

**OPENING STATEMENT
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THE UNITED STATES SENATE COMMITTEE ON FOREIGN RELATIONS**

**THE PRESIDENT, CONGRESS, AND SHARED AUTHORITY OVER
INTERNATIONAL ACCORDS**

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Mr. Chairman, Ranking Member Cardin, and Members of the Committee, thank you for the opportunity to be here today – and for convening this hearing on a subject I happen to believe is of critical importance to the foreign policy and national security of the United States, yet is rarely focused on in earnest. I am particularly honored to be here, having served as deputy counsel to the Committee many years ago, and having had the honor to brief Members on various treaties in advance of treaty hearings for the Committee during the 110th Congress. I felt beyond lucky to have a chance to serve the Committee then and I feel the same way now, particularly knowing how important the work of this Committee is, and how seriously you take your responsibilities.

Although this will be obvious to all of you, I think it bears repeating at the outset that treaties – whether advice and consent treaties, or otherwise – are absolutely essential enablers of U.S. foreign policy that have helped us meet the challenges we face as a country and take advantage of opportunities key to our prosperity. I say it is worth repeating because although the Committee has a good appreciation of this fact, I have found that over the course of my career, the public conversation about treaties has changed – and I think that change is at least partially responsible for the diminished role of the Congress in relation to international agreements, and the challenges associated with the United States joining advice and consent treaties generally, particularly treaties that should be routine, such as tax treaties. I also worry that the current Administration’s approach to treaties and international law may serve to undermine the international legal order we helped to build on a bi-partisan basis over the history of our country – one that in my view is critical to our security, prosperity, and values.

Treaties were at one time revered as instruments of foreign policy to be used in service of our national security and foreign policy, but instead they are now often perceived negatively without respect to their content – perhaps most popularly as illegitimate constraints on our sovereignty. I would never argue that all treaties are in the interest of the United States to join. Treaties must be considered on a case-by-case basis. Nevertheless, the argument should be focused on the content and not on treaties generally, for the ability of the United States to negotiate and join treaties is absolutely essential to our interests. Far more than people realize, treaties have helped us improve the lives of every day citizens and we need them now, more than ever in this increasingly complex, mobile world.

When you want to call, email, or even send a letter to a friend living abroad, you are able to do so thanks to rules established in treaties. One of the reasons you can feel reasonably safe when getting on commercial flights in countries around the world is that the International Civil

Aviation Organization or “ICAO” – an organization established by treaty – issues safety standards. Treaties help improve the quality of our air and ensure that food imported from abroad doesn’t make us sick. Treaties help American businesses operate in and export their products to foreign markets and protects the intellectual property of American innovators. Bilateral tax treaties make it so that U.S. companies with an overseas presence are not subject to double taxation.

Moreover, multilateral frameworks – frequently established by advice and consent treaties as an historical matter – substantially enhance our ability to address challenges that cross borders, which happens more frequently now than ever before, and to prevent and respond to increasingly complex threats that demand coordinated action. For example, when Ebola swept through West Africa, our response benefitted greatly from the resources of the World Health Organization, which was established by an international agreement. When the globe was gripped by a worldwide financial crisis, the World Bank and the International Monetary Fund, two institutions founded by treaties, allowed us to take measures to respond and mitigate the recession. And when we needed a force to maintain a fragile peace in South Sudan, Haiti, or Kashmir, the Security Council, an organ of the United Nations established by treaty, was able to react by sending in Blue Helmets. In other words, treaties framing the international order allow us to mobilize unprecedented collective action to address challenges central to global prosperity and stability.

Far from tying our hands, treaty regimes serve as mechanisms through which the United States exercises its power and advances its interests and values. The Genocide Convention and other core human rights treaties that promote our interests in preventing atrocities and promoting universal rights and fundamental freedoms consistent with our Constitution and the Declaration of Independence, are examples of U.S. global leadership. Furthermore, when the United States negotiates environmental treaties that obligate other countries to take measures that we already take domestically, we are effectively shaping the world’s approach to dealing with environmental problems, raising foreign standards to meet our own, leveling the playing field for our industries, and helping to protect the health of our people. When we negotiated the Law of the Sea Convention, we enshrined rules regarding freedom of navigation and rights of coastal states that benefit the United States more than any other state. Conversely, when we choose to stay outside treaty regimes, such as the Law of the Sea Convention, we allow others to shape the terms of international cooperation, in ways that maximize their interests and advance their values rather than our own. It means, for example, that our companies will have to operate under others’ rules in many of the places they do business around the world—or else, in the absence of international legal frameworks, operate in a less predictable and certain environment.

Yet, despite what I view to be the growing importance of treaties, the Senate is finding it harder and harder to deliberate on, and approve treaties. Since 1960, the U.S. Senate has provided advice and consent to ratification of over 800 treaties, a rate of more than one treaty every month. Between 1995 and 2000, when President Clinton was in office and Jesse Helms chaired the Senate Foreign Relations Committee, the Senate approved over 140 treaties or an average of over 23 treaties a year, including the Chemical Weapons Convention, the START Treaty, treaties dealing with labor rights, law enforcement cooperation, environmental

protection and investment protection. But since 2009, the Senate has provided advice and consent to just 21 treaties, or roughly 2.3 treaties per year—a fraction of the historical average. And I know this Committee has tried to reverse that trend, yet the structural and political challenges have become formidable.

I suppose some might question whether this trend is so terrible. Although the Constitution’s only mention of treaties specifically provides that the President make treaties by and with the advice and consent of the Senate, the reality is that the Executive Branch has for quite some time entered into numerous international agreements, considered to be treaties from an international law perspective, without the advice and consent of the Senate. In fact, today, the vast majority of international agreements concluded by the United States are what are often referred to as “executive agreements” or “congressional-executive agreements.” What, therefore, are the practical implications of the fact that it is becoming increasingly difficult to get treaties approved by the Senate?

I would argue that the practical implications are significant.

First of all, there is no question that over time, the degree of congressional involvement in treaties, throughout their life, has been reduced and this is not good for our democracy, our prosperity, our foreign affairs, or our national security. Although a number of international agreements that are not advice and consent treaties are based on statutory authorizations, the vast majority of international agreements are concluded without the involvement of, or even the barest consultation with, the Congress. To do otherwise may be impractical given the number of international agreements that are, and should be, concluded on an annual basis but I think it is fair to say that the balance is not what it should be, and this is particularly true in today’s complex and internationally mobile world, in which what we do on the domestic plane and what we do internationally is increasingly intertwined. Specifically:

- Congressional involvement, and particularly the Senate’s involvement, would likely enhance the legitimacy of international agreements from a domestic perspective, allowing for greater deliberation regarding the interaction of international law and domestic law, making it more likely that our efforts in foreign policy are perceived as bi-partisan, long-lasting, and well-considered.
- Congressional involvement would enhance the legitimacy and the lasting nature of our commitments to foreign governments, which we must maintain if we are to rely on other countries to follow through on their commitments to the United States. I know from personal experience that foreign governments care whether a treaty we conclude with them is an advice and consent treaty or an executive agreement. They see the former as more significant, more reliable, and potentially longer lasting. We should not lose that option, when it is appropriate to pursue.
- Congressional involvement would allow for greater deliberation regarding the interaction of international law and domestic law, hopefully with the result of greater compatibility and mutual reinforcement between the two.
- Congressional involvement, and more public debate, would enhance the accountability of the Executive Branch in treaty-making.

Second, if it remains as difficult as it is today to obtain the advice and consent of the Senate for even routine treaties, we may lose the ability to negotiate and enter into certain critical international agreements that historically have been understood to be agreements that require the advice and consent of the Senate, such as extradition treaties, boundary treaties, mutual legal assistance treaties, and tax treaties – all treaties that are viewed on a bi-partisan basis as critical to U.S. interests. Even if over time these treaties are done as congressional-executive agreements, there will be lingering questions regarding their validity in such a form.

Third, at a time when multinational intergovernmental organizations that serve our interests abroad and at home are struggling and in need of reform, we have made it increasingly difficult to negotiate changes to their underlying authorities because many of the underlying agreements establishing them were done by treaty with the advice and consent of the Senate.

Fourth, because the Congress is less involved, we are feeding the perception that international law is not critically important to the United States and that the obligations we undertake are ones that do not endure from Administration to Administration.

The harder question, of course, is what can be done about the fact that it has become so difficult to obtain Senate consideration of advice and consent treaties, and how can we move toward a more meaningful and productive consultative process between the branches regarding international agreements, grounded in a better informed public debate on these questions?

I would suggest a few possible ways to approach this question, some of which overlap with Mr. Bradley's recommendations.

First, I agree that there is a need for greater transparency in this area, as it would help to further a more productive conversation and at least allow the Congress and the public to respond to concerning trends in international agreement making. Specifically,

- I would promote making public the legal basis for concluding international agreements;
- I would support legislation requiring the Executive Branch to report notifications regarding the withdrawal or termination of international agreements to which the United States is a party;
- I would support legislation requiring the reporting of significant political commitments;
- I would support a mechanism for establishing agency accountability for reporting agreements to the State Department; and
- Perhaps most importantly, in support of these additional requirements, I would support increasing the resources provided to the Legal Adviser's office for such purposes.

Second, I would recommend having a look at the Senate rules of procedures for considering and disposing of treaties. There are a variety of anachronisms associated with the rules of procedures regarding treaties and through a streamlining process, it might be possible to make it easier to deliberate on treaties, while at the same time making it harder for one or two Senators to effectively block a debate on treaties. Such changes might help this Committee pursue a serious treaty agenda in future.

Third, I would recommend establishing an annual report and hearing from the Legal Adviser's Office of the U.S. Department of State regarding international agreements, their development and interpretation. Such a hearing could provide the Committee with an opportunity, among other things, to engage on issues of particular interest, including trends in treaty-making, while simultaneously raising the public awareness of their importance generally.

Let me just end by thanking you again for your work on these issues and your efforts to advance the interests of Americans who rely on treaties for their security and prosperity on a daily basis. I often think the skepticism you hear about the importance or value of treaties would have been surprising to our founders, who routinely relied on treaties to build political and economic relationships, leading to their prominent placement in our Constitution. Hearings like this help.