and Two-Level Games," in Patrick and Forman, *Multilateralism and U.S. Foreign Policy*, pp. 416–432.

123. Interestingly, many companies have now reversed course and joined lobbying efforts to control greenhouse gas emissions. Development of energy-saving technologies promises lucrative future returns.

were fully informed and had the opportunity to comment. What made this effort so remarkable is that it was conducted in parallel with very difficult negotiations with the allies, particularly the Soviet Union. An entire structure was thrashed out among those fighting the Axis before the end of the war.

In addition to seeking bipartisan support, advance planning must consider what economic interests may be adversely affected. Strategists should consult leading companies during the negotiation process, show them potential benefits, and involve them in attempts to mitigate adverse impacts as much as possible. Officials successfully employed this approach in both regulating the production of CFCs and garnering business support for the Chemical Weapons Convention. In each case, business interests were taken into account and strong appeals made early to support a treaty that served the public interest. For the Kyoto Protocol, presidential leadership to enlist senatorial support was lacking, and the affected business community was well aware of the need to mobilize opposition. In relevant cases, particularly those involving international trade, a labor strategy is equally important.

Second, even without strong presidential leadership, a skillful, well-executed executive strategy may overcome structural and political obstacles to treaty ratification. The Clinton administration, for example, won a narrow triumph when it secured passage of the Child Soldier Protocol to the Convention on the Rights of the Child. The convention, however, remains stymied in the Senate. But a quiet effort to overcome Defense Department opposition managed to avoid the inflated rhetoric and public campaign that defeated the convention itself, even with a Republican majority in the Senate.¹²⁴

Third, treaty campaigns can hinge on whether powerful senators, who serve at key veto points in the process, become champions or opponents.¹²⁵ The role of Henry Cabot Lodge in derailing the League of Nations is legendary. And decades later, Senator Helms used his position and institutional power to block or undermine numerous treaties. But when that tenaciousness—even unsupported by the executive branch—is directed the other way, it can sometimes overcome the obstacles. As previously mentioned, the Genocide Convention benefited from the ardent support of Senator Proxmire.¹²⁶

124. Eunjeong Kim, "The Role of the Executive Branch in Overcoming Ratification Obstacles: U.S. Ratification of the Child Soldier Optional Protocol," unpublished paper, Fletcher School of Law and Diplomacy, Tufts University, 2003. On the importance of executive strategy, see also Jeffery S. Lantis, "Leadership Matters: International Treaty Ratification in Canada and the United States," *American Review of Canadian Studies*, Vol. 35, No. 3 (Autumn 2005), pp. 383–421.

125. Mariano-Florentino Cuéllar, "The International Criminal Court and the Political Economy of Antitreaty Discourse," *Stanford Law Review*, Vol. 55, No. 5 (May 2003), pp. 1597–1632.

126. See Power, "A Problem from Hell."

Fourth, to reach the supermajority requirement, grassroots popular support must be developed to put pressure on wavering or indifferent senators. The initiative has often been taken by nongovernmental organizations working locally and nationally. Unfortunately, though, mobilization to defeat a treaty has proven more effective than mobilization to ratify. The campaigns against the CRC and CEDAW, which utilized inflammatory catchphrases and “bumper stickers” to cultivate support, have not been well matched by successes. Yet even in the slogan-ridden area of human rights, the grassroots effort reminding the public of the Holocaust, dramatized by the Anne Frank story, finally helped move the Senate to give advice and consent to the Genocide Convention. The pace and ease of internet technology can further magnify the impact of grassroots mobilization. And the potential for building up popular opinion seems favorable indeed. Data show that a strong majority of the American public supports multilateralism and international cooperation, though it is a diffuse rather than intense commitment.¹²⁷

Fifth, cultivating public support increasingly requires a sophisticated public affairs campaign. It must take into consideration what galvanizes popular passions as well as the media’s biases in coverage and tendency to sensationalize events. Interested in controversy, the media often focus on colorful opposition. Treaty proponents must keep in mind that objectives, however worthy, matter less than drama and stirring rhetoric.

Its reputation for compliance needs reinforcement. Sixth, any hint of a double standard should be dropped from political rhetoric. Finally, the United States should exercise leadership in providing both technical and financial support for nations struggling to comply, but lacking the ability to do so. These steps will help mitigate the impression that America is too arrogant and unwilling to cooperate.

Conclusion

A shift in U.S. attitudes toward international engagement and international obligations may be occurring. The patent failure of the Iraq War and the mounting human and resource drain in a struggling economic environment seem to be increasing public awareness of the cost of isolation and unilateral behavior. The growing evidence of climate change in the face of U.S. denials has brought state and local efforts to curb emissions, despite national intransigence. Hybrid

127. See Steven Kull, “Public Attitudes toward Multilateralism,” in Patrick and Forman, *Multilateralism and U.S. Foreign Policy*, pp. 99–118.

cars have attracted customers and the film *An Inconvenient Truth* featuring Al Gore won him wide attention, praise, and a Nobel Prize. Corporations previously responsible for blocking support for international control are showing awareness of attitude change in their customer base. The time may be ripening for a more radical strategy of international cooperation.

One place to start may be to disregard the conventional wisdom that an American president may win only one treaty during a four-year term. A turnaround in U.S. treaty behavior could offer evidence of a dramatic shift in willingness to cooperate in all dimensions of global behavior. This might be a corrective that is at once symbolic and powerful—wide participation and cooperation in treaty negotiations that are deemed important by America's strongest allies. Climate change is the most salient. The Kyoto Treaty will be replaced or revised, with new goals. The United States might now play a constructive role. This would provide an opportunity to map the alternatives to drastic and painful emissions control, including financial support for promising alternative energy technologies and for imaginative cooperative approaches to emissions trading.

Further, a new administration could withdraw the "unsigned" of the International Criminal Court (itself of dubious legal status) and leave the Clinton signature in place. This would permit U.S. involvement in the negotiations in 2009 to define crimes of aggression. Gradually, the worst extremes of domestic legislation in the ASPA that hampered cooperation with the ICC could be amended or repealed. These approaches could be bundled with alterations in domestic excesses in the treatment of terrorist suspects such as the Military Commissions Act and Guantánamo. At the same time, a new administration might seek more effective and imaginative cooperative approaches to counter terrorism, which remains a growing threat worldwide, despite current U.S. efforts. These might well be packaged with new international efforts, such as the innovative Proliferation Security Initiative, to curb proliferation of nuclear weapons and other highly dangerous weapons of mass destruction.

These efforts might not all yield success, and there will be senatorial opposition. But such a strategy would be both symbolic and symptomatic of a U.S. desire to change from arrogance and increasing isolation to global participation and cooperation involving the most sensitive issues that face the world.

Not every international problem is amenable to solution by international agreement. The inventory has to include "soft law" as well as treaties, informal arrangements as well as formal ones, bilateral and regional agreements as well as universal approaches. In each, U.S. attitudes and actions are important.

Even if foreign resentment cannot be shown to have immediate and painful consequences for the United States, Americans are becoming increasingly aware of foreign hostility, disgust, and even scorn. Imperviousness cannot be maintained. The world confronts too many global problems that will take far longer to solve, and probably cannot be solved, without the United States.